AMERICAN LAW PROGRAM
The Catholic University of America, Columbus School of Law
Jagiellonian University, Faculty of Law and Administration
20th year, 2019-2020

ENTRANCE EXAM 3 – ESSAY PART

Dear American Law Program Candidate!

In order to let the American Law Program staff, assess your English language skills and abilities to actively participate and benefit from the regular courses, we kindly ask you to take our Entrance Exam. As the number of students willing to join the program exceeds the number of students who can be admitted, it serves also the selection of the best candidates in an objective manner.

To make the assessment and competition both fair and reasonable, we kindly ask you to obey the following rules:

During the exam **you are not allowed** to:
- consult anyone nor any materials, except for the texts that we distribute;
- look at another candidate's work;
- leave the room without permission;
- possess turned on cell phones or similar devices.

During the exam **you are supposed** to:
- write in a readable way, so that we are able to read your answers and grade them;
- mark your papers with your PESEL only.

The exam contains of two parts and **altogether lasts 100 minutes.**

The **first part** is an **essay** part. Your task is to write an essay on the separate sheet of paper, on the assigned topic, which is based on the text attached in order to inspire you. You are supposed to show us that you can discuss a general legal topic in an interesting manner and proper English. Your essay must not exceed one sheet of the given paper. You have **60 minutes** to complete this part. After this time, you must turn in your essay. This part is graded for 0-30 points.

The **second part**, which you are supposed to take later, is a **reading** part. You should read the text provided carefully. You may take notes on the separate sheet of paper. After **30 minutes** you must turn in the texts, but you may still keep the notes. Then you receive the questions and answers sheet. You are supposed to mark T for True and F for False on the given questions, for which you have **another 10 minutes**. This part is graded for 0-20 points.

The **results** should be available by October 6, 2019. The results will be sent to you via e-mail and published on our website: http://www.okspo.wpia.uj.edu.pl/spa/ogloszenia.

Good luck!

ESSAY QUESTION

The article from Harvard Law Review (2018/131, pp. 1790-, *What Is an "Electronic Will"?* refers to the challenges and possibilities of usage of electronic wills under current and future law.

It is a truth universally acknowledged that "[t]he organizing principle of the American law of donative transfers is freedom of disposition." That is, "[p]roperty owners have the nearly unrestricted right to dispose of their property as they please." As the right to dispose of property extends beyond death, one way that a testator can make her wishes known is, of course, by creating a will that lays out her estate plan in detail. To ensure the authenticity of the wills, however, a testator must follow a set of "formalities" in creating and executing a will (traditionally, these are writing, signature, and attestation). Formalities help ensure that only valid wills are admitted, cautioning the testator of the gravity of the step she is about to take, and protecting the testator from those who may attempt to take advantage of her. For centuries, the formalities associated with wills underwent little modification. However, the rise of technology in recent years is likely to bring with it a flurry of previously unforeseen circumstances for courts to confront. American courts are slowly being asked to judge the validity of "electronic wills" — wills that have been written, signed, and/or attested using an electronic medium. […]

scholars and practitioners have suggested a variety of options for courts and legislatures dealing with electronic wills. These run the gamut from continuing to interpret wills as requiring a handwritten document, to creating a centralized database regulated by the government that would store all electronic wills, to using existing wills doctrines to authenticate electronic wills on a case-by-case basis, to laying out a statutory regime that would allow for presumptively valid electronic wills in some situations. […]

The need for a unified approach to electronic wills, of course, becomes more salient if such wills are in fact likely to become more popular in the coming years. Some scholars have identified potential reasons to doubt an increase in the creation of electronic wills. In 2007, Professors Gerry Beyer and Claire Hargrove identified six potential barriers to increased uptake of electronic wills, including: (1) technical barriers such as the lack of software that would provide adequate authentication, (2) social barriers such as attorneys' reluctance to help create electronic wills, (3) economic barriers such as the expense of implementing new technology, (4) motivational barriers such as a lack of recognition of the potential benefits of electronic wills, (5) obsolescence barriers stemming from changes in technology, and (6) a general resistance to change. Even as they identified these important roadblocks, however, they recognized that change was on the horizon, noting that "we must be ready to make the transition when the time is right." The striking increase in the use of electronic devices, cloud services, and social networking over the past decade certainly suggests that users have become more comfortable incorporating electronic devices and the internet into their lives. In 2007, when Beyer and Hargrove were writing, Twitter had only just been launched, and Facebook users numbered only 58 million. Today, Twitter and Facebook boast 328 million106 and 2 billion users, respectively. It appears that at least some of the barriers that Beyer and Hargrove identified are less salient today given users' increased comfort with electronic devices, cloud services, and social networking in various aspects of their lives.

Do you think that under current law forbidding the usage of electronic wills e.g. in Polish law, courts should still accept them if followed by a clear and convincing evidence of authenticity of the will and undeniably proven testator's motivation towards testation? Or what should be the decision of the legislator towards electronic wills? Consider from one side the raising popularity of the electronic devices, but, on the other hand, that still the access to them may be limited, especially among elderly people. And, more generally, reflect on the issue to what extent should the freedom of testator's disposition be protected against demands of stability / predictability?

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ENTRANCE EXAM 3 – READING PART (TEXT)

Read the text of the U.S. District Court, N.D. California judgment in: *O'Connor et al. v. Uber Technologies, Inc.* 82 F.Supp.3d 1133 (2015), in which the Court – by means of analysis of drivers' contracts with Uber and their actual performance, decided on the employee status of Uber drivers.

When reading you may take notes. After 30 minutes you will have to turn in the text and answer the questions with a use of your notes as well as your understanding only.

"EDWARD M. CHEN, District Judge

Plaintiffs filed this putative class action on behalf of themselves and other similarly situated individuals who drive for Defendant Uber Technologies, Inc. Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity "that is paid, given to, or left for an employee by a patron." Cal. Lab. Code § 351.

In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.

In this litigation, Uber bills itself as a "technology company," not a "transportation company," and describes the software it provides as a "lead generation platform" that can be used to connect "businesses that provide transportation" with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as "transportation providers."

Plaintiffs characterize Uber's business (and their relationship with Uber) differently. They note that while Uber now disclaims that it is a "transportation company," Uber has previously referred to itself as an "On–Demand Car Service," and goes by the tagline "Everyone's Private Driver." Indeed, in commenting on Uber's planned expansion into overseas markets, its CEO wrote on Uber's official blog: "We are 'Everyone's Private Driver.' We are Uber and we're rolling out a *transportation system* in a city near you."

The parties agree that determining whether Plaintiffs are employees or independent contractors is an analysis that proceeds in two stages. "First, under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir.2010) (citation omitted). If the putative employee establishes a prima facie case (*i.e.*, shows they provided services to the putative employer), the burden then shifts to the employer to prove, if it can, that the "presumed employee was an independent contractor."

For the purpose of determining whether an employer can rebut a prima facie showing of employment, the Supreme Court's seminal opinion in *Borello* "enumerated a number of indicia of an employment relationship." *Narayan*, 616 F.3d at 901. The "most significant consideration" is the putative

employer's "right to control work details." *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello),* 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). This right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains "all necessary control" over the worker's performance. When evaluating the extent of that control, the Supreme Court has stressed that an employer's "right to discharge at will, without cause" is "strong evidence in support of an employment relationship." *Borello,* 48 Cal.3d at 350, 256 Cal.Rptr. 543, 769 P.2d 399; *see also Ayala,* 59 Cal.4th at 531, 173 Cal.Rptr.3d 332, 327 P.3d 165 (characterizing the right to discharge without cause as "[p]erhaps the strongest evidence of the right to control"); *Narayan,* 616 F.3d at 900 (characterizing the right to discharge at will as the "most important" factor for determining whether an employment relationship exists). This is because the "power of the principal to terminate the services of the agent [without cause] gives him the means of controlling the agent's activities." *Ayala,* 59 Cal.4th at 531, 173 Cal.Rptr.3d 332, 327 P.3d 165 (citations omitted).

The putative employer's right to control work details is not the only relevant factor, however, and the control test cannot be "applied rigidly and in isolation." *Borello,* 48 Cal.3d at 350, 256 Cal.Rptr. 543, 769 P.2d 399. Thus, the Supreme Court has also embraced a number of "secondary indicia" that are relevant to the employee/independent contractor determination. *Id.* These additional factors include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at 351, 256 Cal.Rptr. 543, 769 P.2d 399. *Borello* also "approvingly cited" five additional factors (some overlapping or closely related to those outlined immediately above) for evaluating a potential employment relationship. *Narayan,* 616 F.3d at 900. These additional factors include:

(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

Borello, 48 Cal.3d at 355, 256 Cal.Rptr. 543, 769 P.2d 399. While the Supreme Court explained that all thirteen of the above "secondary indicia" are helpful in determining a hiree's employment status, it noted that "the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations." *Id.* at 351, 256 Cal.Rptr. 543, 769 P.2d 399. Moreover, the Court made it "clear that the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." *Alexander,* 765 F.3d at 989 (quoting) (internal modifications omitted). Thus, as the Ninth Circuit explained in *Narayan,* the fact-finder must "assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other." *Narayan,* 616 F.3d at 901 (citation omitted).

If Plaintiffs can establish that they provide a service to Uber, then a rebuttable presumption arises that they are Uber's employees. *See Narayan,* 616 F.3d at 900; *Yellow Cab Coop.,* 226 Cal.App.3d at 1294, 277 Cal.Rptr. 434. Uber argues that the presumption of employment does not apply here because Plaintiffs provide it no service. The central premise of this argument is Uber's contention that it is not a "transportation company," but instead is a pure "technology company" that merely generates "leads"

for its transportation providers through its software. Using this semantic framing, Uber argues that Plaintiffs are simply its customers who buy dispatches that may or may not result in actual rides. In fact, Uber notes that its terms of service with riders specifically state that Uber is under no obligation to actually provide riders with rides at all. Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers. This argument is fatally flawed in numerous respects.

First, Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (*i.e.,* the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (*i.e.,* enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are *not* technology companies if one focuses solely on *how* they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (*e.g.,* sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as "Everyone's Private Driver," and describing Uber as a "transportation system" and the "best transportation service in San Francisco."

Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers. *See Yellow Cab Coop.,* 226 Cal.App.3d at 1293–1294, 277 Cal.Rptr. 434 (holding that cab drivers provided service to cab company because "the enterprise could no more survive without [drivers] than it could without working cabs"). Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers. As noted above, Uber bills its riders directly for the entire amount of the fare charged—a fare amount that is set by Uber without any input from the drivers. Uber then pays its drivers eighty percent of the fare it charges the rider, while keeping the remaining twenty percent of the fare as its own "service fee." Put simply, the contracts confirm that Uber *only* makes money if its drivers actually transport passengers.

Furthermore, Uber not only depends on drivers' provision of transportation services to obtain revenue, it exercises significant control over the amount of any revenue it earns: Uber sets the fares it charges riders unilaterally. The record also shows that Uber claims a "proprietary interest" in its riders, which further demonstrates that Uber acts as more than a mere passive intermediary between riders and drivers. For instance, Uber prohibits its drivers from answering rider queries about booking future rides outside the Uber app, or otherwise "soliciting" rides from Uber riders. *See, e.g.,* Handbook at 7 (providing that actively soliciting business from a current Uber client is categorized as a "Zero Tolerance" event that "may result in immediate suspension from the Uber network." By contrast, "passive client solicitation (*e.g.,* business cards or branded equipment in backseat)" is categorized as a "Major" issue that Uber "takes very seriously and will take action if you receive more than one in every 180 trips"); Onboarding Script at 10 (stating that if a rider specifically asks drivers about "arranging pickups, tell them to reach out to Uber"); (stating that riders cannot request specific Uber drivers).

As further indicia of its role as a transportation company rather than a software provider, Uber exercises substantial control over the qualification and selection of its drivers. Before becoming "partners" with Uber, aspiring drivers must first complete Uber's application process, including a background check, city knowledge exam, vehicle inspection, and personal interview. In an internal

document titled “SF Hiring Freeze & Quality Push,” Uber stresses that these screening measures are important because “Uber provides the best transportation service ... and to keep it this way, we will be taking some major steps to improve both driver and vehicle quality on the Uber system.” In another document, Uber notes that background checks are important because it only wants “to partner with the safest drivers.” And Uber documents further reveal that Uber regularly terminates the accounts of drivers who do not perform up to Uber's standards. *See, e.g.,* “We will be deactivating Uber accounts regularly of drivers who are in the bottom 5% of all Uber drivers and not performing up to the highest standards.... We believe that the removal of underperforming drivers will lead to more opportunities for our best drivers.”); email from “Uber SF Community Manager” instructing fellow Uber employer to “[g]et rid of this guy. We need to make some serious cuts of guys below 4.5”)

Although the Court's conclusion based on the record facts can likely stand on logic and common sense alone, the case law makes abundantly clear that the drivers are Uber's presumptive employees. In *Yellow Cab Cooperative,* a cab company argued, like Uber here, that its drivers were not its employees because they did not provide any service to the cab company. *Yellow Cab Coop.,* 226 Cal.App.3d at 1292–1294, 277 Cal.Rptr. 434. The company's principal argument, like Uber's, was that it was only in the business of collecting fees from its drivers—specifically a flat $56 fee-per-shift for the use of a cab and provision of “leads” through its radio dispatch service. Notably, (and unlike Uber) Yellow did not share in any of the actual fares a driver received. *Id.* at 1291, 277 Cal.Rptr. 434. Thus, if a Yellow driver never provided any rides during a shift or actually used any of Yellow's “leads,” Yellow would receive the same $56 lease payment regardless. *Id.* Based on these facts, the Court of Appeal flatly rejected Yellow's argument that the drivers did not provide it a service, finding that Yellow's actual “enterprise consists of operating a fleet of cabs for public carriage. The drivers, as active instruments of that enterprise, provide an indispensable ‘service’ to Yellow; the enterprise could no more survive without them than it could without working cabs.” *Id.*

The reasoning of *Yellow Cab Cooperative* applies even more forcefully here. Unlike Yellow Cab, which received a flat fee and did not share in its drivers' fares, Uber only receives its fees if a driver successfully transports an Uber “lead” to some destination. Moreover, the precise amount of this fee is set by Uber, without negotiation or input from the drivers. Under such circumstances, it strains credulity to argue that Uber is not a “transportation company” or otherwise is not in the transportation business; it strains credulity even further to argue that Uber drivers do not provide Uber a valuable service. Like the cab drivers in *Yellow Cab Cooperative,* Uber's drivers provide an “indispensable service” to Uber, and the firm “could no more survive without them” than it could without a working smartphone app. Or, put more colloquially, Uber could not be “Everyone's Private Driver” without the drivers.

As noted above, the “principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” *Ayala,* 59 Cal.4th at 531, 173 Cal.Rptr.3d 332, 327 P.3d 165 (quoting *Borello*). “Perhaps the strongest evidence of the right to control” is whether Uber can fire its transportation providers at will. *Id.* This critical fact appears to be in dispute. Uber claims that it is only permitted to terminate drivers “with notice or upon the other party's material breach” of the governing contracts. Plaintiffs, however, point out that the actual contracts seem to allow Uber to fire its drivers for any reason and at any time. *See, e.g.,* Addendum at 4 (“Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App....”). To the extent this important factor in the employee/independent contractor test is in dispute, summary judgment is unwarranted.

Uber further claims that the right to control element is not met because drivers can work as much or as little as they like, as long as they give at least one ride every 180 days (if on the uberX platform) or every 30 days (if on the UberBlack platform). Mot. at 20. According to Uber, drivers never have to

accept any "leads" generated by Uber (*i.e.*, they can turn down as many rides as they want without penalty), and they can completely control *how* to give any rides they do accept. These contentions are very much in dispute. For instance, while Uber argues that drivers never actually have to accept ride requests when logged in to the Uber application, Plaintiffs provided an Uber Driver Handbook that expressly states: "We expect on-duty drivers to accept all [ride] requests." Handbook at 1. The Handbook goes on to state that "[w]e consider a dispatch that is not accepted to be a rejection," and we "will follow-up with all drivers that are rejecting trips." *Id.* The Handbook further notes that Uber considers "[r]ejecting too many trips" to be a performance issue that could lead to possible termination from the Uber platform. *Id.* at 8; *see also* email from Uber to driver stating that the driver's "dispatch acceptance rate [of 60%] is too low ... Please work towards a dispatch acceptance rate of 80%. If you are unable to significantly improve your dispatch acceptance rate, Uber may suspend your account").

It is also hotly disputed whether Uber has the right to significantly control the "manner and means" of Plaintiffs' transportation services. Plaintiffs cite numerous documents, written in the language of command, that instruct drivers to, amongst other things: "make sure you are dressed professionally;" send the client a text message when 1–2 minutes from the pickup location ("This is VERY IMPORTANT"); "make sure the radio is off or on soft jazz or NPR;" and "make sure to open the door for your client." Onboarding Script at 3–6. As Uber emphasizes, "it is the small details that make for an excellent trip," and Plaintiffs have presented evidence (when viewed in the light most favorable to them) that Uber seeks to control these details right down to whether drivers "have an umbrella in [their] car for clients to be dry until they get in your car or after they get out." *Id.* at 6, 9. Plaintiffs note that drivers are even instructed on such simple tasks as how to pick up a customer with their car. Uber responds that it merely provides its drivers with "suggestions," but does not actually require its drivers to dress professionally or listen to soft jazz or NPR. *See, e.g.*, Reply Br. at 6. But the documents discussed above (and others in the record) are not obviously written as mere suggestions, and Uber's arguments to the contrary cannot be assumed as true on Uber's motion for summary judgment where all reasonable inferences from the record must be drawn in favor of Plaintiffs. *See, e.g., Cameron v. Craig*, 713 F.3d 1012, 1018 (9th Cir.2013) (reiterating that the court must view summary judgment evidence in the light most favorable to the nonmoving party). Indeed, there is evidence of drivers being admonished (or terminated) by Uber for failing to comply with its "suggestions." *See, e.g.*, Uber terminating driver whose "overall driver rating has fallen below the minimum threshold we allow".

Nor can this Court at this juncture credit the argument that Uber has no ability to ensure that any driver actually complies with its "suggestions" or otherwise actively monitor its drivers' performance. In fact, there is evidence suggesting that Uber monitors its drivers to ensure compliance with Uber's many quality control "suggestions." Most notably, Uber requests passengers to give drivers a star rating, on a scale of 1–5, after each completed trip based on the driver's performance. Uber also provides a space for riders to provide written comments or feedback on drivers. Uber documents make it clear that Uber uses these ratings and feedback to monitor drivers and to discipline or terminate them. As the Uber Driver Handbook clearly states, "Uber follows up on all client reports of dissatisfaction" and "monitor[s] your star rating as well as any complaints made by clients." Handbook at 7. Uber notes that it tries to "follow up on *every* quality issue." *Id.* (emphasis added); *F*urthermore, the relevant contracts with Plaintiffs provide that Uber may terminate any driver whose star rating "falls below the applicable minimum star-rating," Addendum at 9, and a significant amount of evidence in the record indicates that Uber does, in fact, terminate drivers whose star ratings far below a certain threshold determined by Uber. While it is apparent that drivers' adherence to every detail of Uber's directions (or "suggestions") may not be specifically discernible through rider ratings (since specific questions are not asked in the feedback form), the facts viewed in Plaintiffs' favor suggest monitoring through rider ratings may be a generally effective enforcement mechanism.

Finally, Uber makes much of the fact that Uber has no control over its drivers' hours or whether its drivers even "report" for work more than once in the relevant period. This is a significant point, and one on which this Court previously commented in noting that such evidence might weigh heavily in favor of a finding of independent contractor status. However, as noted above, freedom to choose one's days and hours of work (which concededly did not truly exist for FedEx drivers in *Alexander*) does not in itself preclude a finding of an employment relationship. *See, e.g., Air Couriers Int'l,* 150 Cal.App.4th at 926, 59 Cal.Rptr.3d 37 (holding hirees were employees as a matter of law despite the fact that "drivers determined their own schedules"); *JKH Enterprises Inc.,* 142 Cal.App.4th at 1051, 48 Cal.Rptr.3d 563 (holding certain hirees were employees as a matter of law despite the fact that they were "not required to work either at all or on any particular schedule"). The more relevant inquiry is how much control Uber has over its drivers *while they are on duty* for Uber. The fact that some drivers are only on-duty irregularly says little about the level of control Uber can exercise over them when they *do* report to work. Indeed, and as noted above, the Court of Appeal has (at least implicitly) recognized this precise distinction in earlier cases where hirees who were "not required to work either at all or on any particular schedule" were nonetheless held to be employees as a matter of law based on the amount of control the employer could exercise when those employees decided to turn up for work. *JKH Enterprises Inc.,* 142 Cal.App.4th at 1051, 48 Cal.Rptr.3d 563

To be sure, a number of secondary factors (*e.g.,* drivers use their own vehicle, may employ other drivers to drive on their behalf, and signed an agreement stating no employment relationship is created), do support an independent contractor classification. But even as to these factors, their significance is ambiguous. For instance, the fact that the drivers provide their own vehicles and thus invest significant capital is a substantial factor favoring an independent contractor relationship as Uber properly contends, but this fact alone is not dispositive. In *Alexander,* an employment relationship was found even though drivers provided their own vehicles. Moreover, this *Borello* factor is qualified by the fact that Uber supplies the critical tool of the business— smart phone with the Uber application. *See* Service Agreement at 7 (Uber provides drivers with the smartphone to run the Uber app); email terminating driver and including "steps" to "return your Uber-issued phone".

As noted above, rarely does any one factor dictate the determination of whether a relationship is one of employment or independent contract. Here, numerous factors point in opposing directions. As to many, there are disputed facts, including those pertaining to Uber's level of control over the "manner and means" of Plaintiffs' performance. Viewing the current record in the light most favorable to Plaintiffs, the Court cannot conclude as a matter of law that Plaintiffs are Uber's independent contractors rather than their employees. Consequently, Uber's summary judgment motion must be denied.

The application of the traditional test of employment—a test which evolved under an economic model very different from the new "sharing economy"—to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy." Until then, this Court is tasked with applying the traditional multifactor test of *Borello* and its progeny to the facts at hand. For the reasons stated above, apart from the preliminary finding that Uber drivers are presumptive employees, the *Borello* test does not yield an unambiguous result. The matter cannot on this record be decided as a matter of law. Uber's motion for summary judgment is therefore denied.

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ENTRANCE EXAM 3 – READING PART (QUESTIONS)

Based on the read text of the U.S. District Court, N.D. California judgment in: *O'Connor et al. v. Uber Technologies, Inc.* 82 F.Supp.3d 1133 (2015) – in particular your notes as well as your understanding to it, decide whether the statements below are True (T) or False (F). You have 10 minutes to complete this part of the exam.

PESEL:

		True	**False**
1.	The opinion of the Court was written by its single member we know from name.		
2.	The case was initiated by a single plaintiff.		
3.	The issue of the case was whether the Uber driver(s) is/are eligible for statutory protection as for employee(s).		
4.	Uber receives payments in form of fixed sums from the drivers, just like taxi companies.		
5.	In Uber marketing it presents itself as a technology delivery company.		
6.	The employment relationship characteristic is established by the Court with reference to statutory premises in the state of California.		
7.	One of the fundamental employer's right is the right to all necessary control over the employee's performance.		
8.	It is an additional factor of employment relation e.g. that performed task demands special skills.		
9.	The Court established that it is Uber which enables customers to book and receive rides, not its drivers themselves.		
10.	The assessment of a technology company, according to the Court, depends not on whether it uses technology, but whether it is the substance of company activity.		
11.	The ride charges are established by drivers according to Uber strict indications.		
12.	There is an exam that a driver must pass in order to be admitted to Uber.		

13.	The decision by Uber manager to terminate the contract with the low-ranked driver by the Uber internal controlling agency was invoked by the Court.		
14.	Uber drivers never have to accept ride orders when logged-out from the Uber application, unless at least once for certain time.		
15.	There is no evidence invoked that Uber drivers were terminated by Uber for failing to comply with transportation service "manner" suggestions, but the Court establishes it as "highly likely".		
16.	When it is established that Uber drivers own the cars in which the rides are provided, it is always definite that there may be no employment relation.		
17.	There are agreements between Uber and its drivers that clearly establish that there is no employment relation.		
18.	It is clearly prescribed in the Uber contracts that Uber may terminate lacking particular reason, at its sole discretion.		
19.	The Court indicates that legislation may enact based on "sharing economy" principles but the judgment must be based on principles of employment relation that not fully adjust to the "sharing economy".		
20.	The analysed Court's judgment fully regards merits of the case, and is a judgment in favour of the motion by plaintiff side.		