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ONLYEMPLOYEES: Ending the Misclassification of Digital Sex Workers in the Shared and Gig Economy

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ONLYEMPLOYEES: ENDING THE MISCLASSIFICATION OF DIGITAL SEX WORKERS IN THE SHARED AND GIG ECONOMY

MARY MARSTON*

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I. INTRODUCTION

Mia Khalifa was only paid a total of \$12,000 in shooting fees during her ten-month career in the adult film industry, but she remains one of the most searched adult film stars of all time.¹ Social and monetary discrepancies between adult film stars' payment and the revenue made by pornography studios parallel the difficulties other sex workers face, like exotic dancers and prostitutes, especially in terms of their misclassification as independent contractors instead of employees.²

In addition to this misclassification, sex workers face a lack of financial and physical protections in traditional sex work.³ These lack of protections, paired with the economic downturn of 2008 that led to the rise of the shared and gig economy and precipitated a second digital disruption, has led to an increase of paid online platforms in which sex workers can charge users to view their content.⁴

OnlyFans has become one of the most popular social media platforms for sex workers to post their content, providing a more accessible and physically safer environment to participate in the industry.⁵ OnlyFans also gives its Creators ownership of their intellectual property, photos, and videos, and the Creators post to their pages for their Fans to view for a monthly subscription

1. See e.g., Trace William Cowen, *Mia Khalifa Reveals She Only Made \$12,000 as an Adult Film Star*, COMPLEX: POP CULTURE (Aug. 13, 2019), <https://www.complex.com/pop-culture/2019/08/mia-khalifa-sparks-discussion-after-revealing-she-made-12-thousand-dollars-adult-film> (showing an embedded filmed interview with Ms. Khalifa that discusses how much she earned in shooting fees).

2. See *Black Sex Workers' Lives Matter*, INNER HOE UPRISING (June 10, 2020, 12:41 AM), https://podcasts.apple.com/us/podcast/inner-hoe-uprising/id1057045285?i=1000477385181&fbclid=IwAR2Agq3NwY5uaF5mH_uRLkFLnifhnqD6DDzPeF9jan3ri9r2ZU4P0IY91I (discussing how activists and academics use "sex work" to destigmatize work associated with prostitution); see generally Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U. J. GENDER SOC. POL'Y & L. 465, 466-70 (1999) (discussing the difficulties adult entertainers face in obtaining labor rights).

3. E.g., *Black Sex Workers' Lives Matter*, *supra* note 2 (emphasizing that sex workers are cisgender women, trans, or people of color face additional levels of violence).

4. E.g., Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019) <https://nyti.ms/2UOmRiL> (explaining how OnlyFans formed a userbase beginning with ten sex workers); see Joshua Brustein, *The Gig Economy Was Built to Thrive in a Downturn – Just Not This One*, BLOOMBERG (May 6, 2020 6:45 AM) <https://www.bloomberg.com/news/newsletters/2020-05-06/the-gig-economy-was-built-to-thrive-in-a-downturn-just-not-this-one> (discussing how the 2008 recession transformed the economy).

5. E.g., *id.* (illustrating how these sex workers' content was different from free pornography online).

fee.⁶

To quantify how much prospective Creators can earn per month, OnlyFans provides a sliding scale to show estimated earnings based on how much Creators charge their Fans to access their page.⁷ This estimate excludes income that Creators can earn through tips and curated content, such as photos, videos, and other digital pay-per-view content a Fan can privately purchase from a Creator.⁸ In exchange for providing this medium for Creators, OnlyFans takes a 20% commission from Creators' subscription fees, tips, and the amount they earn from curated content.⁹

These facts force courts to consider whether Creators are employees or independent contractors.¹⁰ If courts categorized Creators as employees, OnlyFans would bear the responsibility of covering payroll taxes, ensuring its Creators make minimum wage based on the number of hours they produce content for the site, and giving Creators all the tips they earn versus taking a commission from them as it currently does.¹¹

Judge Vince Chhabria of the Northern District of California stated this conundrum faced by courts, in fairly and accurately categorizing these workers, requires creating a new category of workers that are entitled to a different set of protections.¹² Inspired by this suggestion, this Comment

6. *E.g.*, *Terms of Service*, ONLYFANS, <https://onlyfans.com/terms> (last visited May 17, 2020) (defining a “Creator” on OnlyFans as a user that posts content on the platform) [hereinafter *Terms of Service*].

7. *E.g.*, *id.* (defining a “Fan” as a user who follows another Creator and views the Creator’s content); *see also Help & Support*, ONLYFANS, <https://onlyfans.com/how/> (last visited May 17, 2020) (displaying a sliding scale to show Creators how much they could earn per month based on Fan subscriptions) [hereinafter *Help & Support*].

8. *E.g.*, *Help & Support*, *supra* note 7 (showing that sliding scales does not include additional information about income).

9. *See generally* Bernstein, *supra* note 4 (explaining how OnlyFans makes money from how much its Creators charge their Fans).

10. *See Terms of Service*, *supra* note 6 (referring to the cut OnlyFans takes from its Creators profits); *see also* Belizaire v. Ahold U.S.A., Inc., 18 Civ. 5020 (LGS), 2019 WL 280367, at *2-5 (S.D.N.Y. Jan. 22, 2019) (concluding workers were independent contractors and not entitled to compensation for wage theft); *cf.* Franze v. Bimbo Foods Bakeries Distribution, LLC, No. 17-cv-3556 (NSR), 2019 WL 2866168, at *5-6 (S.D.N.Y. July 2, 2019) (revealing NYLL focuses on the degree of control of a hiring party).

11. *E.g.*, Mumin v. Uber Techs, Inc., 239 F. Supp. 3d 514, 515, 528 (E.D.N.Y. 2017) (alleging Uber misrepresented payment of tips to drivers and failed to meet minimum wage standards in violation of NYLL); *cf.* Dykes v. DePuy, Inc., 140 F.3d 31, 37-38 (1st Cir. 1998) (clarifying that employers shift tax filing responsibilities to workers if they are classified as independent contractors).

12. *E.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081-82 (N.D. Ca. 2015) (asserting current labor laws do not account for the needs of shared and gig economy

asserts that OnlyFans' level of control over its Creators' payment-processing is comparable to how ride-sharing services manage their drivers.¹³ Because of this high degree of control, and because OnlyFans depends upon Creators' products and income to operate the social media site, this Comment concludes that courts should classify OnlyFans Creators as employees.¹⁴

To make this assertion, this Comment contends that courts should rule that Creators are employees of OnlyFans based on how integral they are to the social media site's business model, and the level of control it exerts over processing Creators' payment.¹⁵ Courts should grant Creators minimum wage and gratuity protection under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") because of these factors.¹⁶ Part II lays the foundation of the traditional tests used to categorize workers as employees or independent contractors at the federal and state level, and how they pertain to digital sex workers.¹⁷ Part III applies case and statutory law from California and New York to assert how labor rights are given to shared and gig economy workers and can plausibly extend to OnlyFans Creators.¹⁸ Part IV makes the policy recommendation that current employment tests do not serve workers of the shared and gig economy properly and that lawmakers must form a new test.¹⁹ Finally, Part V closes by finding that although OnlyFans Creators fit the mold of an independent contractor under current laws, the social media site's dependence on its Creators and its control mechanisms warrant their classification as employees.²⁰

workers).

13. *E.g., infra* Part III (analyzing how courts could classify Creators as employees based on classifications of exotic dancers and ride-share drivers as employees).

14. *Cf. Cotter*, 60 F. Supp. 3d at 1081-82 (explaining the limited applicability of twentieth century labor law tests).

15. *E.g., infra* Part III (emphasizing the intrinsic value a worker brings to the hiring party and the degree of control a hiring party has over the worker aid in determining employee status).

16. *Compare Cotter*, 60 F. Supp. 3d at 1081-82 (implying policymakers need to formulate a new labor test for shared and gig economy workers), *with Franze*, 2019 WL 2866168 at *5 (discussing what factors NYLL focuses on to verify employment status), *and Mumin*, 239 F. Supp. 3d at 529 (explaining that NYLL entitles drivers to various employment protections).

17. *E.g., infra* Part II (explaining how courts have applied traditional labor law tests and drawing parallels to its applications for digital sex workers).

18. *E.g., infra* Part III (analyzing the mentioned state labor laws, their merits, and their intersections of the Fair Labor Standards Act test).

19. *E.g., infra* Part IV (suggesting that policymakers develop a new labor law test for shared and gig economy workers).

20. *E.g., infra* Part V (balancing how NYLL and the FLSA can be interpreted to grant OnlyFans Creators employee status).

II. BACKGROUND

A. *Digital Sex Workers and the 21st Century*

Sex workers on digital platforms, like adult film actors, generally lack control of how pornography studios utilize their images and recorded performances because they do not hold copyrights to these materials.²¹ Adult film actors' inability to obtain residual income from copyrights associated with films in which they starred helped lead to the popularity of user-generated pornography in the 2000s.²² The lack of enforced copyright protections for individual uploaders became immediately apparent, which disincentivized independent pornographers from engaging in the medium for profit.²³

One of the only exceptions is *Jules Jordan Video, Inc. v. 144942 Canada*, since the plaintiff filmed his own adult videos and held significant social capital in the adult film industry.²⁴ Ashley Gasper (pseudonym Jules Jordan) won his right of publicity claim under California law, which protects against the unauthorized use of a person's name, voice, signature, photograph, and likeness.²⁵ The court deduced that the Copyright Act covered the help of his image, which was obtained by illegal means.²⁶ Even with the lack of copyrights, pay-per-view content subscription models have remained a popular way for sex workers to engage in work digitally with limited interference from adult entertainment companies.²⁷

The rise of OnlyFans capitalized on the growing popularity of digital sex

21. Cf. Cowen, *supra* note 1 (discussing how Mia Khalifa does not make residual income from the adult films she starred in).

22. See Preservation Techs. LLC v. MindGeek USA Inc., 2019 WL 3213585 at *1 (C.D. Cal. Apr. 2, 2019) (claiming that MindGeek, which owns PornHub, illegally dispersed pornographic materials); see also Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 811-16 (2008) (considering the implications of viral dispersal of pornography).

23. Compare Bartow, *supra* note 22, at 812-13 (finding that the prevalence of free pornography decreases users' willingness to pay), with *Malibu Media, LLC v. Doe*, 381 F. Supp. 3d 343, 354 (M.D. Pa. 2018) (dispensing free pornography devalues the copyrights of adult film studios' productions).

24. Cf. *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1156 (9th Cir. 2010) (discussing that plaintiff's claim fell within the subject matter of copyright).

25. See *id.* at 1153-54 (explaining what form of relief the court granted the plaintiff); see also CAL. CIV. CODE § 334(a) (articulating that this right protects persons from being commercially exploited without consent).

26. E.g., *Jules Jordan Video*, 617 F.3d at 1155 (confirming the plaintiff's shooting of his own videos gave him intellectual property rights).

27. Cf. Bartow, *supra* note 22, at 812 (communicating anyone could commercially exploit pornography on pay-per-view services).

work because the site enables Creators to have tight control over the production of their content, generally without the risk that the site will delete their social media page via content moderation.²⁸ The site also posts tips on how Creators can grow their fanbase, resulting in higher revenue for the Creators and OnlyFans.²⁹ Creators are also granted copyrights to their published content through the social media site's compliance with the Digital Millennium Copyright Act (DMCA).³⁰ This Act aids in giving United States-based Creators intellectual property rights over their posted content.³¹ OnlyFans' compliance with the DMCA is another factor that drives digital sex workers to it.³² Users of other social media platforms, like Instagram, are not granted these same protections.³³

Instagram, a free, public social media application that enables its users to share photos and interact with their followers, has strict guidelines regarding the types of photos users can post on the platform.³⁴ Instagram's public nature and popularity led sex workers to use the publicity generated from their free Instagram pages to drive traffic to their OnlyFans profiles, where they can post racier content that Instagram would likely remove.³⁵

Another factor that brings sex workers to OnlyFans is the digital

28. See generally Bernstein, *supra* note 4 (analyzing what draws a plethora of sex workers to the site).

29. E.g., *Tips and Tricks*, ONLYFANS, <https://blog.onlyfans.com/categories/tipsandtricks/> (last visited May 21, 2020) (showing Creators how to gain more Fans and increase their revenue stream by creating engaging content) [hereinafter *Tips and Tricks*].

30. See 17 U.S.C. §§ 101, 104, 104A, 108, 132, 114, 117, 701 (amending United States' Code extending copyrights); see also 17 U.S.C. §§ 512(g)(1) (creating the take down provision section of copyright law).

31. See generally, *DMCA Takedown Policy*, ONLYFANS, <https://onlyfans.com/dmca> (last visited May 21, 2020) (displaying how OnlyFans complies with DMCA policies regarding removing copyrighted content that does not belong to the poster).

32. E.g., Bernstein, *supra* note 4 (explaining that digital sex workers favor OnlyFans because it gives them copyrights and allows for racier images and videos).

33. E.g., *Sinclair v. Ziff Davis, LLC*, 2020 WL 1847841 at *4 (S.D.N.Y. Apr. 13, 2020) (discussing how Instagram's user agreement gives the company copyrights over users' posted images and rights to remove content).

34. See *id.* at *3 (referencing Instagram's user policy that it reserves the right to remove a user's content); cf. *Southgate v. Facebook, Inc.*, Civil Action No. 1:17-cv-648 (AJT/IDD) 2017 WL 6759867 at *1 (E.D. Va. Nov. 14, 2017) (divulging that Instagram is a subsidiary of Facebook).

35. See *Meet Lead Recruiter Amber Gostelow*, ONLYFANS BLOG, <https://blog.onlyfans.com/lead-official-recruiter-amber-gostelow/> (last visited May 21, 2020) (articulating how OnlyFans recruiters seek out new Creators based on their popularity on social media outlets) [hereinafter *OnlyFans Blog*]; see also Bernstein, *supra* note 4 (confirming that Creators want control over their imagery to promote their brands and expand their income bases).

disruption of sex work and the rise of the shared and gig economy.³⁶ This type of economy consists of a labor market of short-term contracts and freelance jobs.³⁷ Sex workers' participation in this economy is defined by moving from traditional sex work, like acting in adult films and working in strip clubs, to even shorter-term opportunities like digital sex work.³⁸ This shift from in-person to digital sex work has led to a new form of economic marginalization because of the significant decrease in payment per scene.³⁹ Lawmakers also marginalized digital sex workers through policies like the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA).⁴⁰ Legislators drafted the Acts to clarify the United States' sex trafficking laws and encourage proactive action against online sex-trafficking, but in reality it advances the derision of safer, online job opportunities for people participating in consensual sex work by removing their posted content online.⁴¹

Although Creators can set prices for subscription rates on OnlyFans, they still suffer the consequences of its business model's design.⁴² The social media site utilizes a sliding scale to aid potential Creators in determining how much they can potentially earn per month solely through subscriptions.⁴³ The site also provides a disclaimer that the estimate does

36. See generally Bernstein, *supra* note 4 (expressing that a small number of adult film stars had lucrative employment contracts with studios prior to the rise of the Internet in the 2000s).

37. See generally Gavin Newsom, *On Labor Day, Let's Pledge to Protect Workers and Create Paths to Union Membership*, SACRAMENTO BEE (Sept. 02, 2019), <https://www.sacbee.com/opinion/article234624897.html> (establishing the differences between shared and gig economy versus traditional employment).

38. E.g., Bernstein, *supra* note 4 (articulating why sex workers from various mediums were drawn to OnlyFans).

39. E.g., *Preservation Techs v. MindGeek USA Inc.*, 2019 WL 3213585 at *3 (C.D. Cal. Apr. 2, 2019) (claiming that MindGeek violation of several patents led to the proliferation of free, stolen pornography).

40. Cf. *Woodhull Freedom Foundation v. United States*, 948 F.3d 363, 368 (D.C. Cir. 2020) (discussing the implications and purpose of the 2017 "Allow States and Victims to Fight Online Sex Trafficking Act" ("FOSTA")).

41. E.g., Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX, (Jul. 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (clarifying the deleterious impacts FOSTA-SESTA has on sex workers' ability to safely find and interact with clients).

42. See Bernstein, *supra* note 4 (asserting how sex workers were integral to OnlyFans success from its inception); cf. *Terms of Service*, *supra* note 6 (explaining OnlyFans' business model).

43. *Compare Help & Support*, *supra* note 7 (utilizing this tool to attract potential Creators), with Erica Heidewald (@erikaheidewald), TWITTER, (Aug. 28, 2020 6:41 PM),

not include the 20% it takes when processing subscriptions, tips, and pay-per-view content to pay who it considers its employees in its headquarters in the United Kingdom and other overhead expenses.⁴⁴ The sliding scale income estimator also fails to factor in additional taxes that United States-based Creators need to pay because of their status as independent contractors under current labor laws.⁴⁵ Receiving a Form 1099 versus a traditional paystub creates various difficulties for Creators of all ranks of popularity and income, from filing taxes to confirming payment with leasing agents to rent an apartment.⁴⁶ These facts further raise questions of whether courts should categorize OnlyFans Creators as employees or independent contractors.⁴⁷

B. Determining Employment Status

The National Labor Relations Act, Fair Labor Standards Act, and the Internal Revenue Service created tests for courts to utilize when ascertaining whether a worker is an employee or an independent contractor.⁴⁸ These classifications are essential to decide the benefits that a worker is entitled to receive as well as minimum wage standards.⁴⁹

Congress enacted the National Labor Relations Act (“NLRA”) in 1935 to

<https://twitter.com/erikaheidewald/status/1299477241705803776> (showing how former non-sex work actors have used OnlyFans as a supplemental source of income) [hereinafter *Erica Heidewald*], and Hannah Gold, *What, Exactly, Happened with Bella Thorne and OnlyFans?*, THE CUT: SEX WORK (Aug. 31, 2020) <https://www.thecut.com/2020/08/bella-thorne-and-onlyfans-the-controversy-explained.html> (demonstrating how Bella Thorne and other mainstream celebrities’ use of the platform has resulted in OnlyFans’s drastic policy changes).

44. See *Terms of Service*, *supra* note 6 (clarifying how the site uses its 20% commission from Creators’ revenue).

45. E.g., *Help & Support*, *supra* note 7 (revealing the sliding scale may be misrepresentative of a Creator’s actual income).

46. E.g., *Interview with The Duchess of Dank*, Creator, ONLYFANS (Aug. 10, 2020) (clarifying that she is in the top 4% of most the popular Creators and suffers the consequences of independent contractor status) [hereinafter *The Duchess of Dank*].

47. See *Terms of Service*, *supra* note 6 (disclosing that OnlyFans takes 20% of Creators income to process taxes, fees, and overhead expenses); cf. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015) (alluding to the implications of applying aged labor tests in the current labor economy).

48. See 29 U.S.C. § 203 (2020) (defining who is an employee under federal labor law); see also 29 U.S.C. § 141(b) (defining the Labor Management Relations Act of 1947).

49. Compare *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-34 (1992) (categorizing a worker within the NLRA and ERISA), with *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000) (explaining who is eligible for FLSA), and *Dykes v. DePuy, Inc.*, 140 F.3d 31, 38 (1st Cir. 1998) (using IRS information to categorize independent contractors).

protect the rights of employers and employees in terms of managing labor practices.⁵⁰ In a landmark NLRA case, *NLRB v. United Insurance Co. of America*, the Supreme Court found that the workers were employees because they conjunctively: (1) were trained by company supervisory personnel; (2) conducted business following the company's policies; (3) received benefits of the company's vacation plan; (4) participated in the group insurance and the pension fund; (5) and had a permanent working arrangement with a company, conditioned on a company's satisfaction with the employee's work.⁵¹ The NLRA's strict, conjunctive employment test discourages workers from using it to argue for employee status.⁵² Some courts infer that workers are independent contractors if they receive a Form 1099 instead of a W-2 to file federal income tax returns.⁵³ Most courts prefer to use the Fair Labor Standards Act ("FLSA"), paired with local state labor law, over relying on a Form 1099 or the NLRA to ascertain a worker's employment status.⁵⁴

The FLSA enables plaintiffs to sue for unpaid minimum wage or underpaid overtime compensation.⁵⁵ Courts only extend these protections to workers whom they classify as employees, not independent contractors.⁵⁶ The FLSA has a lower standard than the NLRA⁵⁷ and simply requires an understanding of: (1) the degree of control which the putative employer has

50. See 29 U.S.C. §§ 151–169 (1947) (refining sections of the United States' labor code impacted by the NLRA).

51. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258-59 (1968) (defining the conjunctive factors of when a worker is an employee in accordance with the NLRA).

52. Compare *id.* (showing the conjunctive and restrictive steps to ascertain employee status under the NLRA), with *Heath*, 87 F. Supp. 2d at 457 (exemplifying how a worker seeking relief utilized the FLSA test).

53. See *Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica*, 361 F.3d 1, 4-5, 8 (1st Cir. 2004) (concluding plaintiff's payment period and her lack of tax deductions made her an independent contractor).

54. Compare *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015) (analogizing the difficulties in balancing labor laws), with *Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529-35 (E.D.N.Y. 2017) (ruling Uber violated NYLL), and *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *11 (S.D.N.Y. July 2, 2019) (balancing what the FLSA and NYLL consider an employee).

55. See *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000) (discussing what the FLSA provides).

56. See *Braxton v. Eldorado Lounge, Inc.*, Civil Action No. ELH-15-3661, 2017 WL 4865476 at *14-16 (D. Md. Oct. 27, 2017) (discussing the intersection of Maryland Labor Law and federal minimum wage standards).

57. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258-59 (1968) (exhibiting the early history of categorization of workers per the National Labor Relations Act).

over how the work performed; (2) the opportunities for profit or loss depending upon the managerial skill of the worker; (3) the putative employee's investment in equipment or material; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) whether the service rendered is an integral part of the putative employer's business to establish if a worker is an employee.⁵⁸

Courts also look at the totality of circumstances to establish if workers are highly dependent on a hiring party, which would give them employee status and FLSA protections.⁵⁹ As the NLRA standard to identify an employee is high,⁶⁰ groups of exotic dancers have used the FLSA paired with state labor and wage laws to pursue class-action lawsuits regarding unpaid wages.⁶¹ Tips paid to exotic dancers by clients also do not count towards satisfying an employer's burden to provide a minimum wage for its employees under the FLSA and statutory wage laws.⁶²

District courts must balance federal and applicable state labor laws to identify a worker's employment status, as federal law establishes the basis of regulation, and state law further details the interactions between employees, employers, and unions.⁶³ The best examples are the evolution of California Labor Law ("CLL") and New York Labor Law ("NYLL").⁶⁴ CLL aligns with the FLSA and has been more accommodating of shared and gig economy workers.⁶⁵ New York employees often bring claims under NYLL

58. *E.g., Heath*, 87 F. Supp. 2d at 457 (balancing the FLSA with Maryland labor law to determine that Purdue was an employer).

59. *E.g., Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 151-52 (D.C. Cir. 2011) (finding independent contractors fall outside of the protection of the FLSA).

60. *See NLRB*, 390 U.S. 254, 358-59 323-24 (1992) (expounding additional factors the NLRA uses to assess employee status).

61. *See In re Penthouse Exec. Club Comp. Litig.*, Master File No. 10 Civ. 1145(KMW), 2014 WL 185628 at *1, *4 (S.D.N.Y. Jan. 14, 2014) (permitting an employee to sue an employer on behalf of similarly situated employees under 29 U.S.C. § 216(b)).

62. *See Hart v. Rick's Cabaret Int'l Inc.*, No. 09 Civ. 3043(JGK), 2010 WL 5297221 at *4 (S.D.N.Y. Dec. 20, 2010) (asserting that directing customers to directly pay employees interferes with employer's minimum wage obligations under the FLSA).

63. *See Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452, 457-59 (D. Md. 2000) (exemplifying how the court balanced the FLSA with state labor law); *see also Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 295-96 (detailing the competing interests of the doctrine of pre-emption in labor law).

64. *Compare* N.Y. LAB. L. §§ 198(1)(a), 215(1), (McKinney 2019) (aligning NYLL with the FLSA), *with* CAL. LAB. CODE §§ 2750.3, 3351 (West 2019) (repealed 2020) (defining employee and independent contractor under California law); *cf.* CAL. UNEMP. INS. CODE § 606.5 (West 2019) (defining what constitutes an employer).

65. *E.g., Newsom supra* note 37 (acknowledging how CLL has become more inclusive of shared and gig economy workers).

and the FLSA because courts recognize they offer differing support for overtime exemptions.⁶⁶

In the late 2010s, a series of California cases established that Uber and Lyft drivers, who courts consider shared and gig economy workers, are employees.⁶⁷ In *Cotter v. Lyft*, Judge Vincent Chhabria asserted that traditional labor laws could not adequately protect workers in the shared and gig economy because these laws evolved under an economy characterized by different business models.⁶⁸ Similarly, in *O'Connor v. Uber Technologies Inc.* the court held that California labor law would find the workers were independent contractors, but the facts persuaded the court to grant them employee status.⁶⁹ In contrast, the Northern District of California strayed from its rulings regarding Uber and Lyft drivers in *Lawson v. Grubhub*.⁷⁰ After applying the Right-to-Control test and the *Borello* Factors, which are the California state law equivalents to the Fair Labor Standards Act, it concluded the plaintiff was an independent contractor based on Grubhub's limited control over how the plaintiff completed his work.⁷¹

The Supreme Court of California realigned itself with the Northern District of California's precedent in *Dynamex Operations W. v. Superior Court*, determining that "a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits"⁷² The California Assembly enshrined this sentiment when it passed California Assembly Bill 5 ("AB5") on September 18, 2019.⁷³ AB5 provides that

66. *E.g.*, *Hayward v. IBI Armored Servs.*, 954 F.3d 573, 576 (2d Cir. 2020) (determining to what extent workers who fall under the motor carrier exemption can bring overtime claims under NYLL).

67. *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (concluding there was significant evidence of an employer-employee relationship); *see also O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (discussing that Uber drivers perform an integral part of Uber's business).

68. *Cf. Cotter*, 60 F. Supp. 3d at 1081-82 (emphasizing that Lyft drivers could be considered a new category of worker altogether).

69. *See O'Connor*, 82 F. Supp. 3d at 1146 (internal citations omitted) (determining independent contractor status in California is a question of mixed fact and law).

70. *See Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018) (concluding drivers were independent contractors based on Grubhub's lack of control).

71. *See id.* (determining a worker's employment status is an all-or-nothing proposition).

72. *See id.* (establishing a new standard of employment status); *see also* CAL. LAB. CODE §§ 2750.03 (repealed 2020), 3351 (West 2019) (defining who is an employee under California law); *cf.* CAL. UNEMP. INS. CODE § 621, (West 2019) (defining who an employee is).

73. *E.g.*, Newsom, *supra* note 37 (discussing how the past century reduced the rights of workers).

courts should consider a worker an employee unless a hiring entity can demonstrate that the worker: (1) is free from control and direction of the hiring entity regarding the performance of the work; (2) performs work that is outside the course of the hiring entity's business; and (3) is engaged in an independently established trade.⁷⁴

Ride-share giants, Uber and Lyft, have taken issue with the move towards classifying their workers in California as employees.⁷⁵ Uber's CEO, Dara Khosrowshahi, said that the company would likely shutter for several months if California did not overturn its classification of its drivers as employees, but his fears were quelled when Proposition 22 passed in November 2020.⁷⁶

The definition of an employer under the FLSA and NYLL are co-extensive,⁷⁷ with NYLL defining an employer as anyone who employs any individual in an occupation, industry, trade, business or service, or, simply, anyone who acts an employer.⁷⁸ The definition of "employed" under the NYLL is also broad, defining an employed person as someone who is "permitted or suffered to worked."⁷⁹ NYLL has moved more closely towards conforming to the FLSA, shifting burdens of disproving employer status by increasing penalties against employers who violated NYLL and extending employer liability to officers and agents of limited liability companies and

74. See CAL. LAB. CODE § 2750.3, 3351 (West 2019) (repealed 2020) (declaring factors a worker must meet for California to consider a worker an independent contractor); *id.* at § 3351 (declaring factors a worker must meet for California to consider a worker an employee); *cf.* CAL. UNEMP. INS. CODE § 606.5 (asserting employers' responsibilities to their employees and this impact on state unemployment).

75. *E.g.*, Lauren Feiner, *Uber CEO Says Its Service Will Probably Shut Down Temporarily in California If It's Forced to Classify Drivers as Employees*, NBC BAY AREA (Aug. 12, 2020), https://www.nbcbayarea.com/news/national-international/uber-ceo-says-its-service-will-probably-shut-down-temporarily-in-california-if-its-forced-to-classify-drivers-as-employees/2343332/?_osource=SocialFlowTwt_BAYBrand (discussing the implications of California Attorney General Xavier Becerra's lawsuit against Uber and Lyft).

76. See *id.* (inferring the potentially dire implication of this lawsuit for Uber's drivers and its profit margins); see also Suhuana Hussain and Johana Bhuiyan, *Prop. 22 Passed a Major Win for Uber, Lyft, Doordash. What Happens Next?*, LOS ANGELES TIMES: TECHNOLOGY (Nov. 4, 2020) (showing that gig economy companies set forth Proposition 22 as a "better solution" that would provide benefits to some workers without forcing the companies to alter their business model).

77. *E.g.*, *Kim v. 511 E. 5th St., LLC*, 133 F. Supp. 3d 654, 665 (S.D.N.Y. 2015) (establishing that NYLL and the FLSA have the same scope and boundaries of defining an employer).

78. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 117 (2d Cir. 2013) (quoting N.Y. Lab Law. §§ 190(3), 651(6)) (exemplifying that the definition of "employer" under NYLL is vague).

79. See *id.* (showing the relatively vague definition of employee).

partnerships.⁸⁰

Shared and gig economy workers have also utilized NYLL's parallels with the FLSA to assert their employee status.⁸¹ The plaintiffs in *Franze v. Bimbo Foods Bakeries Distribution, LLC* alleged Bimbo Foods was the plaintiffs' employer-based on (1) the degree of control exercised by the alleged employer over the worker; (2) the worker's opportunity for profit or loss, and his or her investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the performance or the duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business.⁸²

New York courts also focus on minimum wage entitlements and gratuity theft to categorize a worker as an employee.⁸³ In *Mumin v. Uber Technologies*, the court held that the degree of control exercised by the employer, and the extent to which the plaintiffs' labor was integral to Uber's business model, were vital in determining that the plaintiffs were employees.⁸⁴ This conclusion was primarily based on the level of control Uber has over its drivers' payments.⁸⁵

The balance of these federal and state labor laws contributes to establishing a more inclusive precedent of shared and gig economy workers.⁸⁶ Nevertheless, these laws still create dilemmas for the modern worker because of their focus on a formally, legally established system, and the continuous employer-employee relationship fails the modern worker.⁸⁷ Businesses exploit the high threshold federal and state labor laws set to meet

80. See generally *New York State Strengthens Wage and Hour Protections*, PROSKAUER (Sept. 2009), <https://www.proskauer.com/alert/new-york-state-strengthens-wage-hour-protections> (simplifying changes to New York State Labor Law sections §§ 198(1)(a) (2020), 215(1), and 663(1-2)).

81. Cf. *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *5-11 (S.D.N.Y. July 2, 2019) (discussing why plaintiffs were not employees under NYLL and FLSA).

82. See *id.* at *5 (internal citations omitted) (ruling factors of an employment relationship under the FLSA).

83. See *Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529-31 (E.D.N.Y. 2017) (emphasizing how Uber's statement that tips were included in a rider's fare violated NYLL).

84. See *id.* at 515, 529 (explaining how degree of control and level of integrality to business are two key factors in determining employee status).

85. E.g., *id.* at 529 (describing that riders make a payment through Uber's mobile application, and the company pays drivers their share of the profits weekly).

86. See generally Newsom, *supra* note 37 (recognizing that California's amendments to its labor law needs to extend nationally).

87. E.g., *id.* (proffering an example of how antiquated labor laws fail shared and gig economy workers).

employee status to make their businesses more profitable by reducing their legal liabilities and responsibilities to their workers.⁸⁸

C. *Sex Workers Have More Labor Rights than Actors*

Courts primarily rely on the FLSA test, combined with states' labor laws, to categorize live sex workers, such as exotic dancers, as employees,⁸⁹ and non-sex work actors as independent contractors.⁹⁰ Courts' classification of live sex workers as employees directly relates to their employers' control of their workplace, and their workers' dependence on their employer to source work and a revenue stream.⁹¹ For example, courts concluded in *McFeeley v. Jackson Street Entertainment*, *Clinicy v. Galardi Enterprises, Inc.*, and *In re Penthouse Executive Club Compensation Litigation*, that the degree of control the club owners had over the exotic dancers' performances favored categorizing the exotic dancers as employees.⁹² Other district courts use this same line of reasoning to their states' labor laws to decide exotic dancers' entitlement to minimum wage benefits based on the number of hours they work for a club.⁹³

Courts oftentimes conclude that non-sex work actors and other entertainers are independent contractors.⁹⁴ In *Radio City Music Hall Corp. v. United States*, Radio City successfully asserted that actors performing in its vaudeville shows were independent contractors because it lacked control over the nature of the performances and was merely a host.⁹⁵ The lack of a

88. *E.g., id.* (discussing how gig and shared economy business models depend on the exploitation of workers).

89. *Compare* *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 244 (4th Cir. 2016) (asserting these exotic dancers were employees), *with* *Clinicy v. Galardi Enter., Inc.*, 808 F. Supp. 2d 1326, 1330 (N.D. Ga. 2011) (concluding an employer's level of control over exotic dancers confirms whether they are employees).

90. *See* *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-18 (2d Cir. 1943) (categorizing actors as independent contractors so they have freedom to work on projects with different film companies).

91. *See* *McFeeley*, 825 F.3d at 239-40 (internal citations omitted) (focusing on the degree of control an employer has over the manner of which work is performed).

92. *See* *In re Penthouse Exec. Club Comp. Litig.*, Master File No. 10 Civ. 1145 (KMW), 2014 WL 185628 at *4 (S.D.N.Y. Jan. 14, 2014) (stating the exotic dancers here were employees).

93. *Compare* *Braxton v. Eldorado Lounge, Inc.*, Civil Action No. ELH-15-3661, 2017 WL 4865476 at *1 (D. Md. Oct. 27, 2017) (applying Maryland labor law and the FLSA to determine an exotic dancer's right to minimum wage), *with* *Hart v. Rick's Cabaret Int'l Inc.*, No. 09 Civ. 3043 (JGK), 2010 WL 5297221 at *4 (S.D.N.Y. Dec. 20, 2010) (analyzing whether the workers were paid less than the statutory minimum wage).

94. *Cf. Radio City Music Hall*, 135 F.2d at 717-18 (supporting that some non-sex work actors are independent contractors based on their contract brevity).

95. *See id.* (asserting that the short-term nature of the actors' working contract

promised time frame of continuous employment also helped the court reason that the actors were independent contractors.⁹⁶ In contrast, in *Club Hubba Hubba v. United States*, the District Court of Hawaii used the framework established by *Radio City Music Hall Corp. v. United States* to determine that the dancers, who were not sex workers, hired by the club were employees based on the degree of control the club had over them.⁹⁷

Actors, regardless of their participation in sex work, are generally categorized as independent contractors because film studios have limited control over how they complete their work.⁹⁸ This limited control attempts to balance actors' freedom to pursue additional work and directors' ability to maintain some creative control over projects.⁹⁹ Courts rule that dancers at clubs, including sex workers, are employees because of the degree of control club owners exercise over how they complete their work.¹⁰⁰ Digital sex workers remain in a legal grey-area due to the lack of clear legal precedent that addresses their needs.¹⁰¹

determined that they were independent contractors).

96. See *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-18 (2d Cir. 1943) (weighing the concept of continuous employment heavily in confirming independent contractor status).

97. See *Club Hubba Hubba v. United States*, 239 F. Supp. 324, 327-29 (D. Haw. 1965) (deciding the degree of control the club exercised over the dancers' performances constituted an employer-employee relationship).

98. See *Radio City Music Hall*, 135 F.2d at 717-18 (setting precedent to consider actors as independent contractors); but see *id.* at 718 (presenting that entertainers were employees).

99. See e.g., *id.* (presuming the brevity of the actors' stint implied independent contractor status); see also *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 578-80 (9th Cir. 2014) (discussing how petitioner attempted to control actors' means of accomplishing work by directing them to perform without a condom).

100. See *Club Hubba Hubba*, 239 F. Supp. at 327-29 (establishing the non-sex worker dancers were employees based on the club's control of their work environment); see also *Clinco v. Galardi S. Enter., Inc.*, 808 F. Supp. 2d 1326, 1338-501330- (N.D. Ga. 2011) (concluding exotic dancers were employees of the club).

101. See generally *Bartow*, *supra* note 22, at 813 (revealing the difficulties sex workers face).

III. ANALYSIS

A. Courts Misclassify OnlyFans Creators Under Current State and Federal Labor Laws

Ride-share and food delivery companies, which are by-products of the shared and gig economy, face issues in courts determining whether their workers are independent contractors or employees.¹⁰² This issue parallels difficulties that courts have categorizing sex workers who star on camera, like adult film stars, because their status as a worker mirrors that of both actors and other sex workers.¹⁰³

In the case of ride-share companies, like Uber and Lyft, courts in California and New York categorize drivers as employees.¹⁰⁴ These courts hold that they are employees because of the degree of control the companies have over the drivers' workplace, their cars, the degree of control that these companies have over their drivers' payment, and the fact that these platforms depend on the drivers' income.¹⁰⁵ These courts also find the companies' desire to categorize their drivers as independent contractors allows the companies to evade minimum wage standards in these jurisdictions and at the federal level.¹⁰⁶

Since the start of the adult film industry, studios have controlled the means and mechanisms by which adult film stars complete their work are similar to how Uber and Lyft manage their drivers' performance.¹⁰⁷ These adult film

102. Compare *Belizaire v. Ahold U.S.A., Inc.*, No. 18 Civ. 5020 (LGS), 2019 WL 280367, at *2-5 (S.D.N.Y. Jan. 22, 2019) (discussing whether delivery fees counted as gratuity), with *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 40-42 (Cal. 2018) (establishing novel precedent determining employee status), and *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (explaining how plaintiff was an employee); but see *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1083-93 (N.D. Cal. 2018) (asserting plaintiff was an independent contractor).

103. See generally *Bartow*, *supra* note 22, at 813 (discussing the intersection of difficulties faced by adult film stars).

104. Compare *Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529-32 (E.D.N.Y. 2017) (recognizing issues Uber has with compensating its drivers), with *Cotter*, 60 F. Supp. 3d at 1069-70 (implicating Lyft violated California Labor Law (CLL)).

105. Compare *Dynamex Operations W.*, 416 P.3d at 40-42 (establishing what makes a worker an employee), with *Mumin*, 239 F. Supp. 3d at 529-32 (supposing drivers were entitled to NYLL protections), and *Cotter*, 60 F. Supp. 3d at 1078 (discussing why Lyft drivers may be considered employees or independent contractors).

106. See *Mumin*, 239 F. Supp. 3d at 529-35 (explaining how Uber's level of control over payment proved its drivers were employees); see also *Cotter*, 60 F. Supp. 3d at 1081 (weighing degree of control heavily in determining employee status).

107. See e.g., *People v. Freeman*, 758 P.2d 1128, 1129 (Cal. 1988) (discussing the

stars are essential to creating pornographic films, which would persuade courts to categorize adult film actors as employees.¹⁰⁸ Digital sex workers, which include OnlyFans Creators, manifest the same level of essentialness.¹⁰⁹ Unlike vaudeville actors, which a venue would hire to fill space between the main acts, Creators are the sole reason OnlyFans is profitable.¹¹⁰

Paralleling these dependencies of the hiring parties on their hirees, OnlyFans depends on its Creators to generate revenue to sustain the platform.¹¹¹ The platform takes 20% of Creators' general subscription revenue, and 20% of the income they earn from tips and bespoke content made for individual Fans.¹¹² Also, the exact level of control OnlyFans has over Creators' means of completing their work, and how it pays them, may influence courts to categorize them as employees.¹¹³ This uncertain degree of control creates complications for Creators, such as needing to refer to income earned on 1099 Tax Forms to secure lines of credit for an apartment versus presenting proof of employment.¹¹⁴

Currently, OnlyFans classifies Creators as independent contractors.¹¹⁵ The platform does not hold the degree of control over its Creators as required by the NLRA to confirm employee status, which is why most workers seeking employee classification depend on the FLSA.¹¹⁶ OnlyFans'

employment relationship between directors and adult film actors).

108. *Cf.* *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 578-80 (9th Cir. 2014) (discussing how directors controlled adult film actors' performance by encouraging them to engage in sex without use of a condom).

109. *Cf.* Bernstein, *supra* note 4 (showing how OnlyFans depends on Creators income to sustain its platform).

110. *Cf.* *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-18 (2d Cir. 1943) (referencing that vaudeville actors were independent contractors based on the Hall's lack of control over their performance).

111. *See e.g., Terms of Service, supra* note 6 (inferring that OnlyFans is dependent on its Creators' income based on the percentage OnlyFans takes from their earnings and the formulation of its business model).

112. *See e.g., The Duchess of Dank, supra* note 46 (clarifying the different services Fans can pay for).

113. *See* *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 40-42 (Cal. 2018) (asserting modern employee determination standards); *see also* *Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529-32 (E.D.N.Y. 2017) (explaining Uber's business model of taking a share of its driver's profits).

114. *See e.g., The Duchess of Dank, supra* note 46 (expressing her frustration with what proof of employment she could use to prove her income).

115. *Cf. id.* (explaining how her taxes show she is an independent contractor).

116. *See e.g., NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258-59 (1968) (determining when a worker is an employee under the NLRA); *cf. Terms of Service, supra* note 6 (stating the role of a Creator in OnlyFans' business operation).

dependency on its Creators' revenue to sustain the platform mirrors half the factors necessary under the FLSA to show that a worker is an employee.¹¹⁷ Courts' districts heavily influence how they define an employee, in addition to the FLSA definition.¹¹⁸ It is necessary to apply tests asserted by different courts and compare it to how OnlyFans manages its Creators' operations.¹¹⁹

B. Lawmakers Must Formulate New State and Federal Labor Law Tests to End the Misclassification of Creators

The 2008 recession and the second digital revolution permanently changed business models and practices, which created the shared and gig economy.¹²⁰ The creation of this economy led to establishing a new category of a laborer whose work consists of more flexibility than the traditional employee, but whose status as an independent contractor under standard labor tests places them in a precarious position.¹²¹ These workers are unable to seek remedies in courts because they are not considered employees.¹²² The inability to seek remedies enables hiring parties to evade hour and wage laws, potentially depriving workers of tipped income.¹²³ Further, since health insurance is mainly employer-based in the United States, these workers are more dependent on government welfare to live.¹²⁴

OnlyFans informs its Creators about how to increase their number of subscribing Fans and manages how Fans pay the social media site's

117. *See e.g.*, *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000) (using the FLSA and Maryland labor law to establish employee status).

118. *Compare* *Cotter v. Lyft* 60 F. Supp. 3d 1067, 1078-82 (N.D. Cal. 2015) (explaining plaintiff could be an employee), *with* *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *5 (S.D.N.Y. July 2, 2019) (focusing on hiring party's degree of control to deduce employment status).

119. *Compare* *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 40 (Cal. 2018) (explaining the suffer or permit to work standard to judge employment status), *with* *Franze*, 2019 WL 2866168 at *5 (balancing NYLL with FLSA to determine employee status).

120. *See* *Brustein*, *supra* note 4 (discussing the impact of the 2008 recession on workers).

121. *See* *Newsom*, *supra* note 37 (showing how workers misclassified as independent contractors are denied basic legal protections).

122. *Compare* *Belizaire v. Ahold U.S.A., Inc.*, No. 18 Civ. 5020 (LGS), 2019 WL 280367 at *5 (S.D.N.Y. Jan. 22, 2019) (discussing wage protections under NYLL), *with* *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1083-93 (N.D. Cal. 2018) (reasoning that plaintiff was not an employee).

123. *See e.g.*, *The Duchess of Dank*, *supra* note 46 (confirming OnlyFans takes 20% of the revenue she earns from tips in addition to her subscription income).

124. *See* *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000) (displaying complications for a worker who is not categorized as an employee under the FLSA); *see also* *Newsom*, *supra* note 37 (noting the burden on state's welfare programs).

Creators.¹²⁵ It also charges refunds for Fans back to its Creators and takes 20% from its Creators' earnings through their subscriptions, tips, and individualized curated content.¹²⁶ The latter is key to sustain its business model, and all of the stated factors lend themselves to courts to potentially categorize Creators as employees.¹²⁷ Current tests at federal and state levels do not account for these factors.¹²⁸ They also require a hiree in the shared and gig economy to meet a set of conjunctive factors that are difficult to prove, denying them traditionally reserved protections for employees.¹²⁹ Although there is no single test that addresses shared and gig economy workers' needs, interpretation of cases under CLL and NYLL, paired with the FLSA, indicates that workers of this category are employees.¹³⁰ Courts and policymakers can use these precedents to establish a federal test that addresses the needs, and grants protections, to shared and gig economy workers.¹³¹

125. See "Tips and Tricks" *supra* note 29 (posting articles on how Creators can increase their amount of paying Fans).

126. See *Terms of Service*, *supra* note 6 (failing to include how OnlyFans takes income from Creators tips).

127. See *id.* (determining the functions of how OnlyFans operates and its profitability); *cf.* *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015) (inferring courts should create a new test to meet the needs of ride-share drivers).

128. See *Newsom*, *supra* note 37 (discussing how corporations profit from the shared and gig economy benefit through the misclassification of workers).

129. See *e.g., id.* (explaining the necessity of AB5 in the current economy).

130. Compare *Cotter*, 60 F. Supp. 3d at 1078-80 (asserting that courts could categorize drivers as employees or independent contractors), with *Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529 (E.D.N.Y. 2017) (concluding Uber drivers are employees per NYLL).

131. See *e.g., Cotter*, 60 F. Supp. 3d at 1081-82 (emphasizing that courts should consider Lyft drivers a new category of worker altogether).

C. California Labor Law Fails Creators Because It Ignores the Realities of Their Relationship With OnlyFans

In California, courts generally favor categorizing shared and gig economy workers as employees because hiring parties in this economic system still exercise a high degree of control over their hirees.¹³² In *O'Connor v. Uber Technologies Inc.*, the court denied summary judgment in favor of Uber that the plaintiff was an independent contractor.¹³³ Material facts remained in dispute from which a court could draw a reasonable inference of an employment relationship, such as Uber's extent of control over its drivers' performance.¹³⁴

The difficulties for courts to ascertain whether a worker is an independent contractor or an employee in the shared and gig economy were made clear in *Cotter v. Lyft*.¹³⁵ Here, District Judge Vince Chhabria found that applying employment law tests from the twentieth century to address twenty-first century problems was outmoded.¹³⁶ The court also found that Lyft's assertion that its application was merely a platform, and that its drivers did not perform a service for it, was faulty.¹³⁷ It also ruled that determining Lyft's extent of control over the plaintiff weighed more heavily in determining whether he was an employee or an independent contractor.¹³⁸

District Judge Chhabria's assertion that tests like the NLRA, FLSA, and state labor laws do not adequately address shared and gig economy workers'

132. See *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (discussing how traditional employment tests evolved under a different economy than the current "sharing economy"); see also *Cotter*, 60 F. Supp. 3d at 1081-82 (suggesting courts should classify drivers that work over a requisite number of hours as employees); cf. *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 40 (Cal. 2018) (using the ABC Test to decide employment status may be individually applied to each case in the class action); contra *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018) (reasoning that the *Borello* Factors confirmed that plaintiff was an independent contractor).

133. See *O'Connor*, 82 F. Supp. 3d at 1146 (internal citations omitted) (determining independent contractor status in California is a question of mixed fact and law).

134. See *id.* at 1148-52 (finding that Uber's extent of control over its drivers is a key to determine if its drivers are employees).

135. See *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015) (discussing the unsuitability of applying antiquated labor law tests in the modern economy).

136. See e.g., *id.* (proposing a new test for workers in the modern economy).

137. See *id.* at 1078 (citing *Yellow Cab v. Workers' Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 437 (1991) (concluding that the company's cultivation of a passenger market enabled the drivers to perform a service for the company)).

138. See *id.* at 1079-80 (emphasizing the degree of control a hiring party has over its hiree aids in determining his employment status).

needs is well-founded.¹³⁹ First, workers in most jurisdictions rarely seek relief under the NLRA because of the exceptionally high burden it places on workers to prove that they are employees.¹⁴⁰ Second, the FLSA test is conjunctive.¹⁴¹ It requires that a hiree be dependent on the hiring party for opportunities for profit or loss; that the hiree lack a sophisticated degree of skill required for work, and that the hiree has a high degree of permanence in the working relationship.¹⁴² Judge Chhabria diverted from traditional interpretations of the FLSA, with support of CLL, in *Cotter* by finding three factors of the test were necessary: the hiring party's degree of control over how hired parties perform the work; their investment in equipment or materials; and whether their services are an integral part of the hiring party's business.¹⁴³

The Northern District of California also finds a hirer's ability to control the manner and means of work, and the ability to terminate at-will, are vital factors in determining whether a worker is an employee or independent contractor.¹⁴⁴ In *Lawson v. Grubhub, Inc.*, the court found Grubhub exercised little control over the details of how Lawson performed his work.¹⁴⁵ This limited control impacted GrubHub's ability to terminate Lawson with fourteen days' notice, and it did not suffice as an essential means of control that favored an employee-level relationship.¹⁴⁶ Contrarily, the District found Uber and Lyft drivers were employees, and these ride-share companies exercised the same ability to terminate drivers with notice.¹⁴⁷

The extent of control, and whether workers need to use their own tools to complete a job, also impact a court's determination of independent

139. *Cf.* *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258-59 (1968) (discussing the conjunctive nature of how courts ascertained employment status in the past).

140. *See* *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000) (balancing the FLSA test with local labor law).

141. *See id.* (concluding that Purdue was an employer based on Maryland labor law and the FLSA).

142. *See id.* (simplifying the terms of the FLSA).

143. *See* *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015) (weighing the factors of the FLSA in conjunction with CLL).

144. *See id.* at 1079 (re-emphasizing the importance of the control factor in determining employment status).

145. *See* *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018) (explaining characteristics of an independent contractor under CLL).

146. *See id.* (determining that the plaintiff was an independent contractor based on Grubhub's low degree of control over the plaintiff).

147. *Compare* *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Ca. 2015) (demonstrating Uber drivers were employees), *with* *Cotter*, 60 F. Supp. 3d at 1082 (concluding that the FLSA and CLL affirm that Lyft drivers are employees).

contractor status.¹⁴⁸ In *Dynamex Operations W. v. Superior Court*, the Supreme Court established the “worker is employee” presumption.¹⁴⁹ In September 2019, California’s AB5 codified this presumption by establishing three factors that, if a hiring party could prove a hiree conjunctively met, would make the hiree an independent contractor.¹⁵⁰ AB5 further states that the *Dynamex* assertion does not apply to contracts for “professional services,” which includes a worker’s ability to set or negotiate their own rates for services performed or if they can set their working hours.¹⁵¹ AB5 parallels the FLSA because it is more flexible than the NLRA and has a looser interpretation of what constitutes a high degree of control for a hiring party.¹⁵² The third facet, “if the worker is engaged in an independently established trade,” is convoluted because California courts rule that ride-share drivers are employees, and these ride-sharing companies’ business models permit drivers to engage in other trades outside of driving.¹⁵³

In comparing *O’Connor* and *Cotter’s conclusions* to the status of OnlyFans Creators, OnlyFans exerts a different level of control over its Creators than ride-share companies because it does not control what the Creators post and how they post it.¹⁵⁴ For example, riders use Uber or Lyft’s mobile application to hail a driver through the application, which quotes the price for the ride set by the companies, not by the driver.¹⁵⁵ Discounts, high

148. *E.g.*, *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 8, 25 (Cal. 2018) (requiring workers use their own vehicles and pay upfront costs lends itself to finding that its workers are independent contractors).

149. *See id.* (describing the employee presumption); *see also* CAL. LAB. CODE §§ 2750.3, 3351 (West 2019) (codifying the presumption for employees); *cf.* CAL. UNEMP. INS. CODE §§ 621, 606.5 (West 2019) (detailing employers’ responsibilities under the presumption).

150. *But see* *Feiner*, *supra* note 75 (proving Uber and Lyft drivers were considered employees under AB5).

151. *See* CAL. LAB. CODE §§ 2750.3, 3351 (alluding to the fact that some workers that are in high-ranking positions are exempt from AB5).

152. *Cf.* CAL. LAB. CODE §§ 2750.3, 3351 (mirroring the FLSA’s determination of employment over the NLRA’s for inclusivity).

153. *E.g.*, *Cotter v. Lyft* 60 F. Supp. 3d 1067, 1069-82 (N.D. Ca. 2015) (discussing how Lyft’s business model allows for a flexible work experience for its drivers).

154. *See id.* at 1078 (revealing that Lyft was responsible for attracting riders); *see also* *O’Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Ca. 2015) (stating that Uber’s business model makes it difficult to determine if drivers are independent contractors); *cf. Terms of Service*, *supra* note 6 (revealing the limited control OnlyFans exercises over its Creators).

155. *Compare Cotter*, 60 F. Supp. 3d at 1070-71 (explaining how riders hail a driver and how the company processes payments), *with O’Connor*, 82 F. Supp. 3d at 1141 (discussing Uber’s statement that it was not an employer because its application was akin to a platform for which the company had limited control).

demand for drivers, and other factors also impact the price of the ride.¹⁵⁶ After the driver completes the ride, the rider has the option to tip the driver.¹⁵⁷

OnlyFans, conversely, enables its Creators to set the price of their subscriptions and even allows its Creators to run promotions, such as bundle packages for a certain percentage of subscriptions or individualized curated content.¹⁵⁸ The social media site also provides articles on its blog that show how Creators can improve their number of subscribers and their posts' quality.¹⁵⁹ OnlyFans depends on the revenue generated from its Creators to operate the social media site.¹⁶⁰ Like the drivers in *Cotter*, OnlyFans' Creators do perform a service for the site, and it does not serve merely as a virtual community bulletin board on which individuals can advertise their services.¹⁶¹

Echoing Judge Chhabria's conclusion, it would be challenging to categorize OnlyFans Creators as independent contractors based on dated employment tests, since lawmakers conceived these companies' business plans under different, perhaps antiquated, business models than those that are currently at work.¹⁶² OnlyFans also lacks the same level of control over how and what content its Creators post, unlike Uber and Lyft's control over their drivers' vehicles. Like Uber and Lyft, though, OnlyFans depends on its Creators' subscriptions, tips, and payments for pay-per-view content from Fans to sustain its business model, which is similar to how Uber and Lyft depend on their drivers to sustain their platforms.¹⁶³

In applying *Lawson's* holding to OnlyFans Creators, it is reasonable to find that Creators are independent contractors because Creators can delete

156. *Compare Cotter*, 60 F. Supp. 3d at 1071 (discussing how Lyft pays its drivers and how it is impacted by special fares), *with O'Connor*, 82 F. Supp. 3d at 1142 (explaining how Uber charges its riders without input from drivers).

157. *Compare Cotter*, 60 F. Supp. 3d at 1070 (portraying how payment for a Lyft ride was optional in the application's early phase), *with O'Connor*, 82 F. Supp. 3d at 1142 (discussing the percentage of the fare Uber takes from its drivers).

158. *Cf. The Duchess of Dank*, *supra* note 46 (confirming not all OnlyFans Creators rely on this information).

159. *E.g., Tips and Tricks*, *supra* note 29 (implying that OnlyFans is dependent on Creators' revenue).

160. *E.g., Terms of Service*, *supra* note 6 (inferring how integral Creators are to OnlyFans' business model).

161. *See id.* (explaining that Creators' production of material is what makes the platform profitable); *cf. Cotter v. Lyft* 60 F. Supp. 3d 1067, 1078 (N.D. Ca. 2015) (declaring that Lyft was not just a platform that independent contractors could use).

162. *Cf. Cotter*, 60 F. Supp. 3d at 1081 (asserting that current employment laws do not suit the shared and gig economy).

163. *See Terms of Service*, *supra* note 6 (displaying how integral Creators are to OnlyFans' business model).

their account at any time, and OnlyFans exercises minimal control over how Creators work.¹⁶⁴

The *Dynamex* assertion, AB5, also creates conundrums for OnlyFans Creators.¹⁶⁵ Creators are free from OnlyFans' control and direction of how they complete their work.¹⁶⁶ A court may question whether Creators meet the second and third factors of AB5, which confirm a worker is an independent contractor if the worker (2) performs work that is outside the course of the hiring entity's business and (3) is engaged in an independently established trade.¹⁶⁷ These two factors also apply to Uber and Lyft drivers, which courts in California deduced are employees.¹⁶⁸ Uber and Lyft have challenged this ruling, with Uber stating their drivers prefer the independent contractor classification.¹⁶⁹

Further, like ride-share drivers, OnlyFans Creators can set their working hours.¹⁷⁰ Unlike ride-share drivers, Creators can set and negotiate prices for services performed, which fits the standards of "professional service" under the *Dynamex* assertion.¹⁷¹

164. See *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1083-93 (N.D. Cal. 2018) (asserting plaintiff was an independent contractor based on Grubhub's minimal control); cf. *Terms of Service*, *supra* note 6 (confirming OnlyFans has a lax policy regarding Creator account termination).

165. Cf. *The Duchess of Dank*, *supra* note 46 (determining that many Creators fall into a legal grey area because of the vague nature of AB5).

166. E.g., *Terms of Service*, *supra* note 6 (showing the amount of temporal freedom a Creator has in terms of work); see CAL. LAB. CODE §§ 2750.3, 3351 (detailing who is considered an employee); see also CAL. UNEMP. INS. CODE §§ 621, 606.5 (ruling on responsibilities employers have to their employees).

167. See CAL. LAB. CODE §§ 2750.3, 3351 (excluding workers who can control their own hours from being employees); see also *Dynamex Operations W. v. Super. Ct.*, 416 P.3d at 8, 25 (expanding the scope of which workers are considered employees); cf. *Lawson*, 302 F. Supp. 3d at 1093 (discussing the conjunctive nature of determining an independent contractor status).

168. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (concluding plaintiff was an employee based on Lyft's degree of exercised control); see also *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (explaining that California's labor laws led to an ambiguous conclusion regarding plaintiff's employment status).

169. E.g., *Feiner*, *supra* note 75 (referring to Uber's hopes that Proposition 22, which exempts rideshare application drivers from AB5 would pass); see *Hussain and Bhuiyan*, *supra* note 76 (clarifying that Proposition 22 requires that these companies provide an hourly wage for ride time equal to or 120% of either local or state minimum wage and a stipend for health insurance coverage for drivers).

170. Cf. *Help & Support*, *supra* note 7 (advertising that OnlyFans Creators have the ability to temporally manage their work schedules).

171. Cf. CAL. LAB. CODE §§ 2750.3, 3351 (West 2019) (inferring a Creator may not qualify as an employee under AB5).

California has made significant advances in ending the misclassification of workers as independent contractors.¹⁷² NYLL is comparatively superior to California's labor laws in making the case of classifying OnlyFans Creators as employees.¹⁷³ NYLL emphasizes the intrinsic value of, and how essential the worker in question is, to the hiring party's business.¹⁷⁴ Its co-extensive use of the FLSA also establishes a more solid foundation on more niche aspects of what a court should include to rule on a worker's employment in the shared and gig economy.¹⁷⁵

D. New York Labor Law Favors Creators Because It Focuses on Companies' Dependencies on Workers

In New York, courts categorize cases involving workers in ride-sharing services as employees instead of independent contractors based on the level of control the companies have over their performance.¹⁷⁶ Payment and wage theft issues are vital determinants in applying the employment status of OnlyFans Creators, given how OnlyFans differs in its level of control over its Creators' products versus the degree of control companies have over their workers in the following cases.¹⁷⁷

Shared and gig economy workers often claim they are employees under NYLL and the FLSA based on the "economic realities" of their working relationship.¹⁷⁸ The plaintiffs in *Franze v. Bimbo Foods Bakeries*

172. See Newsom, *supra* note 37 (determining that AB5 is a monumental advancement in workers' rights).

173. Compare *Mumin v. Uber Techs, Inc.* 239 F. Supp. 3d 507, 529 (E.D.N.Y. 2017) (concluding Uber drivers met the threshold for employee classification under NYLL and the FLSA), with *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *5 (S.D.N.Y. July 2, 2019) (introducing that the hiring party should be highly dependent on the worker for the worker to qualify as an employee).

174. See *Franze*, 2019 WL 2866168 at *5 (asserting that if a worker is not highly integral to the hiring party's work, the worker is an independent contractor).

175. Compare *Mumin*, 239 F. Supp. 3d at 541-42 (alluding to how Uber drivers are classified per NYLL), with *Belizaire v. Ahold U.S.A., Inc.*, 18 Civ. 5020, 2019 WL 280367 at *2-5 (S.D.N.Y. Jan. 22, 2019) (discussing the rights of a gig economy worker), and *Camilo v. Lyft, Inc.*, 384 F. Supp. 3d 435, 437 (S.D.N.Y. 2019) (assuming the plaintiff was an employee).

176. See *Mumin*, 239 F. Supp. 3d at 529 (E.D.N.Y. 2017) (categorizing Uber drivers as employees); cf. *Franze*, 2019 WL 2866168 at *5 (affirming that NYLL focuses on degree of control in determining employment status).

177. See generally *Franze*, 2019 WL 2866168 at *5 (focusing on the degree of control Bimbo had over its drivers to plead a NYLL claim); cf. *Terms of Service*, *supra* note 6 (presenting the lack of control OnlyFans has over its Creators).

178. E.g., *Franze*, 2019 WL 2866168 at *5 (using NYLL and the FLSA to conclude

Distribution, LLC alleged Bimbo Foods was the plaintiffs' employer based on several factors that parallel the FLSA.¹⁷⁹ The court concluded that the two most important factors were the degree of control exercised by the alleged employer over the worker, and the extent to which the work is an integral part of the employer's business, which the plaintiffs failed to meet.¹⁸⁰ The court further explained how Bimbo's business model mirrored other gig economy jobs, like Uber.¹⁸¹ The court reasoned the plaintiffs were not integral to Bimbo's business model, unlike drivers to Uber, since Bimbo's business model was contingent on bakery product manufacturing and not delivery of goods.¹⁸²

A court may assume that a worker is an employee to decide a motion to dismiss or the terms of an arbitration proceeding.¹⁸³ In *Mumin v. Uber Technologies, Inc.*, the plaintiffs claimed that Uber failed to pay overtime, supplied inadequate pay statements, violated minimum wage standards, and unlawfully retained gratuities.¹⁸⁴ The court made the assumption of employee status based on the level of control Uber has over its drivers' payment: riders make a payment through Uber's mobile application, and Uber pays drivers their share of the profits weekly.¹⁸⁵ In this case, the plaintiffs worked more than forty hours per week for Uber, were not reimbursed for their expenses associated with driving, and made below New York's minimum wage based on the number of hours they worked, after expenses.¹⁸⁶ The plaintiffs also asserted that Uber misled them on how much

the plaintiffs were independent contractors).

179. *E.g.*, *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *6 (S.D.N.Y. July 2, 2019) (internal citations omitted) (balancing factors of the FLSA with factors NYLL would find the most important in determining employee status).

180. *E.g.*, *id.* at *5-11 (explaining that NYLL follows the FLSA standard but puts more emphasis on the degree of control).

181. *E.g.*, *id.* at *9 (citing overruled case law from the Third Circuit concluding that Uber and other ride-share drivers were independent contractors).

182. *E.g.*, *id.* at *10 (reasoning the plaintiffs' role as drivers was not essential for Bimbo to conduct its business).

183. *See Mumin v. Uber Techs, Inc.*, 239 F. Supp. 3d 507, 529 (E.D.N.Y. 2017) (assuming that the worker was an employee); *see also Camilo v. Lyft, Inc.*, 384 F. Supp. 3d 435, 437 (S.D.N.Y. 2019) (clarifying that certain labor protections only extend to workers classified as employees).

184. *Contra Belizaire v. Ahold U.S.A., Inc.*, 18 Civ. 5020 (LGS), 2019 WL 280367 at *2-5 (S.D.N.Y. January 22, 2019) (finding that plaintiffs failed to allege specific facts that defendant violated §§ 196-d, 195-1 of NYLL, which deal with gratuities and overtime pay).

185. *See Mumin*, 239 F. Supp. 3d at 514-15 (adding that the amount a driver earns is impacted by certain promotions Uber gives its riders, which are unknown to a driver).

186. *See id.* at 516 (establishing details of plaintiffs' individual claims for minimum

they could earn per week.¹⁸⁷ They claimed this practice was deceptive because it did not account for expenses drivers' incurred due to driving for Uber, and it misrepresented to riders that Uber included drivers' tips in the fare.¹⁸⁸

OnlyFans' Creators face parallel issues to plaintiffs in these court decisions, especially concerning the intrinsic value of their content to the website's profitability.¹⁸⁹ Precedent from these decisions creates a more persuasive case to grant Creators employee status under the combination of NYLL and the FLSA.¹⁹⁰

wage violations).

187. *See id.* (adding that hours worked aided in the court's conclusion that the plaintiffs were employees).

188. *See id.* at 516-17, 542-43 (showing plaintiffs' separate actions related to violations of minimum wage standards and gratuity theft under N.Y. Lab. L. § 196-d).

189. *See Bernstein, supra* note 4 (explaining how Felix International Limited, OnlyFans' parent company, uses its 20% cut from Creators' revenue).

190. *E.g., Kim v. 511 E. 5th St., LLC*, 133 F. Supp. 3d 654, 665 (S.D.N.Y. 2015) (delineating the contours of the intersections of NYLL and the FLSA).

1. Courts Must Classify Creators as Employees Based on OnlyFans' Dependence on Creators' Labor and Income

OnlyFans lacks a high degree of control over its Creators throughout the working relationship, and it lacks the ability to motivate Creators' initiatives to post content.¹⁹¹ However, it exercises a degree of investment in its Creators' products because the Creators' work is integral to OnlyFans' business model.¹⁹² For example, OnlyFans does not provide guidelines on precisely what its Creators may post, but it has a blog with dozens of articles on how Creators can increase their fanbases and create content their Fans will enjoy.¹⁹³ It also published an interview with a worker at its headquarters in the United Kingdom, whom the site refers to as an employee, on how her primary objective is to recruit semi-influential people from social media to join OnlyFans as Creators.¹⁹⁴ OnlyFans does not mandate its Creators to read its published advice on its blog.¹⁹⁵ The fact that it provides advice, has recruiters dedicated to bringing more Creators to the social media site, and its business model depends on Creators' revenue from Fans shows that Creators are OnlyFans employees under the NYLL and the FLSA.¹⁹⁶

What also differentiates OnlyFans Creators from Uber drivers is that OnlyFans does not require the same amount of training of its Creators that Uber requires of its drivers.¹⁹⁷ Nevertheless, like Uber, OnlyFans processes

191. *Cf. Terms of Service*, *supra* note 6 (noting a lack of training provided by OnlyFans to Creators and its ability to end its working relationship with Creators).

192. *See Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *6 (S.D.N.Y. July 2, 2019) (exemplifying how Creators could meet the second, third, and fifth requirements of the FLSA test); *see also Terms of Service*, *supra* note 6 (explaining how OnlyFans' business model depends upon Creators' revenues); *cf. "Tips and Tricks"*, *supra* note 29 (revealing that OnlyFans regularly publishes advice on how Creators can increase their number of paid subscribers).

193. *See generally Tips and Tricks*, *supra* note 29 (giving tips to Creators on how to improve their pages from popular social media influencers); *cf. Terms of Service*, *supra* note 6 (displaying a lack of guidelines for Creators, only that they cannot post copyrighted material).

194. *E.g., OnlyFans Blog*, *supra* note 35 (explaining the role of the Lead Recruiter and how she scopes talent).

195. *Cf. Terms of Service*, *supra* note 6 (indicating no guidelines that Creators must read the published advice in order to become a Creator).

196. *See Tips and Tricks*, *supra* note 29 (providing information on how Creators can improve their pages); *see also Mascetti*, *supra* note 36 (expounding how integral Creators are to OnlyFans' operation); *cf. Franze*, 2019 WL 2866168 at *6 (referencing the intersection of the FLSA and NYLL).

197. *See Mumin v. Uber Techs, Inc.* 239 F. Supp. 3d 507, 515 (E.D.N.Y. 2017) (stating the training process of Uber drivers); *see also Tips and Tricks*, *supra* note 29

its Creators' payment before dispersing funds to them and gives its Creators "80% commission" from the revenue collected from the Creator's Fans per month.¹⁹⁸ The Duchess of Dank clarifies that OnlyFans' 20% taking also includes revenue from tips and custom products that Creators create and send directly to Fans that paid for the bespoke products through the site.¹⁹⁹ An employer's taking of tips from an employee violates NYLL; therefore, if New York courts classified them as employees, OnlyFans would have to amend this policy to conform with the state's labor laws.²⁰⁰

If New York courts classified OnlyFans Creators as employees under NYLL, they would also be entitled to pay statements, minimum wage, and overtime pay claims.²⁰¹ As previously stated, a lack of pay statements creates real issues if a Creator seeks a line of credit or proof of income to rent an apartment.²⁰² Plaintiffs in *Mumin* qualified their claims for adequate pay statements and minimum wage by deducting work-related expenses, such as car cleanings and gas, from the divided amount of time of income they earned with the number of hours they drove for Uber.²⁰³ The plaintiffs were able to meet their claims for overtime pay because the court presumed they were employees, which enabled the plaintiffs to show they were entitled to additional pay for hours worked more than the standard workweek, which is forty hours in New York.²⁰⁴

OnlyFans Creators claim varying amounts of hours worked to create content for the site, and some even find that the number of hours worked to pay ratio is better than working a traditional job with employee benefits.²⁰⁵ However, this sentiment does not detract from the fact that some Creators

(giving Creators advice on how to create engaging content to gain more Fans).

198. See *Terms of Service*, *supra* note 6 (showing that a training process to become an OnlyFans Creator is not required).

199. See *Terms of Service*, *supra* note 6 (implying the 20% commission OnlyFans takes to operate its platform); see also *The Duchess of Dank*, *supra* note 46 (clarifying that she can send a Fan who pays for a custom photo or video through OnlyFans).

200. E.g., N.Y. Lab. L. § 196-d (explaining what constitutes tip theft under NYLL).

201. See *New York State Strengthens Wage and Hour Protections*, *supra* note 80 (displaying how New York's amendment to its state wage and hour laws in 2009 expanded protections for workers).

202. See *The Duchess of Dank*, *supra* note 46 (finding the implications that independent contractor status creates).

203. See *Mumin v. Uber Techs, Inc.* 239 F. Supp. 3d 507, 515 (E.D.N.Y. 2017) (explaining that Uber denied the plaintiffs minimum wage benefits by refusing to compensate them for work-related expenses).

204. See N.Y. LAB. L. § 195 (determining the hours of a standard workweek in New York State).

205. Cf. *The Duchess of Dank*, *supra* note 46 (discussing how her career as a Creator has been very profitable given the number of hours she works).

use this social media platform as their primary source of income and put at least forty working hours per week towards creating content for it.²⁰⁶ It also does not diminish the fact that OnlyFans takes 20% off Creators' revenue earned from tips, which would violate NYLL if courts found that Creators were employees.²⁰⁷

OnlyFans also provides a sliding scale that shows how much a prospective Creator could earn through OnlyFans, which is comparable to Uber's and Lyft's advertisements of how much drivers could earn per month.²⁰⁸ Unlike Uber and Lyft, it does not promise that Creators will earn the estimated amounts, and it does not account for the individual and upfront investment Creators must make to establish themselves on OnlyFans.²⁰⁹ An example of an upfront investment that Creators make to establish themselves on the platform includes creating more custom, pay-per-view content for individual Fans.²¹⁰ This pay-per-view content helps some Creators establish a loyal fanbase of subscribers, which translates into a more stable and consistent stream of income for Creators as well.²¹¹ Top creators can generate income from content created while they are on vacation, as they find their Fans enjoy seeing more unique photos and videos.²¹²

OnlyFans also charges "Refunds" or "Chargebacks" to Creators from their Fans who demand it, but it does not provide information regarding the loss the average Creator suffers due to these refunds per month.²¹³ OnlyFans

206. See generally Bernstein, *supra* note 4 (interviewing Creators who rely on OnlyFans as their sole source of income).

207. See N.Y. LAB. L. § 196-d (prohibiting employers from taking tips from an employee in any form).

208. See *Help & Support*, *supra* note 7 (finding that estimates do not include potential tips paid to Creator by Fans); see also *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (discussing Lyft's argument that it was not plaintiff's employer because it was only a platform); cf. *Mumin*, 239 F. Supp. 3d at 516-17 (discussing Uber's misleading advertisements).

209. See *Terms of Service*, *supra* note 6 (inferring that OnlyFans does not account for monetary capital investments to make a Creator's page successful); cf. *The Duchess of Dank*, *supra* note 46 (finding that being a Creator serves as supplemental income to pursue previous personal interests).

210. See *The Duchess of Dank*, *supra* note 46 (clarifying creating custom content for individual Fans consumed a number of hours).

211. Compare *id.* (discussing that she did not need to make more custom content because of her subscription revenue), with *Heidewald*, *supra* note 43 (stating a majority of sex workers on OnlyFans depend on subscription income). See *Gold*, *supra* note 43.

212. E.g., *The Duchess of Dank*, *supra* note 46 (explaining that Fans enjoy photos of her enjoying herself).

213. See *Terms of Service*, *supra* note 6 (clarifying that the "refund" and "chargeback" process is handled by OnlyFans' parent company, Felix International Limited).

states that it will only give either, or both, of these two forms of monetary reimbursement, if it, not the Creator, determines that a Fan has a “bona fide dispute” regarding a charge.²¹⁴ The platform recently reformed its policy of giving Fans that request refunds by placing burdens on Creators.²¹⁵ The maximum they can earn from custom messages is now \$50, and the maximum singular tip is now \$100 when, before, Creators could earn unlimited dollars from these revenue streams.²¹⁶

OnlyFans’ subscription cancellation policies pay the Creator for the Fan’s subscription for that month, and the Fan has access to the Creator’s paid content for that time.²¹⁷

OnlyFans separate estimates of how much Creators may earn per month does not include tips that Fans may give Creators.²¹⁸ How OnlyFans processes Fans’ monthly subscription payments, takes a 20% cut of its Creators’ earnings and depends on this cut to sustain its business model, supports the assertion that OnlyFans creators are entitled to wage protections under the FLSA and NYLL.²¹⁹

IV. POLICY RECOMMENDATION

Sex workers have been responsible for the meteoric rise of OnlyFans since the social media platform debuted in 2010.²²⁰ The website has created a new means for Fans to show Creators their appreciation for their general and bespoke content through monetary support by subscribing to Creators’ accounts.²²¹ OnlyFans’ business model also depends on taking 20% off

214. *See id.* (adding that a Fan’s credit card company may be involved in a dispute regarding a charge from OnlyFans).

215. *See* Heidewald, *supra* note 43 (explaining how non-sex worker actors’ mimicking of sex workers content on OnlyFans negatively impacts those whose full-time occupation is sex work).

216. *E.g., id.* (clarifying the impact of the surge of non-sex work celebrities teasing nude content and failing to produce it for Fans).

217. *See The Duchess of Dank, supra* note 46 (explaining how the subscription cancellation policy has not impacted her).

218. *E.g., Mumin v. Uber Techs, Inc., 239 F. Supp. 3d 507, 516-17 (E.D.N.Y. 2017)* (discussing how gratuity theft violates NYLL).

219. *See Terms of Service, supra* note 6 (explaining how Fans’ subscription fees are processed and stating OnlyFans gives its Creators an “80% commission” from monthly payments collected from Fans); *see also Mumin, 239 F. Supp. 3d* at 514 (explaining how Uber processes payments to its drivers); *cf. Franze v. Bimbo Foods Bakeries Distribution, LLC, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *6 (S.D.N.Y. July 2, 2019)* (referencing what the FLSA and NYLL consider an employee).

220. *See generally Bernstein, supra* note 4 (explaining how OnlyFans started with ten Creators who were all sex workers).

221. *See id.* (discussing how Creators establish pseudo-intimacy with their Fans).

Creators' earnings from subscriptions, tips, and custom content to make the site a profitable business.²²²

OnlyFans Creators face a predicament similar to other workers in the shared and gig economy, namely Uber and Lyft drivers, in that courts have difficulty categorizing them as independent contractors or employees under traditional labor law tests.²²³ Further, Creators who are sex workers, and those who generally profit from the explicit nature of their postings that Instagram deems not suitable for its social media users, have often been sidelined by labor laws because of the moralization of their profession.²²⁴

State governments and federal courts have addressed the inequities between the independent contractor and employee status.²²⁵ In September 2019, California took the step to enshrine a more inclusive definition of employee to meet the current economy's needs and end workers' misclassification as independent contractors.²²⁶ In New York, courts hold that its labor laws are co-extensive with the FLSA, but put more weight on the level of control a hiring party has over its hiree to conclude a worker is an employee.²²⁷ Judge Chhabria points out that labor laws at a federal level continue to fail the modern worker, especially one who participates in the shared and gig work.²²⁸ Labor laws must evolve to meet workers'

222. See *Terms of Service*, *supra* note 6 (explaining how OnlyFans gives its Creators 80% of their subscription, tip, and pay-per-view content revenue while taking 20% of it for operational costs).

223. Compare Bernstein, *supra* note 4 (discussing how OnlyFans Creators rule their working conditions) with *Mumin*, 239 F. Supp. 3d at 528 (explaining the level of control Uber has over its drivers and how it needs to comply with NYLL) with *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015) (detailing how Lyft controls how its drivers operate their vehicles and their payment methods).

224. See generally INNER HOE UPRISING, *supra* note 2 (deliberating the multitude of issues sex workers of marginalized backgrounds face with the criminal justice and social system); cf. Bernstein, *supra* note 4 (demonstrating how some social media platforms regularly remove sexually explicit content).

225. Compare New York State Strengthens Wage and Hour Protections, *supra* note 70 (discussing measures New York took to ensure greater protections for workers) with *Newsom*, *supra* note 37 (exemplifying how California addressed inequities faced by workers categorized as independent contractors).

226. See generally *Newsom*, *supra* note 37 (discussing how AB5 addresses the needs of shared and gig economy workers by expanding the definition of employee).

227. Compare *Clincy v. Galardi Enter., Inc.*, 808 F. Supp. 2d 1326, 1330-37 (inferring club owners were employers based on their degree of control of exotic dancers), with *In re Penthouse Exec. Club Comp. Litig.*, Master File No. 10 Civ. 1145(KMW), 2014 WL 185628 at *2 (S.D.N.Y. Jan. 14, 2014) (showing that the amount of control the club owners had over the workplace of the exotic dancers proved they were employers).

228. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (comparing the application of labor law tests from the last century to this economy as "attempting to

fundamental needs, as business models have changed to meet corporations' primary goals.²²⁹

Although there is currently no federal standard that adequately addresses critical rights for shared and gig economy workers, New York Labor Law, with the support of California Assembly Bill 5, lends itself towards creating federal governing law for these marginalized workers.²³⁰ OnlyFans may have a diminished level of general control over its Creators compared to what ride-share companies have over their drivers.²³¹ Even so, the integral nature of Creators' income from subscriptions, tips, and curated content plays in OnlyFans' business operations, and that OnlyFans exercises a significant amount of control over processing Creators' payment, makes a persuasive case that Creators are entitled to employee protections.²³²

V. CONCLUSION

Traditional tests of employment, such as the National Labor Relations Act, would lead courts to rule that OnlyFans Creators are independent contractors.²³³ However, questions of a workers' employment status are a question of mixed fact and law.²³⁴ A majority of courts balance the Fair Labor Standards Act and state labor law to judge the employment status of a worker.²³⁵ California Attorney General, Xavier Becerra, successfully filed suit against Uber and Lyft for continually misclassifying their drivers as independent contractors under AB5, following a series of rulings that favor classifying more independent contractors as employees.²³⁶ In New York, courts find that a hiring party's degree of control, paired with the necessity of the worker's labor to the hiring party's business operation, decides

fit a square peg into two round holes").

229. Cf. Newsom, *supra* note 37 (discussing how business models evolve in response to economic downturns).

230. E.g., *id.* (explaining why shared and gig economy workers need AB5).

231. See *The Duchess of Dank*, *supra* note 46 (discussing the amount of temporal and creative freedom she has over her content on her page).

232. Cf. *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *5 (S.D.N.Y. July 2, 2019) (determining that the delivery drivers were not integral enough to the business for the court to consider them employees).

233. See *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 258-59 (1968) (determining NLRA factors that lead to employee status).

234. See *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1146 (N.D. Cal. 2015) (internal citations omitted) (determining independent contractor status in California is a question of mixed-fact and law).

235. E.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015) (discussing how shared and gig economy workers require a new set of labor protections).

236. See generally *Feiner*, *supra* note 75 (implicating that this lawsuit will force Uber and Lyft to change its business model).

whether a worker is entitled to minimum wage and gratuity rights.²³⁷

OnlyFans' Creators exemplify the most vulnerable of workers: the majority of them are sex workers, and their status as "Creators" was born from the gig and shared economy.²³⁸ Approximately 450,000 Creators are now in an even more precarious economic position because of OnlyFans' shift from paying its Creators from weekly to monthly.²³⁹ New York courts' holdings establish precedent that leads to Creators' categorization as employees, based on OnlyFans' dependence on their income to sustain its business model and its ability to control their payments.²⁴⁰

The nature of the employment space is ever-changing, and courts and state governments have reacted to the rise of the shared and gig economy by expanding the definition of employee to workers that the law traditionally excluded.²⁴¹ Unlike delivery drivers and vaudeville actors, Creators are why OnlyFans exists and why it can continue to operate.²⁴² Because of this, courts should grant Creators the same labor rights as other shared and gig economy workers, such as drivers for Uber and Lyft.²⁴³

237. See *Mumin v. Uber Technologies, Inc.*, 239 F. Supp. 3d 507, 529 (E.D.N.Y. 2017) (emphasizing how Uber's statement that tips were included in a rider's fare violated NYLL); see also *Franze*, 2019 WL 2866168 at *5 (discussing NYLL's parallels to the FLSA, but emphasizing an employer's degree of control).

238. Compare *Erica Heidewald*, *supra* note 43 (explaining how sex workers usually earn a large income infrequently given the fickle nature of demand for sex work), with *Gold*, *supra* note 43 (asserting that Bella Thorne's actions on OnlyFans harmed the community of sex workers on the website).

239. See *id.* (showing most Creators are impacted by this policy change).

240. Cf. *Mumin*, 239 F. Supp. 3d 507, 529, 537 (ruling that Uber was an employer based on its dependency on its drivers to sustain its platform and its ability to control their payment).

241. See *O'Connor v. Uber Techs, Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (arguing that the traditional employment tests are antiquated); see also *Newsom*, *supra* note 37 (emphasizing the importance of AB5 in ending the misclassification of workers).

242. See *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 17-cv-3556 (NSR), 2019 WL 2866168 at *5 (S.D.N.Y. July 2, 2019) (concluding that delivery drivers were not entitled to employee status); see also *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-18 (2d Cir. 1943) (asserting vaudeville actors were independent contractors given the Hall's lack of control over their performances).

243. Cf. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015) (concluding that current labor laws do not suit the needs of shared and gig economy workers).