

PLATFORM PLEADING: ANALYZING EMPLOYMENT DISPUTES IN THE TECHNOLOGY SECTOR

Joseph A. Seiner*

Abstract: The technology sector has created thousands of new jobs for workers across the country in an emerging multi-billion dollar industry. Many companies in this platform-based sector are attempting to characterize their workers as independent contractors rather than employees, thus stripping them of both federal and state workplace protections—including the right to bargain collectively, receive fair compensation, and avoid discrimination. The federal courts, which have always grappled with the question of worker classification, are now struggling to define employment with respect to these gig sector jobs. The result has been scattered court decisions with inconsistent and conflicting analyses.

This Essay seeks to provide the courts with much needed guidance on the question of worker classification in the technology sector at the pleading stage of a case. This Essay performs a review of the recent cases that have addressed this issue, synthesizing the varied analyses of these decisions. Navigating the reasoning used by the courts, as well as the Supreme Court’s evolving pleading precedent, this Essay proposes a new analytical framework for addressing the question of worker classification for technology sector claims. The model proposed by this Essay will assist the courts and litigants in better evaluating whether an employment relationship has been established by a platform-based worker in the gig economy.

* Professor of Law and Oliver Ellsworth Professor of Federal Practice, University of South Carolina School of Law. The author would like to thank Derek Black and Ned Snow for their helpful contributions, as well as the participants at the Thirteenth Annual Colloquium on Scholarship in Employment and Labor Law for their helpful thoughts on technology-related employment issues. This Essay benefited greatly from the extraordinary research efforts and drafting contributions of Axton Crolley, Elliot Condon, Michael Parente, Adair Patterson, Sarah Specter, Matthew Turk, and Erin Waldron. Vanessa McQuinn, Rachel Ford, and Inge Lewis assisted greatly in finalizing this Essay. The author would also like to thank the editors of *Washington Law Review* for their wonderful help in publishing this piece. Any errors are completely my own.

INTRODUCTION	1948
I. THE HISTORY OF PLEADING AND THE COMPLAINT	1954
II. THE RISE OF THE PLAUSIBILITY STANDARD	1958
III. PLEADING AND THE PLATFORM ECONOMY	1961
A. Insufficient Pleadings	1965
B. Sufficient Pleadings.....	1967
C. Avoiding the Plausibility Standard.....	1971
IV. DRAFTING THE COMPLAINT: A PROPOSED PLEADING STANDARD.....	1973
A. When Work Performed	1974
B. Where Work Performed	1975
C. How Often Work Occurs.....	1975
D. Manner of Work	1975
E. Pricing/Cost Information	1976
F. Any Other Factors Related to Control.....	1976
G. The <i>Bradshaw</i> Complaint—An Illustrative example	1978
V. IMPLICATIONS OF PROPOSED STANDARD	1979
CONCLUSION	1983

Better never means better for everyone It always means worse, for some.¹

—The Commander, *The Handmaid’s Tale*

INTRODUCTION

The rise of the so-called gig economy in the technology sector has created an expansive new industry that has generated billions of dollars and thousands of new employment opportunities. The sector has been described as offering “dream” jobs, providing workers the opportunity for “setting their own hours, working from home, [and] being their own bosses.”² The sector has seen tremendous growth, as over 15% of the workforce now finds their employment tied to the technology sector.³ The gig economy has generated enormous excitement, numerous jobs and

1. MARGARET ATWOOD, *THE HANDMAID’S TALE* 211 (First Anchor Books 1998) (1986).

2. Andy Sullivan, *Here’s How to Prepare for Your Financial Future if You Work in the Gig Economy*, *BUS. INSIDER* (Oct. 28, 2017), <http://www.businessinsider.com/gig-economy-how-to-achieve-financial-wellness-2017-10> [https://perma.cc/33G9-2QJA].

3. *Id.*; see also Ben Casselman, *Maybe the Gig Economy Isn’t Reshaping Work After All*, *N.Y. TIMES* (June 7, 2018), <https://www.nytimes.com/2018/06/07/business/economy/work-gig-economy.html> [https://perma.cc/W22C-JC2V].

substantial prosperity. While this new sector has created vast new opportunities for employment, these jobs—when compared with more traditional work—have not been “better for everyone” and have indeed been undeniably “worse, for some.”⁴

The primary hurdle facing many of these workers has been the loss of their employment status. Many gig sector companies have attempted to characterize their workers as independent contractors rather than employees, thus depriving them of most state and federal employment protections.⁵ Efforts to characterize workers in this way are not surprising, as recent estimates show that companies spend far less on workers who lack true employment status.⁶

Independent contractors lack the protections afforded most employees under federal and state law including wage, hour, and overtime provisions, and anti-discrimination protections.⁷ But despite the significance of a worker’s classification, the courts have struggled for decades to clearly define employment status.⁸ The gig economy has only added an additional layer of complexity to this issue. Employment laws in this country were written at a time that pre-dated not only platform-based workers, but the internet as well.⁹ The courts have thus struggled to apply these laws to the more modern workers found in the gig economy.¹⁰

4. ATWOOD, *supra* note 1, at 211.

5. *See, e.g., O’Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (addressing the question of worker employment status).

6. *See* Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html> [<https://perma.cc/UTQ3-HF9Y>] (“[C]lassifying drivers and other gig workers as employees tends to cost 20 to 30 percent more than classifying them as contractors.”).

7. *See Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (noting Fair Labor Standards Act (FLSA) provisions only protect employees); *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (addressing employment status and FLSA issues); *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 489 (8th Cir. 2003) (explaining that both Title VII and the ADA protect employees but not independent contractors); *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1091–92 (N.D. Cal. 2018) (“Of primary significance, Grubhub did not control the manner or means of [the plaintiff’s] work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub’s competitors at the same time he had agreed to deliver for Grubhub.”); *Sill v. AVSX Techs., LLC*, 243 F. Supp. 3d 664, 670 (D.S.C. 2017) (“Only an employee may recover under the South Carolina Payment of Wages Act and FLSA.”).

8. *See infra* Part IV (discussing tests for determining existence of employment relationship); *see generally* Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 340 (2001) (“For modern employment law purposes, control is an indistinct cloud that may or may not cross a vague line set arbitrarily by a judge or agency as the boundary of employee status.”).

9. *See* Carlson, *supra* note 8, at 340; *infra* Part IV.

10. *See infra* Part IV (discussing the application of the plausibility standard to technology sector workers).

The uncertainty in this area has resulted in widespread litigation by platform-based workers claiming employment law violations.¹¹ This multi-billion-dollar industry has already seen numerous individual and class-action employment claims brought on the basis of different workplace laws, including wage, hour and overtime violations.¹²

The courts have struggled to properly analyze many of these claims.¹³ While analyzing these workplace claims is difficult enough, the Supreme Court added an additional layer of complexity with the plausibility pleading standard created in its decisions in *Bell Atlantic Corp. v. Twombly*¹⁴ and *Ashcroft v. Iqbal*.¹⁵ These cases overturned decades of pleading precedent by adopting a new requirement that plaintiffs must allege enough facts in the complaint to set forth a plausible claim.¹⁶ This new plausibility standard has generated substantial confusion over which specific facts are necessary to include in a complaint, particularly for those cases brought in the employment context.¹⁷ The plausibility standard has had a negative impact on plaintiffs in the civil rights and workplace fields, and employment litigants have struggled to satisfy this test in the lower courts.¹⁸

The combination of the new gig sector worker with the overall difficulty of applying both employment laws generally and the Supreme Court pleading standard have left many lower courts confused. As one federal court judge eloquently stated, resolving the question of who is an employee in the platform economy is like being “handed a square peg and asked to choose between two round holes.”¹⁹ The result of this confused area of the law has been varied reasoning in scattered opinions, and the

11. See generally Joseph A. Seiner, *Tailoring Class Actions to the On-Demand Economy*, 78 OHIO ST. L.J. 21 (2017) [hereinafter Seiner, *Tailoring Class Actions*] (discussing numerous cases advancing litigation on employment-related issues in the technology sector).

12. See *id.*

13. See *id.*

14. 550 U.S. 544, 556–57 (2007).

15. 556 U.S. 662, 666 (2009).

16. *Id.*; *Bell Atl. Corp.*, 550 U.S. at 556–57 (2007).

17. See generally Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179 (2010) [hereinafter Seiner, *After Iqbal*].

18. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (discussing *Iqbal*'s impact on civil cases); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (considering changes which have made it more difficult for discrimination claimants to bring claims); see generally Joseph A. Seiner, *Plausibility & Disparate Impact*, 64 HASTINGS L.J. 287 (2012) [hereinafter Seiner, *Plausibility & Disparate Impact*]; A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

19. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

courts have faced tremendous difficulty in developing a consistent body of case law. The courts (and litigants) are simply unsure what it takes to sufficiently plead a workplace violation in the platform economy.²⁰

This Essay takes some of the guesswork out of litigation in the technology sector. This Essay performs a review of many of the recent published federal court decisions on the question of employment status in the technology sector. More specifically, this Essay examines how the courts have addressed motions to dismiss brought by platform sector employers on this question. This issue has not been fully addressed by the federal appellate courts—at least not in the technology sector—and thus the review performed here looks primarily to federal district court decisions. This function of the Essay is both descriptive and normative, and this Essay closely details the analysis used by the courts when evaluating—at the pleading stage of the case—the existence of an employment relationship in the technology sector.²¹

Simply reporting the results of how the federal courts have ruled on which technology sector workers are considered employees does provide worthwhile information in this emerging field. Beyond performing this reporting mechanism, however, this Essay takes the next broad step. It synthesizes these decisions, concluding that the federal courts have largely treated cases involving platform-based workers in one of three ways.²²

First, some courts have concluded that the worker in the case has failed to allege sufficient facts in the complaint to establish an employment relationship with the technology sector employer. These courts have tended to apply a more heightened, rigid version of the Supreme Court's plausibility standard to the claim in the case.²³ Second, a number of courts have taken a contrary approach and concluded that the facts presented by the plaintiff in the complaint are sufficient to create at least a factual question on the issue of employment, and the courts have therefore allowed the case to proceed to discovery. These courts have been more flexible in their approach to pleading and view the question of employment status as one that is more appropriate for resolution at a later stage of the litigation.²⁴ Finally, some courts have avoided the question

20. See *infra* sections IV.A–IV.C (discussing different approaches of federal courts to technology sector workplace claims).

21. See *infra* Part IV (summarizing federal district court decisions).

22. See *infra* Part IV.

23. See *infra* section IV.A (addressing rigid application of plausibility standard).

24. See *infra* section IV.B (discussing more flexible approach by courts to applying plausibility test).

altogether. These courts have either sidestepped resolving the employment question or have decided the matter on other grounds.²⁵

What is remarkable about a close examination of these cases is that the vast majority of them arise in one particular subset of the technology sector—ridesharing, platform-based companies.²⁶ Given the widespread press coverage and publicity the litigation in this area has received, it is not surprising to find many published decisions in this field.²⁷ Many of these include a similar set of facts with respect to the workers and employers involved. Despite sharing these common facts, the courts have been unable to agree on the correct way to approach these claims. Rather, they have analyzed the cases in one of the three very different ways outlined above.²⁸ This uncertainty will only create further litigation in this area, as there is no common set of ground rules as to how these cases should be addressed.

This Essay attempts to establish these ground rules. Indeed, this Essay sets forth a proposed pleading standard for gig sector workers to sufficiently establish the existence of an employment relationship in the case. With the technology sector specifically in mind, this Essay suggests a model framework that the courts can use to properly analyze any claim in this area.²⁹ Looking to the federal court decisions already existing in the field as well as the Supreme Court's plausibility pleading standard, the framework proposed here establishes a six-part test that can be used to determine whether sufficient facts have been alleged by a technology sector worker to create this employment relationship. This test focuses heavily on the element of control which has been required by the courts and is found in the common law.³⁰ However, by integrating the flexibility inherent of most work in the technology sector, the proposed model considers this control requirement from the standpoint of this new and still emerging economy.

The model proposed by this Essay has a number of important implications.³¹ The confusion and uncertainty found in this field has

25. See *infra* section IV.C (discussing how some federal courts have avoided employment questions raised in technology-sector cases).

26. See generally Part IV (summarizing technology sector cases).

27. See generally Casselman, *supra* note 3; Faiz Siddiqui, *New York Considering Setting Minimum Wage for Uber, Lyft Drivers*, WASH. POST (July 2, 2018), <https://www.washingtonpost.com/news/dr-gridlock/wp/2018/07/02/new-york-considering-setting-minimum-wage-for-uber-lyft-drivers/> (last visited Nov. 19, 2019, 5:22 PM).

28. See *id.*

29. See *infra* Part V (preparing model framework to consider workplace disputes arising in technology sector cases).

30. See *infra* Part V.

31. See *infra* Part VI (discussing implications of analytical framework suggested in this Essay).

caused widespread frustration on the question of employment in the technology sector.³² While no test can capture all factual possibilities of gig sector employment, the model proposed here can be used by the majority of courts as a general framework to evaluate a platform sector case. Similarly, both defendants and plaintiffs will have much clearer guidance on what should be alleged in the technology sector with respect to the employment relationship.³³ By creating more certainty in this area, the complaints will be more precise and the claims themselves will be more clearly framed. Indeed, where there is more certainty in the law, there is a greater likelihood of settlement and reduced overall litigation.³⁴ This type of judicial efficiency is sorely needed in the technology sector, which has faced a tremendous amount of overall litigation.³⁵

This Essay proceeds as follows. In Part II, this Essay navigates the history of pleading laws in this country. The Essay explains the development of the pleading rules over time and explores the role of the Federal Rules of Civil Procedure. This Part details the importance of the notice pleading standard created by these rules. Part III of this Essay further explores the development of the Supreme Court's plausibility standard. This Part explains how this new test overturned decades of pleading precedent and created substantial confusion in the lower courts.

Part IV of this Essay reviews the current case law in this area. This Part synthesizes these decisions, explaining the three different approaches the federal district courts have taken on the question of employment in the technology sector. Some courts have applied a heightened pleading standard, some courts have taken a much more relaxed approach, and others have simply avoided the question altogether. Part V of this Essay proposes a model pleading standard for evaluating whether an employment relationship has been properly alleged in a complaint brought by a workplace plaintiff in the technology sector. The test proposed here navigates the difficult question of defining employment, the intricacies of

32. See Jeffrey Hirsch & Joseph Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1729 (2017) (“Workers in the on-demand technology sector represent a new breed of employees, and courts are still struggling to define this hybrid working relationship. While the law grapples with the rights that should be afforded to these workers, many employee protections are simply falling through the cracks.”).

33. See *id.*

34. See, e.g., Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL’Y REV. 95, 136 (2006) [hereinafter Seiner, *Disentangling Disparate Impact*] (“[A]ll parties should benefit in the long term [from less confusion] as greater certainty in the legal process leads to reduced litigation costs.” (citing Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 (1985))).

35. Indeed, greater certainty in the law can even reduce potential barriers for technology sector start-ups. The current confusion created by state and federal employment laws can create serious hurdles for potential businesses attempting to enter the technology industry.

the platform-based workplace, and the Supreme Court's plausibility pleading standard. Part VI discusses the implications of the analytical framework proposed in this Essay. This Part notes some of the efficiencies that the proposed framework would create, as well as the greater certainty that would be provided in a currently confused area of the law. This Part further addresses some of the possible concerns that could be raised by adopting the model proposed here.

One thing is certain in defining technology sector employment: there is no such definition. This Essay provides much-needed guidance in this emerging area of the law.

I. THE HISTORY OF PLEADING AND THE COMPLAINT

While legal scholars typically view the federal rules in modern terms through the lens of modern cases, it can be instructive to take a step back and examine the pleading standards from a historical perspective. These rules have evolved over hundreds of years, and an understanding of the changes that have occurred over time is helpful when considering the proper tests that should be used.³⁶

While this Essay is not a historical piece, and thus cannot fully explore the fascinating and in-depth history of pleading rules in this country, both cultural and political developments played important roles in the creation of the rules that we have today. The procedural rules that we currently have in this country are borrowed heavily from English law.³⁷ The English system contained inconsistencies in its rules between the courts of equity and courts of law.³⁸ The system in England was complex and heavily favored the more sophisticated pleader, rather than the individual with the more meritorious claim.³⁹

In the United States, the pleading standards were quite different in the early courts of the colonies.⁴⁰ To provide more clarity and consistency,

36. See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1111 (2010); see generally Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115 (2019) [hereinafter Seiner, *Discrimination Presumption*] (discussing pleading rules in context of workplace cases).

37. See Schwartz & Appel, *supra* note 36, at 1116; see generally Seiner, *Discrimination Presumption*, *supra* note 36.

38. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 96 (3d ed. 2005); Jack Ritchie, *Flexible Interpretation of Rules of Court to Suit Circumstances of a Particular Case*, 24 TEX. L. REV. 77 (1945); Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 520 (1957).

39. See generally FRIEDMAN, *supra* note 38; Ritchie, *supra* note 38; Weinstein & Distler, *supra* note 38.

40. FRIEDMAN, *supra* note 38, at 97.

the state legislatures started adopting a code pleading system in the early 1800s.⁴¹ Despite being designed as an attempt to streamline the pleading system, code pleading ultimately resulted in a “slow, expensive, and unworkable” process that required parties to be heavily inclusive in their pleading.⁴²

The Field Code, adopted by New York in 1848 (and subsequently by numerous other states) did away with the distinction between law and equity.⁴³ The result was to allow a simple type of suit, the civil action.⁴⁴ The Field Code also sought to be simpler than other systems, and to provide greater access to the courts.⁴⁵ Nonetheless, over time, a strict application of the rules of the Field Code led to its downfall.⁴⁶

Numerous changes were made to both state and federal pleading rules during the subsequent decades.⁴⁷ Congress sought to unify the pleading rules in the 1930s, and an Advisory Committee of practitioners and law professors (including Professor Charles E. Clark) worked through multiple early drafts of a uniform procedural system.⁴⁸ The final version of the Federal Rules of Civil Procedure were put in place on September 16, 1938.⁴⁹ The rules *rejected* an overly fact-intensive pleading system, which could allow more sophisticated parties to prevail rather than those with the more meritorious claims.⁵⁰ Perhaps the centerpiece of this approach was Federal Rule of Civil Procedure 8(a)(2), which requires only that a plaintiff give “a short and plain statement of the claim showing

41. Schwartz & Appel, *supra* note 36, at 1114.

42. *Id.* (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004)).

43. *See* FRIEDMAN, *supra* note 38, at 293; Schwartz & Appel, *supra* note 36, at 1115.

44. FRIEDMAN, *supra* note 38, at 293.

45. *Id.* at 293–94, 1116 (quoting 1848 N.Y. Laws 521); Schwartz & Appel, *supra* note 36, at 1115.

46. Weinstein & Distler, *supra* note 38, at 520.

47. *Id.* at 518–21; Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 353–54 (1987); *see also* Charles E. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1320 (1936); Schwartz & Appel, *supra* note 36, at 1117; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PENN. L. REV. 1999, 2002 (1989).

48. Goodman, *supra* note 47, at 353–58; Schwartz & Appel, *supra* note 36, at 1117; Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 916 (1976); *cf.* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 6 (1989) (“[T]he few existing procedure histories suffer from too much reliance on the work of Charles Clark, one of the most influential early twentieth century reformers and an historian of code procedure. Clark’s reform ambitions skewed his historical work.”).

49. Goodman, *supra* note 47, at 363–64; Schwartz & Appel, *supra* note 36, at 1117.

50. Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 105 (2011).

that the pleader is entitled to relief.”⁵¹ These rules provided for a "notice pleading" system, whereby providing the opponent with simple notice of the claim was sufficient to allow the plaintiff to proceed in the case.⁵² The Federal Rules of Civil Procedure thus finally provided a robust, uniform procedural system that favored parties proceeding to discovery in cases where the merits of individual claims could be better assessed.⁵³

Of course, this system was far from perfect and much criticism emerged with respect to this approach.⁵⁴ In particular, defendants were often frustrated that the system seemed to favor plaintiffs, and that they were often forced to incur great expenses simply to evaluate the merit of a claim.⁵⁵

Despite the criticism, the Federal Rules of Civil Procedure formed the basis of pleading claims in the federal system, which allowed for liberal discovery.⁵⁶ In the decades following the adoption of these rules, the Supreme Court has interpreted and refined their meaning through numerous decisions.⁵⁷ Perhaps the most well-known Supreme Court pleading decision came in *Conley v. Gibson*,⁵⁸ an opinion issued in 1957.⁵⁹

In *Conley*, a group of black railway workers brought a class action against their union (and others) for failing to represent them on the basis of their race.⁶⁰ In examining the pleadings, the Supreme Court concluded, in a now well-known statement, that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁶¹ The Court noted that the pleading requirements are designed to “give the defendant fair notice of what the plaintiff’s claim is and the

51. FED. R. CIV. P. 8(a)(2).

52. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 257 (5th ed. 1999); GENE R. SHREVE & PETER RAVEN-HANSEN, *UNDERSTANDING CIVIL PROCEDURE* 229 (4th ed. 2009); Cavanagh, *supra* note 50, at 106; Schwartz & Appel, *supra* note 36, at 1118; Weinstein & Distler, *supra* note 38, at 522.

53. Cavanagh, *supra* note 50, at 106; Schwartz & Appel, *supra* note 36, at 1118; Smith, *supra* note 48, at 918; Weinstein & Distler, *supra* note 38, at 523 (“[A] resulting general requirement that pleadings be sufficiently detailed to give the parties and court notice of the particular transactions relied upon and of the rule of law being invoked.”).

54. Cavanagh, *supra* note 50, at 107.

55. *See id.*

56. Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 235–38 (2011).

57. *Id.*

58. 355 U.S. 41 (1957).

59. Schwartz & Appel, *supra* note 36, at 1120.

60. *Conley*, 355 U.S. at 42.

61. *Id.* at 45–46.

grounds upon which it rests,” and “to facilitate a proper decision on the merits,” rather than favoring a particular party based on skillful pleading.⁶² The holding in *Conley* established the basis for the relaxed pleading standard for the next five decades. The decision largely stood for the proposition that liberal pleading standards and discovery should govern.

The Supreme Court has applied the *Conley* standard to varying contexts since. In *Swierkiewicz v. Sorema N.A.*,⁶³ the Supreme Court provided its most recent guidance on the appropriate pleading standards for federal employment discrimination cases.⁶⁴ In 2002, Swierkiewicz, a Hungarian immigrant, alleged that he had been demoted because of his age and national origin.⁶⁵ While the lower courts rejected the complaint on the pleadings, the Supreme Court noted that plaintiffs should not be subjected to a heightened pleading standard and “need not plead a prima facie case of discrimination to survive a motion to dismiss.”⁶⁶ Establishing a prima facie case is not necessary under the pleading requirements as it creates an unnecessary burden on plaintiffs prior to discovery and because of the unique requirements found in employment discrimination claims.⁶⁷ Thus, in a complaint, a discrimination plaintiff *need not* allege all of the prima facie requirements: “[that he belongs to] a protected class, that [he was] qualified for the position, that [he] suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination.”⁶⁸

The Supreme Court precedent from *Conley* appeared to settle the pleading standards for civil cases—establishing a relatively low bar and liberal discovery rules. The Court’s decision in *Swierkiewicz* seemed to follow this trend, similarly creating a low pleading bar for employment discrimination plaintiffs. Decades of well-established pleading precedent would all change with the Supreme Court’s decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, and the introduction of a plausibility requirement.⁶⁹

62. *Id.* at 47–48.

63. 534 U.S. 506 (2002).

64. *Id.* at 508–09.

65. *Id.*

66. Seiner, *After Iqbal*, *supra* note 17, at 184–85 (citing *Swierkiewicz*, 534 U.S. at 510–11).

67. *Id.* (citing *Swierkiewicz*, 534 U.S. at 510–11).

68. *Id.* at 185.

69. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 444 (2007). *Cf.* Charles Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1621 (2011) (“The ultimate interplay between *Twombly/Iqbal* and *Swierkiewicz* remains to be finally resolved in the courts, or, perhaps, in Congress . . .”).

II. THE RISE OF THE PLAUSIBILITY STANDARD

In *Twombly*, the Supreme Court revisited years of settled pleading precedent. *Twombly* involved a complex antitrust case brought pursuant to Section 1 of the Sherman Act.⁷⁰ The plaintiffs alleged that certain telephone companies were engaging in inappropriate conduct that disfavored competition and that they had not properly competed outside of their markets.⁷¹ In considering the case, the Supreme Court abrogated *Conley* and the “no set of facts” standard, replacing it with a plausibility requirement.⁷² This new test “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁷³ More specifically, a complaint must include “enough facts to state a claim to relief that is plausible on its face,” and must “raise a right to relief above the speculative level.”⁷⁴ While the Court stated that a plausible claim does “not require heightened fact pleading of specifics,” the standard has dramatically changed the pleading requirements with this new test.⁷⁵ And this vague plausibility standard has left judges with substantial discretion when considering the sufficiency of the pleadings.⁷⁶

Two years later, in *Iqbal*, the Supreme Court further refined the plausibility requirement, making clear that the new test would apply beyond the antitrust context. After the tragic events of September 11, 2001, Javaid Iqbal, a Pakistani citizen, was detained as part of the subsequent investigations.⁷⁷ After his detainment and conviction, Iqbal filed a claim against former Attorney General John Ashcroft and FBI Director Robert Mueller.⁷⁸ Iqbal’s complaint alleged that his detainment was the result of an “unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin.”⁷⁹ He further alleged that Ashcroft and Mueller both knew of and inappropriately agreed to subject him to those illegal conditions.⁸⁰

Applying the new pleading standard from *Twombly*, the Court concluded that Iqbal’s allegations had “not ‘nudged [his] claims’ of

70. *Twombly*, 550 U.S. at 550.

71. *Id.* at 550–51.

72. *Id.* at 557.

73. *Id.* at 555.

74. *Id.* at 570.

75. *Id.*

76. Brescia, *supra* note 56, at 238.

77. Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

78. *Id.*

79. *Id.*

80. *Id.* at 669.

invidious discrimination ‘across the line from conceivable to plausible.’”⁸¹ The Court found that the plaintiff’s lack of facts and overly conclusory allegations “disentitle[d] [the allegations] to the presumption of truth.”⁸² In addition, the Court held that it was more likely that the facts supported nondiscriminatory, anti-terrorism activity rather than targeted, unlawful conduct.⁸³ After ruling on the insufficiency of *Iqbal*’s complaint, the Court further rejected his legal arguments.⁸⁴ First, the Court declined to limit the plausibility standard from *Twombly* to antitrust claims, and instead expressly held that the new test should apply to *all* civil actions.⁸⁵ Second, the Court refused to “relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.”⁸⁶ Finally, the Court rejected the claim that the Federal Rules of Civil Procedure should allow for discriminatory intent to be alleged generally—sufficient factual support is required.⁸⁷ Following *Twombly* and *Iqbal*, lower courts and plaintiffs would struggle with determining the facts necessary to plead a plausible civil claim.

In the years following these decisions, the plausibility standard has seemed to favor defendants.⁸⁸ While the standard may have provided some overall benefit in reducing legal costs and streamlining cases, it has also established a formidable barrier with respect to access to the courts and legal justice.⁸⁹

At a minimum, the plausibility standard has generated substantial confusion in the lower courts. And, some courts have applied the plausibility test in a way that has heightened the pleading requirements for plaintiffs,⁹⁰ though there is certainly debate on this question⁹¹ and empirical

81. *Id.* at 680 (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

82. *Id.* at 681.

83. Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 723 (2012).

84. *Iqbal*, 556 U.S. at 684.

85. *Id.*

86. *Id.* at 686.

87. *Id.* at 686–87.

88. See Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES (July 20, 2009), <https://www.nytimes.com/2009/07/21/us/21bar.html> [<https://perma.cc/2WVU-X3DT>].

89. See *id.*

90. See *id.*

91. See *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to “unresolved tension” in pleading cases); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard.”); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (discussing impact of *Iqbal* decision on circuit case law); *Swanson v. Citibank, N.A.*, 614 F.3d 400,

studies are far from conclusive.⁹² Nonetheless, some studies suggest that there has been an overall negative impact for civil rights plaintiffs.⁹³

The creation and development of the plausibility standard also coincides with the expanding platform economy⁹⁴ over the past several years.⁹⁵ As discussed in greater detail below, the courts have had difficulty applying this standard,⁹⁶ and, more specifically, defining “employment” with respect to technology workers.⁹⁷

403 (7th Cir. 2010) (explaining that courts are “still struggling” with application of plausibility standard).

92. See generally William H.J. Hubbard, *The Empirical Effects of Twombly and Iqbal* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 773, 2016), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2479&context=law_and_economics [<https://perma.cc/6588-DCJ2>] (summarizing studies).

93. Malveaux, *supra* note 83, at 719, 728–31; see also Brescia, *supra* note 56 (discussing housing cases); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (discussing impact of *Twombly* and *Iqbal*); Suzette M. Malveaux, *Clearing Civil Procedure Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 623–31 (2011) (discussing procedural changes and impact on civil rights plaintiffs); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (discussing *Twombly* and *Iqbal* and effect on civil rights plaintiffs).

94. See generally Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* (Nat’l Bureau of Econ. Research, Working Paper No. 22667, 2016), <http://www.nber.org/papers/w22667.pdf> [<https://perma.cc/LV9L-Z5BY>] (noting that percentage of workers with alternative work arrangements “rose from 10.7 percent in February 2005 to 15.8 percent in late 2015”); cf. Diana Farrell & Fiona Greig, *The Online Platform Economy: Has Growth Peaked?*, JPMORGAN CHASE & CO. INST. (Nov. 2016), <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-online-platform-econ-brief.pdf> [<https://perma.cc/57CJ-T8NZ>].

95. See generally Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1635 (2017); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016).

96. See Colleen McNamara, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401, 424–25 (2011) (“At this early stage, it appears that *Iqbal* has only generated more confusion over pleading standards because it proposed a test that has been cited by less than half the circuits and has been rigorously applied by an even smaller fraction.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299, 1311–13 (2010) (discussing problems with the plausibility standard); see generally *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010); Lonny Hoffman, *Plausible Theory, Implausible Conclusions*, 83 U. CHI. L. REV. ONLINE 143, 143 (2016) (“[T]rial courts struggle to consistently apply these unfamiliar steps at the pleading stage.”).

97. See generally Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1311 (2017); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 482 (2016); E. Gary Spitko, *A Structural-Purposive Interpretation of “Employment” in the Platform Economy*, 70 FLA. L. REV. 409, 427 (2018).

III. PLEADING AND THE PLATFORM ECONOMY

Courts across the country have recently addressed the difficulty of applying the plausibility standard to technology-sector cases. The standard itself is in flux, as it is still in its early stages and being more fully discussed in the courts and academic literature.⁹⁸ Applying this developing standard to a developing economy thus presents unique challenges.⁹⁹ Indeed, the facts necessary to “sufficiently allege employment”¹⁰⁰ for technology workers are unclear at best. And, as gig sector cases are now brought in courts across the country, jurisdictional differences are beginning to appear.

In the workplace context, the contours of the employment relationship are perhaps the most critical issue currently being developed in the lower courts.¹⁰¹ Regardless of how the courts have approached this question, there is always a focus on the issue of *control*.¹⁰² To be considered an “employee” by the courts, employers must exert a sufficient amount of control over the worker.¹⁰³ The resolution of the question of a worker’s

98. See *infra* sections IV.A–IV.C (discussing cases in this area).

99. See David Weil, *Lots of Employees Get Misclassified as Contractors. Here’s Why It Matters*, HARV. BUS. REV. (July 5, 2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters> [<https://perma.cc/6CBK-3VU7>]; see generally Brookhaven Baptist Church v. Workers’ Comp. Appeal Bd. (*Halvorson*), 912 A.2d 770, 777 (Pa. 2006) (noting that “[c]ourts have struggled to define employment that is ‘casual in character’”); Dan Eaton, *Gig Economy Creates Legal Puzzles for the Courts*, SAN DIEGO UNION-TRIB. (Sept. 3, 2017), <http://www.sandiegouniontribune.com/business/technology/sd-fi-labor-eaton-column-20170807-story.html#> [<https://perma.cc/3KTH-VE4B>] (“In place of uniform definitions, courts and regulators have adopted multi-part tests to distinguish” workers in the gig sector).

100. *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 91 (2d Cir. 2013).

101. See *Sill v. AVSX Techs., LLC*, 243 F. Supp. 3d 664, 670 (D.S.C. 2017) (“Under South Carolina law, the question is whether the employer has the right to control the individual in the performance of work and the manner in which it is done.”); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015) (“[T]he ‘principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.’” (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014))).

102. See *O’Connor*, 82 F. Supp. 3d at 1149 (analyzing the “principal” element under *Borello*, for instance, “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired”).

103. See *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1313 (11th Cir. 2013) (“Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.”); *Roslov v. DirecTV Inc.*, 218 F. Supp. 3d 965, 974 (E.D. Ark. 2016) (discussing worker status and control over profits); *Thornton v. Mainline Commc’ns, LLC*, 157 F. Supp. 3d 844, 849 (E.D. Mo. 2016) (“[Employers] exercised a high degree of control over the manner in which plaintiffs performed their installation and repair work.”); ; *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 42 (Cal. 2018) (finding that employees were improperly misclassified as independent contractors); *O’Connor*, 82 F. Supp. 3d at 1152 (“[H]irees who were ‘not required to work either at all or on any particular schedule’ were nonetheless held to

employment status is a threshold issue, and a worker who is not considered an employee will be protected by few, if any, of the state or federal employment laws.¹⁰⁴ Where enough facts are alleged to suggest an employment relationship exists, however, the case will typically be permitted to proceed, absent any other potential shortcomings.¹⁰⁵

The question of employment status is unquestionably specific to individual jurisdictions and factual scenarios.¹⁰⁶ Nonetheless, the Supreme Court has provided some overarching guidance on how to approach this issue, emphasizing the element of control. In the seminal case, *Nationwide Mutual Insurance Co. v. Darden*,¹⁰⁷ the Court outlined the elements to be considered for control, noting that the lower courts should apply common law agency principles as part of the analysis.¹⁰⁸

The *Darden* Court listed twelve discrete common law agency factors. As noted by the *Darden* Court, these agency factors include:

the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship

be employees as a matter of law based on the amount of control the employer could exercise when those employees decided to turn up for work.” (quoting *JKH Enters. Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046, 1051 (2013))).

104. *Herman v. Express Sixty-Minutes Delivery Serv.*, 161 F.3d 299, 303–04 (5th Cir. 1998) (“Express had minimal control over its drivers”; the drivers’ “profit or loss [was] determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business.”); *Razak v. Uber Techs., Inc.*, No. 16-573, 2018 WL 1744467, at *54 (E.D. Pa. Apr. 11, 2018) (dismissing the case given “‘that no single factor in the economic reality test is dispositive,’ Plaintiffs have not brought to the record sufficient proof to meet their burden of showing that they are employees” (citing *Chao v. Mid-Atlantic Installation Servs.*, 16 F. App’x 104, 106 (4th Cir. 2001))); *Hirsch & Seiner*, *supra* note 32, at 1740 (“[I]ndependent contractors neither have a right to collective action or bargaining nor any protection against, among other things, discrimination and pay that would violate the minimum wage or overtime rules.”).

105. *See Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 983–85 (9th Cir. 2014) (finding employment relationship where employer controlled work hours and specifics of job performance); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (setting forth jury question on issue of whether workers are employees or independent contractors); *O’Connor*, 82 F. Supp. 3d at 1138 (“[O]nce a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee If the putative employee establishes a prima facie case (*i.e.*, shows they provided services to the putative employer), the burden then shifts to the employer to prove, if it can, that the ‘presumed employee was an independent contractor.’” (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900–01 (9th Cir. 2010))).

106. *See, e.g., Alexander*, 765 F.3d at 988–89 (examining question of employment relationship under California law).

107. 503 U.S. 318, 323 (1992) (“‘In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.’” (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989))).

108. *Id.*

between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁰⁹

These control factors set out in *Darden* have been applied in varying ways by the lower courts—dependent upon the facts of the case and the jurisdiction where the claim is brought.¹¹⁰ Moreover, the *Darden* test was developed at a time when brick-and-mortar companies were far more common than they are today.¹¹¹ The technology sector has forced employers and the courts to reconceptualize what the employment relationship means, and non-traditional type relationships are now far more common.¹¹²

The question of who is an employee in the technology sector is relatively new to the academic literature, and there has been little research synthesizing the law on this question.¹¹³ Indeed, only in recent years have we begun to see the cases emerge on this question in the federal courts and the analysis has largely been at the district court level.¹¹⁴ This Essay surveys much of this law, bringing together the many federal district court decisions on this question. This Essay thus examines how the courts have ruled at the pleading stage of a case on the question of who an employee in the technology sector is. This Essay synthesizes those decisions,

109. *Id.* at 323–24 (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

110. *Cf. Carlson, supra* note 8, at 338–39 (“Employer control over the details of the work has been the factor most courts place at the heart of any test of worker status Indeed, one could argue that nearly all the other factors listed by courts are merely different ways of evidencing the employer’s means of control.”).

111. *Id.*

112. *See Abha Bhattarai, Now Hiring, for a One-Day Job: The Gig Economy Hits Retail*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/business/economy/now-hiring-for-a-one-day-job-the-gig-economy-hits-retail/2018/05/04/2bebdd3c-4257-11e8-ad8f-27a8c409298b_story.html?noredirect=on&utm_term=.e653cb6902c1 [<https://perma.cc/Q5JX-TN6C>] (“The rise in gig work comes as state legislatures across the country are considering bills that would legally classify gig workers as independent contractors, stripping them of a number of workplace rights and protections. Until now, the distinction between on-demand employee and contractor has been largely unclear, as evidenced by a number of lawsuits alleging that companies such as Uber, Grubhub and Handy are incorrectly classifying their workers as independent contractors.”).

113. *See generally Benjamin Means & Joseph A. Seiner, Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016) (discussing meaning of employment in the technology sector).

114. *See infra* sections IV.A–IV.C (examining how federal courts have addressed question of employment status in technology sector).

evaluating how the courts have approached this question. Ultimately, this Essay seeks to navigate these cases, providing guidance on the information that must be pled to survive dismissal of an employment claim in the technology sector.

After reviewing the cases in this area, this Essay concludes that the federal district courts tend to address dismissal motions in platform-based employment cases in one of three different ways. This is a broad generalization, but one that is helpful in understanding how the courts have approached this new and complex question.

Thus, by examining the courts' recent decisions in gig sector employment disputes at the motion to dismiss stage, this Essay concludes that the courts have responded: (1) by finding the case to include insufficient facts and thus granting dismissal; (2) by concluding that the complaint contains sufficient factual allegations and thus allowing the matter to proceed; or (3) by sidestepping the question at this early stage of the analysis. This Essay first examines cases where the courts have found the complaint to contain insufficient facts to properly allege an employment relationship.¹¹⁵ This Essay then examines claims where the courts have concluded that workers have properly plead employment within the platform economy.¹¹⁶ Finally, this Essay examines cases in which courts have simply avoided the issue of sufficient technology sector pleading.¹¹⁷

The most high-profile decisions in this area have arisen in the ridesharing context. To be sure, there have been numerous gig sector cases in other areas of the on-demand economy, but decisions involving Uber and Lyft have attracted the most headlines.¹¹⁸ To simplify the discussion in this area, this Essay will look primarily at how the courts have approached this particular subset of technology sector cases, given that those cases have driven the law in this area.¹¹⁹ Nonetheless, this Essay

115. *See infra* section IV.A.

116. *See infra* section IV.B.

117. *See infra* section IV.C.

118. *See generally Judge Approves \$27 Million Settlement in Lyft Driver Lawsuit*, CNBC (Mar. 17, 2017, 7:01 AM), <https://www.cnbc.com/2017/03/17/judge-approves-27-million-driver-settlement-in-lyft-lawsuit.html> [<https://perma.cc/4KM8-898K>]; Tracey Lien, *California Lawsuits Accuse Uber and Lyft of Discriminating Against Wheelchair Users*, L.A. TIMES (Mar. 15, 2018), <http://www.latimes.com/business/technology/la-fi-tn-uber-lyft-wheelchair-20180315-story.html> [<https://perma.cc/6RWL-QUHZ>].

119. Many of these claims arise in California, which applies analysis from *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989). The “most significant” consideration” when examining the existence of an employment relationship is the company’s “right to control work details.” *Id.* at 404. The test examines: (1) whether the individual performing work is engaged in a distinct occupation; (2) whether the work is done with or without supervision; (3) the skill required; (4) who provides the instrumentalities, tools, and place of work; (5) the amount of time the work is

seeks to be broad in scope, and to examine the more general question of the type of elements necessary to successfully plead any workplace case in the platform-based sector—regardless of the exact nature of the technology employer involved.

A. Insufficient Pleadings

The courts, generally, have been reluctant to dismiss platform-based cases early in the proceedings. Where the courts have rejected these claims, they have looked to contradictory statements, overly generalized allegations and insufficient factual detail in the complaint to explain the dismissal.

For example, in *Carter v. Rasier-CA, LLC*¹²⁰ the District Court for the Northern District of California granted ridesharing company Uber’s motion to dismiss with leave to amend in a case involving a driver because the court found that the plaintiff had not pled sufficient factual detail to support his employment status.¹²¹ The court rejected the complaint, holding that it was “insufficient, even at the motion to dismiss stage.” In dismissing the complaint, the court emphasized the lack of factual support in the pleadings:

Plaintiff asserts that Defendants “employed Plaintiff as an employee,” . . . but offers minimal factual allegations to support this conclusion. He states that Uber sets the fare model and collects fares from users and . . . direct[s] drivers where to drive Plaintiff further alleges that Uber may terminate drivers or require them to take additional training if their “rating” falls below a certain level The Court finds this is insufficient, even at the motion to dismiss stage.¹²²

The court focused in on the question of control, holding that conclusory statements were insufficient to establish this element of employment.¹²³ The court further required “more factual detail” from the plaintiff to show how control was actually evidenced by the employer to establish a plausible claim.¹²⁴ The court thus required that any amended complaint

performed; (6) the method of payment; (7) whether the work is a part of the regular business of the employer; and (8) whether the parties believe they are creating an employment relationship. “[T]he individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.” *Id.* at 404.

120. No. 17-cv-00003-HSG, 2017 WL 4098858, at *5 (N.D. Cal. Sept. 15, 2017).

121. *Id.*

122. *Id.* at *2.

123. *Id.* at *5.

124. *Id.* at *2.

“clearly set forth each legal claim and the facts supporting such claims, including each defendant’s specific conduct, if he can do so truthfully.”¹²⁵

In *Alatraqchi v. Uber Technologies, Inc.*¹²⁶ the District Court for the Northern District of California similarly granted the defendant’s dismissal motion (with leave to amend) because of the plaintiff’s failure to sufficiently plead his employment status.¹²⁷ The court specifically found that the Uber driver in the case had not “adequately allege[d] an employment relationship with [the company].”¹²⁸ The court similarly concluded that the facts did not support this relationship¹²⁹ and that the plaintiff’s statements were inconsistent on this issue.¹³⁰

The court emphasized the plaintiff’s “inconsistent allegations”—for instance, that he was both an employee and also engaged in a “business relationship” with Uber.¹³¹ The court also raised concerns about the worker’s “several references to his ‘business arrangement,’ ‘business relationship,’ and/or ‘partnership’ with [the company].”¹³² The court did

125. *Id.* at *5. The court further stated, “Plaintiff’s allegations that Plaintiff is an employee and Defendant can control when and how drivers earn fares by sending User ride requests is a legal conclusion that the Court need not accept as true. Although a rating system may be evidence of Defendant’s control over Plaintiff’s day-to-day work, plaintiff must allege more factual detail about how this rating system regulates drivers’ activities to make the existence of an employment relationship plausible and not merely possible.” *Id.* at *2.

126. No. C-13-03156 JSC, 2013 WL 4517756 (N.D. Cal. Aug. 22, 2013).

127. *Id.* at *5.

128. *Id.* at *4.

129. The pro se complaint appears inconsistent in places with respect to allegations of employment with Uber. Indeed, the complaint references the plaintiff’s “‘business relationship,’ and/or ‘partnership’ with Uber.” *Id.* at *5 (“‘Plaintiff entered into the business arrangement with the Defendant believing this would be along [sic] term, mutually beneficial deal . . . I no longer have the job that I was working before starting with Uber, and declined several other offers believing that Uber was serious about a long term business relationship . . . I say again that I was used by Uber during the most busy night of the year while under the impression that this would be an ongoing business relationship . . . I was invited to become an Uber partner at the busiest time of the year I accepted this Uber partnership . . . I lost money believing that I had enough security in my future income through this partnership to make the investment in this new vehicle . . . I drove as a partner of Uber . . .”).

130. “Further, in recounting an interaction with a ‘customer’ who inquired as to why Plaintiff went to ‘work with Uber,’ Plaintiff alleges that he told the customer that “no I[sic] independent with myself, different company.” Plaintiff also states in his Complaint that ‘I am not an employee of Uber,’ although it is not clear if Plaintiff is referring to his status during his relationship with Uber, or simply after Uber ended the relationship. At the same time, Plaintiff alleges that he ‘accept[ed] Uber’s offer of employment,’ and that ‘Plaintiff has not received payment for all of the work performed during the period of employment.’ Given Plaintiff’s inconsistent allegations, the Court GRANTS Defendants’ motion to dismiss with leave to amend so that Plaintiff may clearly—and concisely—allege the nature of his relationship with Uber.” *Id.* at *5.

131. *Id.* at *5, *89 (internal quotations omitted).

132. *Alatraqchi*, 2013 WL 4517756, at *5; see also *Uber Driving Partner—A Great Part Time Opportunity*, UBER (2019), <https://get.uber.com/p/part-time-driving-partner/> [<https://perma.cc/SN7Y-MR7V>].

grant leave to amend, but noted that at the present time it could not “supply essential elements of the claim that were not initially pled.”¹³³

These cases demonstrate the approach of certain courts on the issue of what must be pleaded to establish an employment relationship in the technology sector. As seen here, these courts have tended to require a high level of specificity in pleading these facts, rejecting conclusory (or conflicting) allegations. Indeed, as these cases illustrate, technology cases will not be allowed to proceed where the allegations fail to include detailed facts about the working relationship between employer and employee. And, by rigidly adhering to the *Iqbal* requirements, these courts have rejected generalized statements about whether an employment relationship has been established. Failure to sufficiently plead these facts, or to make consistent statements throughout the complaint, will result in dismissal of the claim.

The early caselaw has thus suggested that platform-based pleadings should be consistent, specific, and detailed to survive dismissal. Plaintiffs bringing claims in the technology sector should make sure to satisfy this standard if they want to move their cases into discovery.

B. Sufficient Pleadings

Unlike the courts in *Carter* and *Alatraqchi*, several other courts have denied motions to dismiss in platform pleading cases.¹³⁴ A close examination of these cases—where the courts have allowed the matters to proceed—will help to better illustrate the pleading requirements in this area. Generally speaking, these federal courts have applied a much more relaxed pleading standard from *Iqbal* and *Twombly*, forgoing the more rigid standard used by many other courts.¹³⁵

For example, in *Doe v. Uber Technologies, Inc.*,¹³⁶ the district court for the Northern District of California found that the Uber drivers in the case had “alleged sufficient facts to claim plausibly that an employment relationship exist[ed].”¹³⁷ In reaching that result, the court noted that the allegations were sufficient to show that Uber sets the price of rides, controls driver routes, controls customer contact data, and maintains the

133. *Alatraqchi*, 2013 WL 4517756, at *4 (internal quotations omitted).

134. *See, e.g.*, *Phillips v. Uber Techs., Inc.*, 16 Civ. 295 (DAB), 2017 WL 2782036, at *5 (S.D.N.Y. June 14, 2017) (finding it “premature at this point to make a finding based [on] the limited record before it,” but stating allegations “insufficient alone legally to establish control indicative of an employment relationship”).

135. *See supra* Part III (discussing the Supreme Court plausibility pleading standard).

136. 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016).

137. *Id.*

power to fine drivers.¹³⁸ The company further employs workers with no specialized skills on a frequent basis.¹³⁹ The complaint also established that Uber controls the appearance of drivers, as well as the overall atmosphere experienced by the worker.¹⁴⁰ In analyzing the case, the court fully considered the factors weighing both in favor of and against the creation of an employment relationship in the matter.¹⁴¹

The court also looked to prior decisions on the employee/independent contractor issue involving Uber and Lyft.¹⁴² Considering the allegations and prior caselaw, the court held that even if there are facts “that disprove plaintiffs’ allegations or that tilt the scales toward a finding that Uber drivers are independent contractors[,] . . . plaintiffs have alleged sufficient facts that an employment relationship may plausibly exist.”¹⁴³

138. “In support of this assertion, plaintiffs have alleged that Uber sets fare prices without driver input and that drivers may not negotiate fares. If a driver takes a circuitous route, Uber may modify the charges to the customer. Uber retains control over customer contact information.” *Id.* at 782 (citations omitted) (citing Amended Complaint at ¶¶ 39, 40, 42, *Doe*, 184 F. Supp. 3d 774 (No. 3:15-cv-4670-SI)).

139. “Uber’s business model depends upon having a large pool of non-professional drivers. There are no apparent specialized skills needed to drive for Uber. Uber retains the right to terminate drivers at will.” *Id.* (citations omitted) (citing Amended Complaint at ¶¶ 25, 36–38, 53–66, 43, *Doe*, 184 F. Supp. 3d 774 (No. 3:15-cv-4670-SI)).

140. “Uber also controls various aspects of the manner and means by which drivers may offer rides through the Uber App. Among these, plaintiffs have alleged that Uber requires drivers to accept all ride requests when logged into the App or face potential discipline . . . Uber requires drivers to: dress professionally; send the customer who has ordered a ride a text message when the driver is 1–2 minutes away from the pickup location; keep their radios either off or on ‘soft jazz or NPR’; open the door for the customer; and pick up the customer on the correct side of the street where the customer is standing.” *Id.* (citations omitted) (citing Amended Complaint at ¶¶ 44, 45, *Doe*, 184 F. Supp. 3d 774 (No. 3:15-cv-4670-SI)).

141. “Certain factors, as alleged, support Uber’s assertion that drivers are independent contractors, though not enough to convert the question into a matter of law. These include that the drivers generally do not receive a salary but are paid by the ride and that the drivers supply their own cars and car insurance. Even these factors, however, are not necessarily dispositive. It matters not whether Uber’s licensing agreements label drivers as independent contractors, if their conduct suggests otherwise. *Id.* at 782–83 (first citing *S.G. Borello and Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989); then citing Amended Complaint at ¶¶ 40, 50–51, *Doe*, 184 F. Supp. 3d 774 (No. 3:15-cv-4670-SI); then citing *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th at 1, 5 (2007) (“finding drivers for FedEx to be employees even where drivers supplied their own trucks and maintained their own car insurance”); then citing Amended Complaint at ¶¶ 47–48, *Doe*, 184 F. Supp. 3d 774 (No. 3:15-cv-4670-SI) (“[A]lleging that in certain cities Uber drivers may receive a guaranteed minimum rate, ‘tantamount to a salary,’ and that in January 2016 Uber announced that drivers will have guaranteed earnings, thereby—in plaintiffs’ view—giving ‘Uber drivers everywhere . . . essentially guaranteed salaries’”); then citing *Estrada*, 154 Cal. App. 4th at 10–11; and then citing Motion to Dismiss at 6–7, *Doe*, 184 F. Supp. 3d 774 (No. 15-cv-04670 SI)).

142. *Doe*, 184 F. Supp. 3d at 783.

143. *Id.*

In a similar case, the District Court for the District of Columbia held that an assault victim of an Uber driver sufficiently alleged the worker's employment status with the business when "a reasonable factfinder could conclude that Uber exercised control over [him] in a manner evincing an employer-employee relationship."¹⁴⁴ The court examined each element of the District of Columbia's five-factor test. In reaching its result, the court thus looked to a multi-factor control test that is utilized in the jurisdiction.¹⁴⁵ The court here—just like in *Doe*—found the allegations sufficient to show that the defendant exerts control over fares, wages, and other terms of employment.¹⁴⁶ And, like in *Doe*, the court also held that the allegation of these elements in the case was sufficient to survive dismissal.¹⁴⁷ The court further noted that the company here controlled the day-to-day operation of workers,¹⁴⁸ thus further creating a factual dispute in the case as to employment status.¹⁴⁹

In yet another jurisdiction to address the issue, the District Court for the Eastern District of Pennsylvania found an Uber driver's complaint sufficient to establish an employment relationship because it articulated

144. *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 233 (D.D.C. 2015).

145. *Id.* at 231–32.

146. "Uber screens new drivers, dictates the fares they may charge, and pays such drivers weekly. [Plaintiff] claims that '[u]pon threat of termination, Uber subjects its drivers to a host of specific requirements,' including, inter alia, the use of the Uber app, standards for the cleanliness and mechanical functioning of their cars, rules regarding tipping, minimum timeframes and acceptance rates for ride requests, and display of the Uber logo. According to Plaintiff, these facts establish the first four factors of the aforementioned test. Search maintains that the fifth factor, whether Deresse's work is part of Uber's regular business, is satisfied by his allegation that 'Uber is a car service' for which Deresse was a driver." *See id.* at 232 (first citing Amended Complaint at ¶¶ 7–12, 15, *Search*, 128 F. Supp. 3d 222 (No. 1:15-cv-00257); then citing Opposition to Motion to Dismiss at 12–13, *Search*, 128 F. Supp. 3d 222 (No. 1:15-cv-00257 (JEB)); and then citing Amended Complaint at ¶ 6, *Search, Inc.*, 128 F. Supp. 3d 222 (No. 1:15-cv-00257)).

147. "The Court agrees, for the most part. The Amended Complaint sets forth facts illustrating Uber's involvement in the selection process of new drivers (by way of its screening procedures); payment of wages (by paying drivers weekly rather than permitting them to collect payment or tips directly from passengers); and termination of employees (by enjoying broad latitude to terminate employees who fail to comply with the company's standards). As to the question whether driving is Uber's regular business, Defendant simply disagrees with Plaintiff's factual allegation that the company is a 'car service.' It does not argue—for good reason—that even if Uber is a car service, as alleged, Deresse's driving is not its regular work." *Id.* at 232.

148. "Here, Plaintiff has alleged that Uber controls the rate of refusal of ride requests, the timeliness of the drivers' responses to requests, the display on vehicles of its logo, the frequency with which drivers may contact passengers, the drivers' interactions with passengers (including how they accept tips and collect fares), and the quality of drivers via its rating system." *Id.* at 233 (citing Amended Complaint at ¶¶ 15, 8, *Search*, 128 F. Supp. 3d 222 (No. 1:15-cv-00257)).

149. "Taking these allegations as true, a reasonable factfinder could conclude that Uber exercised control over Deresse in a manner evincing an employer-employee relationship . . . in sum, the Court cannot determine as a matter of law that [the driver] was an independent contractor." *Id.*

“several well-pleaded allegations.”¹⁵⁰ The court in this case again looked to the critical element of control, stating that the defendants:

“control the number of fares each driver receives,” “have authority to suspend or terminate a driver’s access to the App,” “are not permitted to ask for gratuity,” and “are subject to suspension or termination if they receive an unfavorable customer rating.” . . . [I]n order to serve as Drivers, “drivers must undergo [] training, testing, examination, a criminal background check and driving history check.”¹⁵¹

The court also noted that there was factual support to demonstrate that Uber drivers are financially dependent on the company.¹⁵²

The court therefore outlined the specific facts plaintiffs had alleged which supported employment status under federal law.¹⁵³ And, the court emphasized the drivers’ assertion that they were “dependent upon the business to which they render service,” looking to prior case law.¹⁵⁴ Thus, the court concluded that, pursuant to federal law and prior precedent, the plaintiffs had sufficiently pled their employment status.¹⁵⁵

In sum, the federal courts have favored technology sector complaints brought in the employment context that have included detailed factual allegations supporting an employment relationship with the company. The courts have tended to allow these cases to proceed where the facts and allegations presented are more than generalizations. Where permitted to proceed, technology sector employment cases also avoid inconsistent allegations. And, the courts that have been willing to entertain these cases have taken a more liberal approach to the pleading standards than those courts discussed in the prior section.¹⁵⁶

Overall, then, the federal courts have accepted complaints in the technology sector that factually support allegations of an employment

150. *Razak v. Uber Techs., Inc.*, No. 16-573, 2016 WL 5874822, at *4 (E.D. Pa. Oct. 7, 2016).

151. *Id.*

152. “Plaintiffs also specifically allege that they are ‘dependent upon the business to which they render service.’” *Id.* at *4 (citing Complaint at ¶ 157, *Razak*, No. 16-573, 2016 WL 5874822 (No. 2:16-CV-00573) (“Plaintiffs and Class members are financially dependent on the fare provided to them by Defendants.”); then citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1383 (3d Cir. 1985)); see also *Razak*, 2016 WL 7241795, at *5.

153. *Razak*, 2016 WL 7241795, at *1–5.

154. *Razak*, 2016 WL 5874822, at *4.

155. *Razak v. Uber Technologies, Inc.*, No. 16-573, 2017 WL 4052417, at *2 (E.D. Pa. Sept. 13, 2017) (“Plaintiff’s allegations that they were Online the Uber App for more than 40 hours in a given week was sufficient—at the pleading stage—to state a claim for overtime pay under the FLSA.” (citing *Razak*, 2016 WL 7241795, at *6)).

156. See *supra* section IV.A (discussing court decisions granting motion to dismiss on the question of the existence of an employment relationship in the technology sector).

relationship, avoid contradictory statements, and provide more than legal and factual generalizations.

C. Avoiding the Plausibility Standard

A third approach worth noting—of those courts that have addressed employment questions arising in the technology sector—has been for those courts to simply avoid the plausibility issue altogether. These courts have tended either to conclude that the question of the sufficiency of the allegations is pre-mature, or to find that the case should be permitted to proceed without further analysis. Some courts, then, have simply avoided applying the plausibility standard completely, showing that clear guidance in this area is badly needed.

For example, in *Bekele v. Lyft*¹⁵⁷ the District Court for the District of Massachusetts concluded that the Lyft drivers bringing the allegations were employees when considering the company’s motions to compel and dismiss.¹⁵⁸ The court stated that while Lyft “classifies its drivers in Massachusetts as independent contractors,” “the complaint alleges” differently and the “Court will assume that [the plaintiff] is an employee for purposes of this motion.”¹⁵⁹ The court looked further to prior precedent to find an employment relationship with the company, noting other ride-sharing cases which had allowed the complaints to survive dismissal.¹⁶⁰ The court thus simply sidestepped the issue by deferring to the analysis and results of other courts in this area.

Similarly, the District Court for the District of Massachusetts also noted the “litigated position of Uber” in considering the sufficiency of an employment complaint brought against the company.¹⁶¹ The court pointed to cases in California, New York, and Pennsylvania to support this result.¹⁶² The court concluded that “[b]ased on the litigated position of Uber, then, plaintiffs have stated a plausible claim.”¹⁶³

157. 199 F. Supp. 3d 284, 303 (D. Mass. 2016).

158. *Id.*

159. *Id.*

160. *Id.* at 303 n.18. Some courts have rejected summary judgment in ride-sharing cases on the question of the existence of an employment relationship; *see generally* *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

161. *Malden Transp., Inc. v. Uber Techs., Inc.*, 286 F. Supp. 3d 264, 281 (D. Mass. 2017).

162. *Id.* Many courts have not been persuaded by Uber’s claim that it lacks the control necessary over its drivers necessary to create an employment relationship. *See generally* *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 532 (E.D.N.Y. 2017); *Razak v. Uber Technologies, Inc.*, 2016 WL 5874822, at *5 (E.D. Pa. Oct. 7, 2016); *O’Connor*, 82 F. Supp. 3d at 1135.

163. *Malden Transp.*, 286 F. Supp. 3d at 281.

The District Court for the Western District of Oklahoma also sidestepped the question of the existence of an employment relationship for workers at Uber.¹⁶⁴ The court stated that it “does not address this dispute because even assuming defendant is John Doe’s employer, for the reasons set forth below, plaintiff has still failed to assert a cause of action that survives defendant’s motion to dismiss.”¹⁶⁵ Like the other cases discussed here, this federal court also avoided squarely addressing the worker misclassification issue.

In a similar state court decision, a superior court of Massachusetts concluded that a ride-sharing driver had sufficiently alleged an employment relationship under the Massachusetts Wage Act.¹⁶⁶ The court stated that “in the light most favorable to [the plaintiff], the complaint [did] not fail to state a claim.”¹⁶⁷ The court did note that, under Massachusetts law, “it is [Uber’s] burden to prove that [plaintiff] meets all three prongs of the independent contractor test; it is not [plaintiff’s] burden to plead that he does not.”¹⁶⁸

In sum, a third approach used by the courts when analyzing whether technology sector workers have been misclassified has been to sidestep the issue altogether. This is not a surprising approach, given the complex allegations often involved as well as the confusion surrounding the *Twombly* and *Iqbal* decisions, and the plausibility standard itself.¹⁶⁹ Several courts have thus decided not to address the issue at all. As detailed below, this Essay sets forth a proposed pleading standard for technology sector employment cases. By creating more certainty in the type of allegations and facts that would typically be expected in a technology sector employment case, this Essay provides more clarity in this area. With a greater level of certainty, the courts may be more willing to address these issues directly when they arise. Nonetheless, currently, many courts are simply choosing to avoid wading into the issue at all. The popularity of this approach illustrates the need for clear guidance in this area.

164. Mazaheri v. Doe, No. CIV-14-225-M, 2014 WL 2155049, at *3 n.2 (W.D. Okla. May 22, 2014).

165. *Id.*

166. Lavitman v. Uber Techs., Inc., No. SUCV201204490, 2015 WL 728187, at *5–6 (Mass. Super. Ct. Jan. 26, 2015).

167. *Id.* at *6.

168. *Id.*

169. See *supra* Part III (discussing the Supreme Court’s plausibility standard).

IV. DRAFTING THE COMPLAINT: A PROPOSED PLEADING STANDARD

After surveying the recent complaints and caselaw in this area, it is now appropriate to provide suggestions for drafting a complaint which plausibly pleads an employment relationship with a technology sector business. Given the confusion noted above—and even the willingness of some courts to completely avoid the issue altogether—a model pleading standard is needed to assist the courts and parties in analyzing this issue.¹⁷⁰

A successful pleading model should closely consider the existing caselaw where plaintiffs have been successful in establishing an employment relationship with a technology sector business. Looking to the *Carter* and *Alatraqchi* cases discussed above,¹⁷¹ we learn that technology sector workers must carefully articulate their factual allegations of employment status. Plaintiffs should avoid any reference to a “partnership,” or “business relationship,” or “independent worker” status. Instead, plaintiffs should identify themselves as “workers” or preferably as “employees.” And, plaintiffs must do more than simply allege conclusory terms, and should include specific facts supporting their employment status with the company.

There can be no magic “template” to establish a satisfactory hypothetical complaint in this or any other area, but there are a number of general guideposts to use to enhance the likelihood of success of a particular claim in this sector. This Essay proposes a basic framework to help evaluate employment claims brought in the technology sector.

The test set forth here is not meant to be exhaustive. Indeed, it is more of a descriptive summary of the factors the federal courts have already relied upon before letting a particular platform-type case proceed. Thus, the framework suggested below must be considered flexible, and each case must be evaluated on its own merits.

Plaintiffs should thus strongly consider pleading the following elements of the proposed model:¹⁷²

- (1) *when* individual works;
- (2) *where* individual works;
- (3) *how* often work occurs;
- (4) *manner* of work performed;

170. Cf. Hirsch & Seiner, *supra* note 32, at 1782 (“Thus, unions and other groups concerned with working conditions must seek alternative strategies. Nowhere is this need more pronounced than in the technology sector, where workers’ employment status remains in flux.”).

171. See *supra* section IV.A (discussing cases in which the federal district courts have allowed technology-based employment cases to proceed past the dismissal stage).

172. This model is based on the factors of the test for establishing the employment relationship suggested in Means & Seiner, *supra* note 113.

- (5) *pricing/cost* information; and
- (6) *any other factors* related to control.

Adequately pleading these six factors should sufficiently articulate an employment relationship that is sufficient to survive a motion to dismiss. To the extent any details can be provided for each of these factors, they should be set out in the complaint itself. While the pleadings need not be lengthy, they should be sufficient to overcome the plausibility standard of *Twombly* and *Iqbal*.¹⁷³ It is important to note that no single factor will be dispositive in this test. Nor is any factor necessarily weighed more heavily than another. Rather, the court will look to the totality of these factors to determine whether an employment relationship exists. This test aims for simplicity, as well as effectiveness in practice. An outline more fully developing each of these factors is discussed below as well as an excellent example of a complaint in this area.

A. *When Work Performed*

The plaintiff should allege any facts supporting when the work was performed. The exact timing of the performance of one's job goes directly to the factors discussed by the Supreme Court in *Darden*.¹⁷⁴ When the performance of work occurs can greatly impact the nature of the job. When one's work is performed also raises the question of the level of control in the employment relationship.¹⁷⁵ Independent contractors tend to set their own hours whereas employees work when required by the business. The platform economy has put this question into flux, however, as employers may encourage workers to perform their tasks during certain peak periods, though they may not necessarily *require* the work to be performed during this time.¹⁷⁶

173. See *supra* Part III (discussing the Supreme Court plausibility standard).

174. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (discussing agency principles and setting forth elements of the control test).

175. See *id.* at 323 (including “the extent of the hired party’s discretion over when and how long to work” as elements suggesting control).

176. See Maya Kosoff, *Stop Complaining About Uber’s Surge Pricing*, BUS. INSIDER (Nov. 1, 2015), <https://www.businessinsider.com/uber-surge-pricing-on-new-years-eve-2015-10> [<https://perma.cc/QG4R-7CMN>] (“Surge pricing happens when there’s a high demand for Uber vehicles in a particular area. During times of high demand—on weekend nights, on holidays, or during bad weather—Uber enacts surge pricing, which charges a multiplier on every fare during busy times. Uber says that by raising its prices, it encourages its supply—drivers—to get out on the road to keep up with increased demand.”).

B. *Where Work Performed*

Plaintiffs should also allege any facts related to where the work was performed. The exact location where one performs the job can substantially impact the nature of the work. Whether one performs their work primarily in an office building, in a car, or in a customer’s home, the exact location of where the work duties are performed will go directly to the question of control.¹⁷⁷ Where an employer has more oversight over a worker, and exercises more supervision over day-to-day activities, the more likely it is that an employment relationship will be created.¹⁷⁸ Supervision can occur in many ways, however, and a supervisor need not *physically* oversee a worker to exercise control over a particular relationship.¹⁷⁹

C. *How Often Work Occurs*

Plaintiffs should further assert in the complaint how often the work occurs. This is a critical inquiry in the technology sector. Many workers in the platform economy will use the particular job as a way to supplement their primary income from another source. It is thus important to allege whether the employment is part time in nature or whether it should be considered more of a full-time job. Where a worker spends fifty to sixty hours a week working for a particular employer, that employer will have far more control over that particular relationship. And such an employee would be far more likely to satisfy the control test articulated by the Supreme Court in *Darden*.¹⁸⁰

D. *Manner of Work*

The plaintiff should further set forth clearly in the complaint the manner in which work is being performed in the technology sector. This

177. See *Darden*, 503 U.S. at 323–24 (including “the location of the work” as a consideration in the control test).

178. See generally *id.*

179. Cf. Carlson, *supra* note 8, at 340–41 (“One might measure control, as the courts always have, by looking to an employer’s direct supervision over and express instructions to the worker in the performance of his work But does it follow that the *absence* of supervision and express instructions should indicate independent contractor status? A lack of direct supervision . . . might be due to [other factors such as] . . . the employer’s trust in the worker, earned by many years of experience and good work.”).

180. See *id.* at 299, 340–41 (including “how long” an individual works as a consideration of control). As paragraphs twenty-eight and thirty-two in the model *Bradshaw* complaint set forth in Appendix A (and discussed *infra*) show, the plaintiff in that case expressly stated that Mr. Bradshaw worked between thirty and sixty hours per week for the ridesharing company. See *infra* app. A.

is critical as this emerging industry presents many opportunities for employment that have never before existed.¹⁸¹ Some federal courts may be unfamiliar with certain jobs that exist in the platform economy, and a concise and accurate description of the type of work being performed is critical for the complaint. The manner of the work performed goes specifically to the control question as well.¹⁸² How the job is done, including the specific requirements imposed by the company, demonstrates how much supervision is involved in the worker's day-to-day activities.

E. Pricing/Cost Information

The pricing model is an often forgotten—yet critical—aspect of the employment relationship. How the pricing is set reveals much about whether a worker is seen as an employee. Independent contractors set their own pricing (and often their own hours). Employees, however, rely on the business to establish what rate customers will pay.¹⁸³ Again, these are general guidelines developed over time. A house contractor will typically provide a quote to a customer based on their own experience and skill set, whereas an employee at McDonald's will allow the business to establish the prices paid for particular menu items. These examples are obviously at the extremes, however, and again the platform economy creates some uncertainty in this area.¹⁸⁴ Nonetheless, pricing is an important factor to examine and often reveals where the true control exists in the working relationship between the business and individual performing the job.

F. Any Other Factors Related to Control

As clearly discussed throughout this Essay, the platform-based economy is new, still emerging, and evolving in many ways. The industry itself places a high value on new ideas and different ways to reach customers and potential clients. It is impossible to fashion a test here that would be directly applicable to every company in the technology industry,

181. See generally Seiner, *Tailoring Class Actions*, *supra* note 11 (discussing the importance of the manner in which work is being performed in determining the existence of an employment relationship in technology sector cases).

182. See *Darden*, 503 U.S. at 323–24 (discussing control factors for employment).

183. Means & Seiner, *supra* note 113 (discussing the importance of pricing models in evaluating employment status in the on-demand economy).

184. See Heather Somerville, *True Price of an Uber Ride in Question as Investors Assess Firm's Value*, N.Y. DAILY NEWS (Aug. 23, 2017), <http://www.nydailynews.com/news/wires/news/business/true-price-uber-ride-question-investors-assess-firm-article-1.3435439> [<https://perma.cc/8JFB-4NLZ>] (“The new [Uber pricing] system also uses an algorithm to better price rides to minimize losses.”).

as well as one that would capture future businesses in this area. Indeed, there can be little doubt that the sector will look far different in five years from how it appears today. Thus, the factors set forth here are important guidelines for establishing where control lies in the working relationship,¹⁸⁵ but the proposed model does not purport to be an all-inclusive test. It is therefore important to have some type of catch-all provision that would allow plaintiffs to assert certain other facts specific to their employment relationship that are suggestive of control.¹⁸⁶ These factors could represent any information that would further help a court to determine whether a worker is an employee or an independent contractor.

Perhaps more importantly, this final factor is a reminder to plaintiffs to take a step back and look more holistically at the facts of the case to determine if there are any other elements that should be alleged. In the face of *Twombly* and *Iqbal*, plaintiffs must look beyond conclusory allegations to more broadly represent early on the nature of the employment relationship and any supporting facts.¹⁸⁷ Thus, as no test is all inclusive, plaintiffs should consider alleging other facts and should be encouraged to assert any information in the case which suggests that the employer has more control in the working relationship.

In summary, plaintiffs should plead as many supporting facts as possible in a technology sector complaint. They should outline facts specific to their working experience which help support the business's control over the working relationship. They should be as concise as possible, avoiding any "contradictory" statements in establishing the claim.¹⁸⁸

185. See Carlson, *supra* note 8, at 339 ("What is it, then, that distinguishes employer control over employees from employer control over independent contractors? The answer of the courts has been that an employer controls the details of an employee's work, but only the *results* of a contractors work.").

186. See *Darden*, 503 U.S. at 323–24 (discussing agency principles and control factors for employment).

187. See *supra* Part III (discussing the plausibility test developed in Supreme Court caselaw). Beyond establishing the elements of the employment test, however, plaintiffs should make sure to satisfy the other requirements of the claim. They should thus make sure to provide facts supporting the argument that a violation of an employment statute has occurred—whether under federal or state law. This analysis is well beyond the scope of this Essay, which is limited to the question of analyzing the existence of an employment relationship in the technology sector—not whether a violation of the law itself has occurred.

188. See *supra* section IV.B (discussing lower courts' dissatisfaction with contradictory statements in technology sector complaints).

G. *The Bradshaw Complaint—An Illustrative example*

The model proposed here may be a bit abstract, and it can be helpful to examine an actual technology sector pleading that implicates a worker's employment status. In *Bradshaw v. Uber Technologies, Inc.*,¹⁸⁹ the ridesharing company did *not* argue that the plaintiffs had insufficiently pled their employment relationship with the business.¹⁹⁰ The federal district court noted that:

[i]n the motion for judgment on the pleadings, Defendants do not take issue with Plaintiff's pleading sufficient facts to establish that they were his employer for purposes of [federal wage/hour law]. Defendants contend, however, that Plaintiff failed to plead sufficient facts to support his contention that he was paid less than the statutory minimum wage or that he was entitled to overtime pay.¹⁹¹

The detailed nature of this complaint helped the worker in this case to establish an employment relationship with Uber. Thus, the *Bradshaw* complaint includes highly detailed factual allegations that are set forth in Appendix A. This detailed complaint alleges general facts supporting the workers' employment status and specific facts setting forth the plaintiff's individual experience with Uber.¹⁹²

Technology sector workers should examine the *Bradshaw* complaint when drafting their own pleadings in a similar case. The ideal allegations would plead not only general facts concerning the business's relationship with workers, but it should further state facts supporting the individual's relationship with the company. Additionally, the ideal complaint would frame these facts in the context of the proposed framework set forth in this Essay, using the elements set forth as a guide to including all of the relevant facts. While the *Bradshaw* complaint does not perfectly model the approach suggested here, it is nonetheless an excellent example of the type of detailed pleadings sufficient to allege an employment relationship in the technology sector. While not perfect, then, the attached complaint is currently the best attempt by a plaintiff to demonstrate that such a working relationship exists in a platform-based business. It thus provides a nice template—combined with the proposed framework set forth here—for technology sector workers to consider when preparing a complaint in this area.

189. No. CIV-16-388-R, 2017 WL 2455151, at *8 (W.D. Okla. June 6, 2017).

190. *Id.*

191. *Id.*

192. For the purpose of brevity, this section does not include all of the facts alleged in the *Bradshaw* complaint. Rather, this detailed complaint is attached in Appendix A. *Infra* app. A. Again, while the *Bradshaw* complaint does not identically mirror the factors set forth in the proposed framework, it is one of the closest examples of such an ideal pleading for platform based employment.

V. IMPLICATIONS OF THE PROPOSED STANDARD

This Essay has examined many of the current cases in the federal courts analyzing who is an employee in technology-based cases. Synthesizing this case law, this Essay proposes an analytical framework for pleading these technology sector claims. As noted throughout this Essay, this approach is not intended to be exhaustive and should serve merely as a guideline for approaching these types of claims. As with any framework, there are a number of benefits and drawbacks to analyzing cases under a more fixed approach. It is worth highlighting some of those implications here, but it is also important to note that this test should never be applied in an overly rigid way. Indeed, the test itself specifically incorporates flexibility into the factors enumerated.¹⁹³ And, as seen in the *Bradshaw* complaint attached here, there may be many ways to successfully plead a case outside of (or in conjunction with) the proposed model.

Perhaps the greatest benefit of the framework proposed here is the ability it provides the courts to better understand whether there are any shortfalls in a particular claim. As demonstrated in the cases above, the courts have taken highly varied approaches with respect to analyzing these types of technology sector cases. The courts have been openly frustrated with the lack of guidance they have been given in this area, struggling to fit the square peg of the evolving modern economy into the round hole of existing—and outdated—caselaw and legislation.¹⁹⁴ The approach suggested here gives the courts a template from which to work and to examine the types of factors necessary to establish an employment relationship in a platform based claim. The courts can thus compare the facts of the case before them against the framework proposed here in determining whether a complaint is sufficient to proceed. The approach proposed here specifically incorporates and navigates the Supreme Court plausibility caselaw, and further considers the recent platform-based decisions of the federal district courts. Thus, this framework provides an updated examination of the pleading requirements necessary for litigants to be permitted to proceed in the technology field. The courts, while understandably confused when considering these claims, will now have better guidance when undertaking this endeavor.

Similarly, this test assists both defendants and plaintiffs to better understand, evaluate and frame litigation in this area. Plaintiffs will have

193. *See supra* Part V (noting importance of taking holistic approach to pleading elements of control in technology sector workplace case).

194. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (determining who is an employee in the technology sector is like being “handed a square peg and asked to choose between two round holes”).

a template to use to help explore what facts to highlight in their claims. The test proposed here thus allows plaintiffs to work from a framework in setting forth the necessary elements for creating an employment relationship in the technology sector. Previously, plaintiffs were left with the general guidance provided in the Supreme Court's *Darden* decision of control and its many possible elements.¹⁹⁵ This framework has simply not been updated to reflect the evolving modern economy. The test proposed here attempts to do just that, incorporating the reality of platform-based work with the traditional test for control and common law agency principles.¹⁹⁶

In the same way, defendants can determine if there are any shortfalls in the case, and the proposed factors quickly establish what arguments can be made with respect to the lack of any employment relationship. Defendants can thus use the framework to quickly determine whether the workers involved in a platform-based claim are employees or independent contractors. Where an employment relationship does not appear to have been created, defendants can move to dismiss the claim.

The test proposed here would also bring greater certainty to this area of the law.¹⁹⁷ Given the confusion which currently exists, some general guidelines are long overdue. Through more certainty in this area, the likelihood that technology-based cases will settle is greatly enhanced.¹⁹⁸ This has the additional benefit of reducing the amount of litigation in the area, benefiting both parties as well as the judiciary. More certainty and more settled law in a particular field inherently leads to greater settlement numbers.¹⁹⁹ Reduced litigation financially benefits all parties and allows the courts to focus more closely on those claims where true legal disputes exist.

Working from a common framework, this model also allows plaintiffs to better streamline their allegations. Rather than throwing everything at a complaint to see what sticks, plaintiffs will have a standard model to help better focus their claims. More streamlined, straightforward

195. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (discussing agency principles and control factors for employment).

196. See *supra* Part V (discussing the *Darden* control factors in the context of technology sector workers).

197. Where there is greater certainty in the law, there can be additional comfort given to potential startups in the technology industry. The uncertainty surrounding state and federal employment laws can undoubtedly act as a barrier for many aspiring technology businesses. Where the rules are more clearly established, potential businesses will be much better able to assess the potential risk, and benefits, of incorporating.

198. See, e.g., Joseph A. Seiner, *Commonality and the Constitution: A Framework for Federal and State Court Class Actions*, 91 IND. L.J. 455, 490 (2016) (addressing the benefits of certainty in the legal system); Stewart, *supra* note 34, at 662 (“The more certain the law—the less variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely litigation will occur because of differences in predicted outcomes.”).

199. See Seiner, *supra* note 198, at 490; Stewart, *supra* note 34, at 662.

complaints will allow cases to move forward much more quickly and more readily provide notice to defendants of the allegations against them. And, through this analytical framework, plaintiffs will much more easily be able to identify and assert the factors necessary to establish the existence of an employment relationship.

Though the model suggested here would lead to many efficiencies for plaintiffs, defendants, and the courts, there are nonetheless certain drawbacks. Perhaps the greatest concern raised by the use of this test would be that the courts would apply it too rigidly. As seen in the federal court decisions issued shortly after the creation of the plausibility standard in *Twombly*, many of the federal courts—particularly in the civil rights context—used the new standard to heighten the pleading bar and dismiss otherwise legitimate claims.²⁰⁰ With any test, then, the possibility exists for the courts to use a given standard as a reason to dismiss a particular claim. Some courts may thus consider the proposed standard to create a heightened bar, and not apply it with the flexibility that was intended. Though the concern certainly exists that the courts would apply the proposed framework too rigidly, the same courts would likely find other reasons to dismiss the case even in the absence of the standard suggested here.

Similarly, given the evolving modern economy, there can be no one-size-fits-all approach. It is entirely possible that many claims will arise where this model is simply insufficient or does not work for the particular case. It is impossible to envision all of the platform-based cases that can arise, or how technology companies may evolve in the future.²⁰¹ The courts and litigants must be careful, then, to consider this test simply as a broad guideline. It is not a standard of proof, and there are likely to be situations where the elements do not fit the facts of the particular case. Additionally, caution should be used when attempting to apply the factors proposed here to the more traditional brick-and-mortar type employment relationships. While the factors would still be relevant in those types of situations, the test proposed here was created with technology sector claims specifically in mind.

Finally, given the number of factors proposed above, there is also a danger that plaintiffs will attempt to over-plead their claims. Alleging all of the factors could enhance the pure size of many complaints, which

200. See *supra* Part III (discussing rigid application of the Supreme Court’s plausibility standard in the employment and civil rights contexts).

201. See, e.g., Forbes Tech. Council, *Upcoming Technology, Ten Trends to Watch in the Next Five Years*, FORBES (Dec. 27, 2016), <https://www.forbes.com/sites/forbestechcouncil/2016/12/27/upcoming-technology-10-trends-to-watch-in-the-next-five-years/#210c260e2fd1> [<https://perma.cc/G6Q4-WQW5>] (examining changes that may occur in the gig sector). Similarly, it is impossible to predict what technology-based jobs will even look like in the future.

would lead to some long-winded claims that would be difficult for the courts to assess. Given the number of elements proposed above, it is therefore fair to have some level of concern that the proposed test will lead to lengthy complaints that are too large and cumbersome. While this is certainly a possibility that should be acknowledged, by analyzing more precise elements targeted specifically at the exact question at issue, plaintiffs are *more* likely to focus in on the relevant factors of a case. While there is no way to completely prevent inartful pleading, in practice, litigants will be able to use the elements of the proposed framework to prepare a more streamlined, concise complaint that identifies the critical areas at issue.

No test is perfect. And any proposed standard certainly comes with some risk. At the end of the day, however, given the level of frustration and confusion in this area, some guidance is undoubtedly necessary for pleading platform-based claims. This guidance should be applied in a flexible manner, and the test proposed above attempts to capture the many different factual scenarios that could exist in a technology-based case. The test is specifically targeted at identifying whether a worker is an employee, and it attempts to weed out those claims where only independent contractors are involved.²⁰² The test proposed here provides definitive judicial efficiencies, should lead to more focused, careful litigation, and allows the courts to focus on those cases where litigation of the facts and law is necessary. With almost all litigants currently confused as to how to properly evaluate a complaint in this area,²⁰³ more certainty in this field of the law is needed. The framework proposed here provides that certainty. This Essay also seeks to foster further debate on the topic, as well as additional discussion of the requirements necessary for technology sector workers to sufficiently allege an employment relationship.

202. It is worth emphasizing that the analytical framework proposed here only attempts to answer the question of whether there is sufficient evidence in a technology sector case to create the existence of an employment relationship. The model was not intended to apply to the more traditional brick-and-mortar employment relationships. Similarly, the test does not attempt to address the more complex question of whether there is an actual violation of a state or federal employment law. Rather, the proposed-framework only seeks to answer the more basic question of whether the worker in the platform based case satisfies the definition of being an employee. *See generally*, Joseph A. Seiner, *Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053, 1077-78 (2006) (discussing the requirements to bring an employment discrimination claim).

203. *See supra* Part IV (discussing different approaches of litigants and the courts to analyzing the employment issue in the technology sector).

CONCLUSION

As this Essay demonstrates, there is widespread confusion and conflicting federal court opinions on the question of worker classification in the technology sector. The courts have always struggled with defining the employment relationship, and the new platform-based jobs in the modern economy have only complicated this inquiry. As this Essay shows, the federal courts have issued varied opinions on the issue of worker classification in the platform economy. The need for guidance in this area has never been greater, and this Essay attempts to provide some fundamental ground rules for litigating in this field. No model is perfect, and no framework can capture every factual scenario in this evolving industry. The guidance proposed here, however, provides some clarity to an otherwise confused area of the law. The law must adapt and evolve with the changing economy, and new rules are needed to define employment outside of the traditional brick-and-mortar working relationship. Looking to the realities of technology sector work, this Essay—for the first time—attempts to provide this new definition. Hopefully, this Essay will spark a dialogue as to how employment should be characterized in this new economy and how we can help better secure the federal and state workplace protections that are now at risk for many workers in this emerging industry.

Appendix A:
Selected Portions of Plaintiff’s Complaint in *Bradshaw v. Uber Technologies*²⁰⁴

2. Uber, a company valued at more than \$50 billion, has and continues to take unfair advantage of its financially struggling Uber Drivers by terming them “Independent Transportation Providers.”²⁰⁵ Only in the counterfactual world could Uber Drivers be considered “independent.”²⁰⁶ Uber Drivers lack discretion in the performance of their employment relationship with Uber, and have no independence apart from Uber in performing their employment with Uber.²⁰⁷

3. Uber Drivers are able to secure fares only through Uber’s mobile application, which governs every aspect of Uber Drivers’ transportation services for Uber.²⁰⁸ When Uber restricts a Driver’s access to Uber’s mobile application, Uber effectively terminates the Driver, as the Driver is unable to work for Uber or Uber’s users. Uber’s misclassification of its Drivers as non-employees of the company has resulted in Uber Drivers’ inability to earn minimum wage.²⁰⁹

4. Plaintiff alleges that he and other Uber Drivers are employees, and as employees, are entitled to basic wage protections such as expense reimbursement, overtime pay, rest- and meal-breaks, and other benefits that attach to employees that do not likewise attach to independent contractors.²¹⁰ Uber misclassifies its drivers as independent contractors to evade these and other protections of Oklahoma law as well as the Fair Labor Standards Act.²¹¹

5. Moreover, Uber intentionally misrepresents to the public how it compensates its Drivers so that it can retain a disproportionate

204. Complaint, *Bradshaw v. Uber Techs., Inc.*, No. CIV-16-388-R, 2017 WL 2455151 (W.D. Okla. June 6, 2017).

205. *Id.* at 1.

206. *Id.*

207. *Id.*

208. *Id.* at 2.

209. *Id.*

210. *Id.*

211. *Id.*; 29 U.S.C. §§ 201–219 (2012).

percentage of the fares generated by Uber Drivers.²¹² Uber markets its rides as gratuity-included, but Uber does not remit the gratuity (or an amount in-kind) to Uber Drivers.²¹³ Uber effectively takes the tips.²¹⁴ To worsen the reality for these Drivers, Plaintiff and members of the putative class finance all expenses related to their employment with Uber (e.g., gas, cost of insurance, deductibles, and vehicle maintenance, among others).²¹⁵

18. Defendants employ(ed) Plaintiff and members of the Class, exercised control over their wages, their hours, and their working conditions.²¹⁶

19. Defendants regulate every aspect of Uber Drivers' job performance.²¹⁷

20. As with other employers, Defendants required Plaintiff and Uber Drivers to submit to background checks, and to disclose banking information and residence, as well as social security numbers.²¹⁸

21. Uber requires Plaintiff and Uber Drivers to register their cars with Uber and the vehicles cannot be more than ten years old.²¹⁹

22. Uber Drivers do not pay Defendants to use Defendants' intellectual property, the mobile application. Uber Drivers do not, in the strictest sense, pay Uber a fee as consideration for use of Uber's mobile application.²²⁰

23. Rather, Defendants compensate their Uber Drivers based upon the employment arrangement that Uber unilaterally imposes upon its Drivers, as with any employment-based business model.²²¹

212. *Id.*

213. *Id.*

214. *Id.* at 2–3.

215. *Id.*

216. *Id.* at 6.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

24. Uber Drivers are not engaged in a business distinct from Uber's business.²²² The Uber application ensures this.²²³ Through the application, Uber controls and directly manages Uber's entire transportation service, critically, inclusive of its Drivers.²²⁴

25. Plaintiff's and Uber Drivers' ability to earn income depends solely on Uber and not in any way on an Uber Driver's particular skill or acumen, or on any managerial or other discretionary job skill.²²⁵

After these general allegations about Uber drivers, the *Bradshaw* plaintiff included specific facts about his personal work relationship with Uber:

26. Plaintiff is a retired Oklahoma State Trooper.²²⁶

27. In February of 2014, Plaintiff began working for UberX. He is still currently employed as an Uber Driver.²²⁷

28. On average, Plaintiff drives thirty (30) hours each week and Uber compensates him on a weekly basis.²²⁸

29. In 2015, Plaintiff drove 40,000 miles.²²⁹ He grossed \$23,872.00, but after paying his employment related expenses, which using the federal rate of 57.5¢ per mile, were \$23,000, Plaintiff netted only \$872.00 for the year, even though he worked 1,500 hours that year.²³⁰ In other words, he made just 58 cents per hour.²³¹ In addition, the \$23,000 for expenses did not include car washes, which cost him \$300 per year, as well as satellite radio, which cost him \$200 per year.²³²31. When Plaintiff first started, after Uber retained its portion of the fare but before paying his employment related expenses, Plaintiff earned between \$500 and

222. *Id.* at 7.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

\$600 per week.²³³ Plaintiff's expenses, including gas, insurance, lease payments, and car repairs, were approximately 30% of any amount earned (\$150 to \$180 each week).²³⁴

32. For some time during his employment, Mr. Bradshaw worked in excess of 50 to 60 hours a week.²³⁵ At all times, Uber failed to pay overtime compensation.²³⁶

33. The terms and conditions of Plaintiff's employment have changed drastically since he first was hired by Uber.²³⁷ The changes were instituted by Uber, without any input from Plaintiff or other drivers.²³⁸

34. Initially, Plaintiff and other drivers earned \$1.50 per mile.²³⁹ Now, he and other Uber Drivers earn only .70¢ per mile.²⁴⁰ Throughout his employment, Plaintiff has been subject to several price reductions implemented at the sole discretion of Uber.²⁴¹

233. *Id.* at 7–8.

234. *Id.* at 8.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*