**INDEPENDENT CONTRACTORS OR EMPLOYEES?   
WHY MEDIATION SHOULD BE UTILIZED BY UBER AND ITS DRIVERS TO SOLVE THE MYSTERY OF HOW TO DEFINE WORKING INDIVIDUALS IN A SHARING ECONOMY BUSINESS MODEL**

**Ethan Rubin\***

1. Introduction

“Certain things I was told to do as an Uber driver basically directs you to the fact that they’re treating you as an employee, even though they say you’re an independent contractor,” stated Levon Aleksanian, who was with Uber between August 2014 and September 2015.[[1]](#footnote-2) Mr. Aleksanian is one of two Uber drivers in New York who broke free of their status as independent contractors after a New York court ruling in October 2016. The dispute over whether drivers are independent contractors or employees began in 2013, when Uber drivers from California and Massachusetts filed a class action lawsuit seeking pay and benefits from Uber.[[2]](#footnote-3) The Uber drivers based their claim on the allegation that they were employees, which challenged Uber’s definition of its drivers as independent contractors. In 2016, after three years of litigation, the two sides negotiated a settlement.[[3]](#footnote-4) However, the settlement did not last long, as a federal judge rejected the settlement for not adequately compensating Uber drivers.[[4]](#footnote-5) Third party viewers considered the settlement a victory for Uber because the company was permitted to label its drivers as independent contractors, which allows the company to avoid overtime pay, health benefits,[[5]](#footnote-6) and other such benefits.[[6]](#footnote-7) Even before the agreement was overturned, it was reported through surveys that a majority of Uber drivers were not content with the results.[[7]](#footnote-8)

In addition to the ongoing California and Massachusetts litigation, Uber is now also facing a class action lawsuit from its New York drivers.[[8]](#footnote-9) It is evident from all this strife that a majority of Uber drivers are not satisfied with their current status as independent contractors.[[9]](#footnote-10) Nevertheless, Uber has refrained from deeming its drivers as full-time employees[[10]](#footnote-11), because in its opinion, it would defeat the company’s mission.[[11]](#footnote-12) Uber spokesman Matt Wing stated, “As employees, drivers would lose the personal flexibility they value most—they would have set shifts, earn a fixed hourly wage, and be unable to use other ridesharing apps.”[[12]](#footnote-13) From Uber’s point of view,[[13]](#footnote-14) the purpose of the Uber application (“app”), and what keeps the company so successful, is the fact that its drivers are independent contractors.[[14]](#footnote-15) According to Uber,[[15]](#footnote-16) the business plan of the company is to allow the ordinary person to sign in whenever and wherever in order to make extra money during their “free” time.[[16]](#footnote-17) Without a doubt, the two sides stand far apart on the issue and even though a settlement was reached, negotiation has not solved the issue thus far.[[17]](#footnote-18) A federal judge struck down the initial settlement because the court found the agreement did not properly compensate the drivers for the amount they could have pursued in litigation.[[18]](#footnote-19) The purposes of this Note will be threefold; first, this Note will explore the background issues that arise in sharing economy businesses; second, this Note will suggest employing dispute resolution to find solutions; and third, this Note will theorize why dispute resolution can help a federal judge find a fair and equitable solution for both parties.

In an effort to do so, each section of this Note will address a different issue of the ongoing disputes between Uber and its drivers and suggest potential solutions for both parties. Section II focuses on the differences between Uber and its drivers’ points of view on whether Uber drivers should be considered employees or independent contractors via National Labor Relations Board (“NLRB”) terminology. Section III discusses why it is difficult to label Uber and its drivers under traditional employment law terminology, as well as failures to do so through negotiation, litigation, and arbitration. Section IV proposes that with an appointed mediator, the Uber cases can be handled in the most effective and fair way for both Uber and its drivers, because in a new type of economy with little precedential case law and few applicable statutes, it is best to leave the outcome in the hands of market participants. [[19]](#footnote-20) In conclusion, Section V briefly outlines why this note proposes that mediation is a better alternative to arbitration; why mediation is the best alternative for now; and why it is so important that this dispute is resolved by Uber and its drivers rather than by an arbitrator or judge.

1. Background
2. *Uber Statistics*

In December 2014, it was recorded that Uber had a total of 162,037 “active drivers” complete at least four or more trips for services.[[20]](#footnote-21) Uber released internal data in January 2015 showing their drivers are making more money as personal drivers from the app than professional taxi drivers do—$17 an hour in Los Angeles,[[21]](#footnote-22) $23 an hour in San Francisco,[[22]](#footnote-23) and $30 an hour in New York.[[23]](#footnote-24) In addition, Uber drivers service more than eight million people; and add an average of 50,000 new drivers a month.[[24]](#footnote-25) With these numbers on the rise, the debate about what companies like Uber mean for the economy and whether the work it offers is sustainable for the tens of thousands of people who have signed up has increased significantly.[[25]](#footnote-26)

Some view Uber’s success and growth as a hopeful future of work in a digital age where anyone with a car can be their own boss, choose their own hours, and determine their own income based on schedule flexibility.[[26]](#footnote-27) On the other hand, critics see Uber’s business platform as a way for the company to exploit drivers by paying them as independent contractors with no guarantees and no benefits.[[27]](#footnote-28) This had led to interesting results; 71% of Uber drivers in a survey responded they had boosted their income and financial security since joining,[[28]](#footnote-29) but the number of organized protests against the company because of fare cuts has increased.[[29]](#footnote-30) As a result of Uber having so many drivers that use the platform in so many different ways spread across the country, it is difficult to come to a conclusion on what definition is most suitable and will leave the majority of the Uber drivers content. Nevertheless, there are groups of drivers both domestically[[30]](#footnote-31) and abroad that are fighting for their right to employment benefits.[[31]](#footnote-32)

1. *For Now, in 2017, Uber Drivers in the United Kingdom, are Company Employees— Not Independent Contractors*

In October 2016, a British court issued a landmark ruling that officially labeled United Kingdom’s (“UK”) Uber drivers as employees,[[32]](#footnote-33) which entitles UK Uber drivers to the same employment rights as other full time employees in Britain.[[33]](#footnote-34) This trial court decision was the result of a case brought against Uber by two drivers backed by the British Trade Union (“GMB”).[[34]](#footnote-35) The ruling by the UK judge entitled Uber drivers to earn the national minimum wage, holiday pay, sick pay, and other benefits. [[35]](#footnote-36) Uber unsuccessfully argued that it was a “technology platform” that enables users to schedule transportation, which also does not function as a transportation provider because transportation services are provided by “independent third party contractors who are not employed by Uber.”[[36]](#footnote-37) The reason for the argument was so Uber would not be obliged to provide the kinds of statutory employment rights full-time workers would expect.[[37]](#footnote-38)

Maria Ludkin, the union’s legal director, said the case represented “a monumental victory”[[38]](#footnote-39) and claimed it would “have a hugely positive impact”[[39]](#footnote-40) for Uber’s drivers, of whom there are around 40,000 in Britain.[[40]](#footnote-41) She went on to further state,

Uber drivers and other directed workers do have legal rights at work. The question for them now is how those rights are enforced in practice. The clear answer is that the workforce must combine into the GMB union to force the company to recognize these rights and to negotiate fair terms and conditions for the drivers.[[41]](#footnote-42)

Uber, for now, is sticking to its independent contractor argument, and its UK general manager Jo Bertram has vowed to appeal the court’s decision.[[42]](#footnote-43) She stated,

Tens of thousands of people in London drive with Uber precisely because they want to be self-employed and their own boss. The overwhelming majority of drivers who use the Uber app want to keep the freedom and flexibility of being able to drive when and where they want. While the decision of this preliminary hearing only affects two people we will be appealing it.[[43]](#footnote-44)

However, the court in its ruling insisted that, “the notion that Uber in London is a mosaic of 30,000 small business linked by a common ‘platform’ is to our minds faintly ridiculous. Drivers do not and cannot negotiate with passengers … they are offered and accept trips strictly on Uber’s terms.”[[44]](#footnote-45) Ms. Ludkin in response stated, “this judgment in no way affects driver flexibility, it merely guarantees them basic employment rights. Uber’s decision to appeal is purely related to protecting their ample profits and nothing to do with protecting the drivers.”.[[45]](#footnote-46)

In addition to Uber appealing, Uber is currently conveying to its drivers that the decision only affects the two drivers who went before the tribunal. In an email sent to drivers after the ruling, Bertram wrote, “… it’s very important to note that today’s decision only affects two individuals and Uber will be appealing it. There will be no change to your partnership …”[[46]](#footnote-47)

Ms. Ludkin strongly responded to the email by stating,

Even after the judge found Ms. Bertram’s evidence lacked credibility and described her as ‘grimly loyal,’ she continues to try and advance a misleading and false set of facts. The Uber judgment applies to 40,000 UK drivers, not two. Ms. Bertram might be wise to think how this judgment reflects on her before she issues any more statements.[[47]](#footnote-48)

Uber will not be ending the fight at this trial court as they plan to appeal the decision because of its detrimental impact on its business platform. [[48]](#footnote-49) Based on the foregoing, Uber should hope they resolve their disputes with its American drivers as soon as possible or it may face the same fate. In order for Uber to prevent the same issues in the United States, it would be more strategic for the company to resolve this dispute through alternative dispute resolution–so they do not have to risk a bad loss.

1. *The Evolving Use and Perception of Alternative Dispute Resolution*

In 2011, for the second time in fifteen years, the leading counsels at many of the world’s largest corporations participated in a landmark survey of perceptions and experience with alternative dispute resolution (“ADR”), including mediation, arbitration, and other third-party intervention strategies intended to produce better ways of managing and resolving conflict.[[49]](#footnote-50) The survey was conducted by Cornell University’s Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution (“CPR”) for Fortune 1000 companies.[[50]](#footnote-51) This survey in addition to perception and experiences with ADR, included approaches to avoid litigation that may be more economical, less formal than a courtroom, more private than court litigation, and provide more satisfactory and durable results.[[51]](#footnote-52) When these attorneys’ responses were compared to those of the mid-1990s, substantial evolutionary trends were observable.[[52]](#footnote-53) Now, more corporations have embraced ADR methods, particularly mediation, and foresee its continuing use for a wide spectrum of disputes.[[53]](#footnote-54) One reason for this is that corporate attorneys believe binding arbitration is not as effective as it used to be and consequently fewer companies are relying on arbitration to resolve its disputes.[[54]](#footnote-55) As a result, the corporate bar is edging away from commercial arbitration and is putting decision-making back in the hands of market participants through mediation.

1. *The Growth of Mediation*

As a result of the survey, mediation has received considerable attention from public tribunals, practicing attorneys, scholars, and coverage by the media.[[55]](#footnote-56) Additionally, many attorneys are encouraging or directing companies to mediate cases in litigation;[[56]](#footnote-57) courts are regularly called upon to interpret and enforce varied, often complex, contractual dispute resolution schemes.[[57]](#footnote-58)

The survey offered important new insights regarding changes in the way large companies handle conflicts and it evidences key trends including a general shift in corporate orientation away from litigation and toward ADR.[[58]](#footnote-59) Most importantly, for the purposes of this Note, it highlights the evolution of mediation. Mediation is being used significantly more than it was in the mid-1990s, and today, appears to be everywhere among major companies.[[59]](#footnote-60) A major reason for this, as the survey shows,[[60]](#footnote-61) is that there is evidence of corporations’ growing sophistication and increasing emphasis on control of the process of managing conflict.[[61]](#footnote-62) Mediation gives companies the ability to control the process because it puts the dispute in the hands of the parties rather than a judge or an arbitrator.[[62]](#footnote-63)

Indications of corporations’ newfound attention include reliance on early neutral evaluation and early case assessment.[[63]](#footnote-64) These new approaches specifically focus on deliberate conflict management in its early stages as well as control over the selection of third party neutrals and increasing sophistication in the use of ADR.[[64]](#footnote-65) This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to conflict resolution in disputes arising in employment law.[[65]](#footnote-66) Employment disputes have seen a significant contrast between the number of market participants that resolve conflict in mediation and arbitration.[[66]](#footnote-67) The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints.[[67]](#footnote-68) Indications based on the survey are that the great majority of employment disputes are resolved informally in the early stages and rarely are dealt with in arbitration or litigation.[[68]](#footnote-69) Based on this data, it seems Uber’s most strategic method to resolve this issue is through mediation and not risking arbitration or litigation. In addition, Uber and its drivers are in an employment dispute, which according to the survey is dealt with more efficiently through mediation than other methods.

1. Discussion
2. *History of Defining Employees and Independent Contractors*

As of 2017, negotiations have not been successful because of the continuous dispute of whether drivers can be considered employees rather than independent contractors. The Supreme Court has recognized that the definition of the term “employee” from the National Labor Relations Act’s (“NLRA”) does not “explicitly define the term, and has therefore held that the National Labor Relations Board (“NLRB”), the entity that applies the definition to working individuals in the United Sates, has the primary responsibility to make that determination.[[69]](#footnote-70) However, the Supreme Court has also held that, generally, an employee is one who works for another for hire and that, in defining what constitutes an employee, the NLRB’s decision must not clash with the NLRA’s overall purpose of encouraging collective bargaining.[[70]](#footnote-71) Therefore, the term “employee” is normally interpreted liberally.[[71]](#footnote-72)

Nonetheless, the NLRA’s definition does impose some limitations on the term by stating; “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice” is an employee, so long as he “has not obtained any other regular or substantially equivalent employment.”[[72]](#footnote-73) As a result of this definition, one of the exceptions to those who can be considered an employee for NLRA purposes is an independent contractor because an independent contractor is not inhibited by labor disputes or unfair labor practices.[[73]](#footnote-74) The Court in *NLRB v. Hearst Publs., Inc.* held that in determining who is an employee, the NLRB is not bound by traditional common law concepts.[[74]](#footnote-75) After the 1947 amendments to the Act, now referred to as the Taft-Hartley Act, and to resolve reoccurring confusion, the NLRB came up with the “right–of–control test” to help differentiate between independent contractors and employees.[[75]](#footnote-76)

The NLRB stated under this doctrine that it is generally recognized that an employer– employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished.[[76]](#footnote-77) Conversely, an employer–independent contractor relationship exists where the control is merely limited to the result to be accomplished and does not apply to the method and manner of the services rendered.[[77]](#footnote-78) The Board then propounded several factors to help the determination, noting that the list is not a limitation.[[78]](#footnote-79) The important principles that the Board has expressed and would apply to Uber include: the right to hire and discharge; the permanence of the relationship; whether the work is part of the employer’s regular business; the extent to which the employer can control the details of the work; the method and determination of the amount of compensation; whether the person doing the work is engaged in an independent business or enterprise; and the parties’ belief as to the nature of the relationship created.[[79]](#footnote-80)

The traditional differentiation between an independent contractor and an employee is the difference between working independently or under the direction of an entity.[[80]](#footnote-81) For example, a dance instructor who selects their own dance routines to teach, locates and rent their own facilities, provides their own sound system, provide music and clothing, collect fees from customers, and is free to hire assistants is an example of an independent contractor.[[81]](#footnote-82) However, a dance instructor working in a health club where the club sets hours of work, the routines to be taught, and pays the instructor from fees collected by the club is an example of an employee.[[82]](#footnote-83) Although this distinction on its surface looks simple, this Note demonstrates how the Uber business model, which is based on a sharing economy, makes the distinction much more complicated with the Uber cases. A sharing economy is a hybrid of both the above examples because it encompasses traits of both an employee and an independent contractor.[[83]](#footnote-84) This is illustrated in the Uber cases—an Uber driver can set their own hours, drive the passengers they desire, and get payments routed through Uber, but, at the same time, an Uber driver also works for Uber, can work a full day’s work rather than a couple hours, and Uber takes a fee from each passenger.[[84]](#footnote-85) In addition, another argument as to why Uber has an employer-employee relationship with its drivers is because it provides an evaluation system of the driver’s services and the drivers’ function as a core to Uber’s central business operations.[[85]](#footnote-86)

1. *Are Uber Drivers Employees?*

Uber views the role of its drivers as independent contractors because it sees itself as a platform to connect willing passengers with willing independent drivers.[[86]](#footnote-87) The arrangement helps them avoid many significant expenses that taxi and other transportation companies are responsible to pay to their drivers.[[87]](#footnote-88) Classifying these drivers as independent contractors has allowed Uber to avoid numerous business related costs such as payroll taxes, health insurance, car maintenance, fuel, and Social Security obligations.[[88]](#footnote-89) The drivers that are against being labeled as independent contractors are in opposition because they want more job security and benefits that an actual employee would receive.[[89]](#footnote-90) Existing legal definitions to differentiate employees from independent contractors may be inadequate for addressing the modern labor market, including the emerging sharing economy, because they focus on more traditional business models.[[90]](#footnote-91)

Under the Fair Labor Standards Act (“FLSA”), the determination of whether someone is an employee or an independent contractor is based on an assessment of various factors known as the “economic realities test.”[[91]](#footnote-92) These factors link to six major questions: (1) whether the work being done is an integral part of the employer’s business; (2) whether the worker’s managerial skills affect their opportunity to make a profit or loss; (3) how does the worker’s investment compare to the employer’s investment; (4) does the work being performed require special skill; (5) is the relationship between the two permanent or indefinite; and (6) the nature and degree of the employer’s control in the relationship.[[92]](#footnote-93) By using this traditional test, Uber and other sharing economy business platforms fit all of the criteria for either an employment-employer relationship or an independent contractor-employer relationship. Uber drivers driving passengers to their destination is an integral part of Uber’s business and there is a degree of control because of the selection process and how Uber drivers collect fees.[[93]](#footnote-94) However at the same time, Uber drivers control their own profit and loss, there is no special skill required, and the relationship is only as permanent as the driver chooses it to be.[[94]](#footnote-95) This is a problem that not only Uber faces, but many participants in the sharing economy as well. The authors of the article *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees* suggested new legislation in order to clear the confusion of how to label working participants in sharing economies. They stated. “ . . . companies should be active in advocating for, and helping to shape, new laws that meet the needs of a new era of technology, that allow for new types of business opportunities, and that reflect the types of arrangements workers in today’s economy seek.”[[95]](#footnote-96)

A new statute written specifically for companies engaged in a sharing economy business model would be useful not only for the Uber cases, but for similar companies as well. Working only on precedents and traditional terminology, gives neither party a strong enough argument to prevail in litigation. As a result, this Note suggests it would be in the best interest of lawmakers to draft a new statute that labels such workers as “hybrids,”[[96]](#footnote-97) due to the overlap in characteristics of both employees and independent contractors in sharing economies. In describing how to classify hybrids for compensation and benefits, lawmakers would consider how “hybrids” engage in a sharing economy. Meaning, if an Uber driver chooses to only log in or out for a couple hours a week to make a few extra dollars, lawmakers would classify this “hybrid” as an independent contractor. However, if an Uber driver, with consent and knowledge of Uber, chooses to treat Uber driving as a full-time job, and works a 30-40 hour week,[[97]](#footnote-98) lawmakers would classify this “hybrid” as an employee. This flexibility, rather than a broad, overarching label, allows Uber to continue its business model and allows for those drivers that depend on Uber for employee benefits to receive those benefits. Since as of 2017 this law does not yet exist, mediation, a dispute resolution method that seeks middle grounds such as this proposed statute would provide is a better alternative to arbitration or litigation, which yields binary conclusions.

1. *Uber Disrupting the Law*

Uber is a prime example of a creative entrepreneurship disrupting the law and causing legal conflict. Traditionally, people would hail a taxicab on the street; now with Uber’s technology, people can rely on an Internet app to hail rides and schedule pickups electronically.[[98]](#footnote-99) In addition, traditional taxi services are highly regulated enterprises with government-licensed cars and full-time drivers; when on the other hand; Uber leverages part-time drivers who use their own cars, which allows practically anyone with a car and spare time to participate.[[99]](#footnote-100)

From a business perspective, Uber’s successful results are undeniable[[100]](#footnote-101) and they have created a thriving industry. After operating for less than four years in New York, there are already more cars affiliated with Uber on the streets of New York City than there are taxicabs.[[101]](#footnote-102) Uber was valued near $51 billion in its most recent investment round in 2017, tying Facebook as the highest-valued venture-backed company in history and reached the $50 billion milestone, two years faster than Facebook.[[102]](#footnote-103) In addition, Uber is currently the highest-valued venture-backed company in the US by a margin of roughly $40 billion.[[103]](#footnote-104) Uber has been widely recognized in the sharing economy industry and has beat out similar companies, like FlightCar and Airbnb, for all kinds of awards and recognitions.[[104]](#footnote-105)

From a legal perspective, Uber is creating a destructive legal conflict.[[105]](#footnote-106) Since Uber’s launch, it has faced many legal battles with its drivers and the cities trying to operate the company.[[106]](#footnote-107) As regulators grapple with how to handle Uber’s business model, traditional taxicab services continue to resist Uber’s presence.[[107]](#footnote-108) One Parisian taxi driver referred to Uber’s business practices as “economic terrorism”—and actively fights for the taxi industry through litigation.[[108]](#footnote-109) These taxicab drivers allege that Uber is engaged in unfair competition as an unlicensed taxi company[[109]](#footnote-110) that avoids expenses such as medallion fees,[[110]](#footnote-111) which can be hundreds of thousands of dollars for each licensed taxicab.[[111]](#footnote-112) Although in New York City virtually all of those medallions are in the hands of very few owners, there are still people who have to pay a substantial amount of money in order to participate in the transportation space that Uber is not paying to be a part of. Additionally, state and local government regulators challenge Uber’s compliance with a host of transportation and taxi regulations, such as insurance coverage minimums,[[112]](#footnote-113) driver background checks,[[113]](#footnote-114) and vehicle safety inspections[[114]](#footnote-115).

1. *Other Entrepreneurships Disrupting the Law*—*Examples of how the Sharing Economy has frustrated other areas of the Law*

It is important to recognize that Uber is not the only technology-based company that is facing difficulties with existing statutory and regulatory models in order to understand the complexity of the issue Uber and its drivers are currently engaged in. Entrepreneurship throughout time has threatened to upend the stagnant market through innovation and in the process it often frustrates existing laws.[[115]](#footnote-116) It is inevitable that when entrepreneurs create new industries it will simultaneously destroy the status quo.[[116]](#footnote-117) The reason for this is because the leading descriptions of entrepreneurship, both in theory and in practice, involve disruptive innovation and creative destruction, where entrepreneurs introduce new products or new business models that threaten existing market leaders.[[117]](#footnote-118) Tesla, an innovative manufacturer of electric cars, is another example of an entrepreneurship’s disruptive innovation.[[118]](#footnote-119)

Tesla is altering the way cars are sold to consumers by selling its cars directly to consumers over the Internet and through company-owned showrooms, rather than by going to a middleman and selling through an independently owned franchisee dealer. Though such direct sales practices are commonplace in most industries, direct sales of automobiles violate some states’ franchise and independent franchisee laws, many of which were initially established when Ford was providing cutting edge technology.[[119]](#footnote-120) As a result, some states have barred Tesla from even operating a showroom because the company refuses to sell its cars through a middleman.[[120]](#footnote-121)

Dealers in Massachusetts and New York argued that it is unfair for Tesla to sell directly to consumers[[121]](#footnote-122) because all traditional car manufacturers sell through third-party dealerships.[[122]](#footnote-123) In the dealerships’ view, Tesla should not be an exception.[[123]](#footnote-124) Tesla successfully argued, in both New York and Massachusetts, that it should be free to sell cars directly to consumers because Tesla has no independent dealers;[[124]](#footnote-125) therefore it would be impossible for Tesla to undercut a dealership’s prices because there are no Tesla dealerships.[[125]](#footnote-126) Following the victories, the Michigan legislature took action to preempt a similar result in the heartland of traditional U.S. car manufacturers.[[126]](#footnote-127) The Michigan legislature voted to amend its dealership statute to require all new motor vehicles to be sold through franchised dealers.[[127]](#footnote-128) This amendment defeats the argument that Tesla successfully used in New York and Massachusetts because it makes the fact that Tesla has no franchised dealers irrelevant.[[128]](#footnote-129) The application of this amendment to Michigan’s dealership law defeats Tesla’s business model.[[129]](#footnote-130)

Regardless of the particularities of state car dealership rules or antitrust law, the root of Tesla’s legal conflict is because of disruptive innovation, which is manifested in two related ways.[[130]](#footnote-131) First, Tesla’s technology for manufacturing electric vehicles is a paradigm shift from the technology involved in producing gas–powered automobiles.[[131]](#footnote-132) Second, Tesla’s business model for selling and manufacturing new cars disrupts and alters how cars have been distributed since the invention of the automobile.[[132]](#footnote-133) This is similar to Uber’s business model for connecting drivers and passengers because the app is a paradigm shift from how people used to hail taxis and it disrupts and alters how the transportation business has operated since the invention of the taxicab medallions. Highlighting Tesla’s struggles as another business engaged in the sharing economy furthers the need for mediation with these businesses over using a judge or arbitrator because it highlights the reoccurring issue that there is little precedential case law and statutes in place to help market participants solve their issues. When issues in a sharing economy are left in the hands of judges and arbitrators it can result in detrimental harm to either the individuals working in it or the entities using the platform.[[133]](#footnote-134) Both Uber and Tesla currently face the risk of losing its business model, and in both circumstances, there are working participants that feel they are being slighted compared to their traditional working counterparts.[[134]](#footnote-135)

1. *As of March 2017, Uber is Pushing for Arbitration and its Drivers are Pushing for Litigation*

Uber and its drivers are currently disputing whether this case should be decided in front of an arbitrator or a judge—Uber is fighting for an arbitrator and its drivers are looking to the court system.[[135]](#footnote-136) Most recently, a Ninth Circuit Court judge held that Uber’s arbitration clause is enforceable and the case should be determined through arbitration, overruling a California trial court’s decision that the clause was unenforceable.[[136]](#footnote-137) Since 2017 it looks like this case is going to be determined by an arbitrator, it is important to delve into why Uber and its drivers are looking for these alternatives and what the benefits of arbitration are for Uber.

Currently, in March 2017, Uber and its drivers are faced with a binary conclusion, either they are independent contractors or employees—there is no middle ground.[[137]](#footnote-138) In such circumstances, when the law is either market participants is one or the other, an arbitrator could be best suited to come to a conclusion the parties cannot reach on their own.[[138]](#footnote-139) An arbitrator has the capabilities to assess current laws, evaluate the surrounding facts, and come to a conclusion efficiently and less costly than litigation could provide.[[139]](#footnote-140) In addition, an arbitrator possesses the authority to provide Uber and its drivers with a legally binding decision to end the dispute.[[140]](#footnote-141) With an arbitrator, Uber and its drivers can end their dispute quicker than through litigation, less costly than litigation, and have an answer to their question that could not be disputed by either party.[[141]](#footnote-142) After three plus years of negotiations without a resolution, it could be difficult for both parties to continue trying to find a solution themselves. Although a middle ground would be beneficial for Uber and its drivers, when the law is one way or the other, as with employment law as of March 2017 is,[[142]](#footnote-143) the easiest direction to a resolution is through an arbitrator.[[143]](#footnote-144) Nevertheless, in the proposal section, this Note will encourage Uber and its drivers to employ a mediator and leave the decision in the hands of the market participants rather than a third party. It is imperative for the future of the sharing economy that Uber and its drivers find a resolution that is not restricted by inapplicable terminology.[[144]](#footnote-145) In addition, mediation is beneficial in circumstances when the disputing parties need to find a middle ground in binary laws.

1. Proposal
2. *Using Mediation to Resolve the Employment Classification Dispute*

Despite Uber and its drivers successfully negotiating a settlement, many of the drivers voiced objections to the process,[[145]](#footnote-146) and a federal judge rejected it.[[146]](#footnote-147) Going forward, as Uber and its drivers find themselves back at the negotiating tables, a mediator would be the best idea for both sides to find a settlement that a federal judge would uphold. Mediation is a process in which a neutral third party assists the parties in exploring the issues in the case.[[147]](#footnote-148)

The mediator facilitates discussion between counsel and parties and guides the parties toward finding their own solution to the dispute.[[148]](#footnote-149) The mediator plays a crucial role[[149]](#footnote-150) because they can help each party understand what a federal judge will find acceptable.[[150]](#footnote-151) This particular role in this type of a dispute is crucial because some of the Uber drivers were unsatisfied with their first settlement and a mediator can help find an agreement the parties will agree on. Although mediation has not been spoken about as an alternative, arbitration has been.[[151]](#footnote-152) If Uber and its drivers decide to go through arbitration both sides take a major risk—Uber risks losing its business model and the drivers risk the possibility of any additional compensation and benefits for employee classification. A mediator could help both sides find an interesting compromise rather than giving the drivers the options of staying as independent contractors and working multiple platforms or choosing to be exclusive employees of Uber. In addition, it would be better for Uber and its drivers to use a mediator rather than an arbitrator because there is very little precedential case law or statutes to guide an arbitrator in a sharing economy. A mediator, unlike an arbitrator, leaves the decision making to the market participants who can better come to a solution rather than relying on precedential case law or statutes.[[152]](#footnote-153)

Mediation is a better alternative to negotiation as well because the problem with the first set of negotiations was that the parties had no direction on whether a federal judge would find the settlement permissible.[[153]](#footnote-154) Although it is not the job of a mediator to make sure there is a *fair* agreement, a mediator can provide guidance on whether a federal judge will *uphold* a settlement.[[154]](#footnote-155) However, a complicated part of this settlement is the logistics of the mediation. Uber is a constant, but there are many different sets of drivers in separate jurisdictions. In order for a single mediation to be effective for the other drivers who have not joined this class action, Uber could add a clause in its contract that states if a driver agrees to be a part of Uber, they are consenting to the terms of the settlement. This could be effective because rather than a state judge of California or Massachusetts looking over the settlement, a federal judge is. Therefore, if the settlement is found to be valid, it could be applied broadly across jurisdictions.[[155]](#footnote-156)

Mediation and arbitration are often mentioned together because both are prime alternatives to litigation.[[156]](#footnote-157) When considering whether mediation is a better choice than arbitration, it is important to consider these six factors: time; money; history, who decides the outcome, what decides the outcome, and maintaining a peaceful relationship between the parties.[[157]](#footnote-158) For the Uber cases, the most significant factors to be considered are: history lesson, who decides the outcome, and what decides the outcome.

1. History Lesson

As highlighted above, Uber’s business model does not fit traditional labor and employment law criteria and it is just as difficult for an arbitrator to resolve the issue as it will be for a judge. Arbitration, like the trial process, requires fact-finding[[158]](#footnote-159) and is responsible for uncovering the “truth” of events in order to assign responsibility, so the focus is on history.[[159]](#footnote-160) In order for an arbitrator to do this successfully, lawyers from both sides present evidence to persuade the arbitrator that the event occurred in a particular way and explain why the opposite party is at fault.[[160]](#footnote-161) This approach will likely be unsatisfying for the Uber cases because traditional terminology is inapplicable to Uber drivers as a result of an Uber driver having characteristics of both an independent contractor and an employee.

On the other hand, mediation takes a different approach. Rather than focusing on who is right or wrong, the mediator puts their focus on the *future*,[[161]](#footnote-162) which encourages parties to engage in conversation to find ways to move beyond their conflict.[[162]](#footnote-163) Although there is an opportunity for each side to tell the mediator its beliefs, the focus quickly shifts to how the parties can resolve their dispute.[[163]](#footnote-164) Ultimately, the majority of the time is spent *collaborating* on a solution and reaching an agreement,[[164]](#footnote-165) rather than presenting a case to an arbitrator hoping for a favorable outcome.

1. Who Decides the Outcome?

In arbitration, similarly to court,[[165]](#footnote-166) a third-party arbitrator conducts a hearing, acting as a judge, and makes a ruling that is binding on the parties.[[166]](#footnote-167) In addition, only with a rare exception can an arbitrator’s ruling be appealed, so in reality the parties are actually giving up more power over their case than in a trial.[[167]](#footnote-168) This would be a very risky option in the Uber cases because Uber and its drivers have so much at stake. If an arbitrator rules in favor of Uber, then the drivers lose all ability to be compensated and to be given benefits as an employee. Similarly, Uber risks losing its sharing economy business plan model and would have to treat all of its drivers as employees, which could cause serious harm to the company.

On the other hand, mediation works differently. In mediation, the parties *themselves* determine the outcome by working with a facilitator who helps them *negotiate* a mutually acceptable resolution.[[168]](#footnote-169) In addition, mediation is more conservative than arbitration and does not concretely bind both parties if the parties are unhappy with how negotiations are proceeding.[[169]](#footnote-170) If the parties, for whatever reason, cannot reach an agreement, they cannot have a settlement imposed on them because mediation is not binding and the mediator does not make rulings.[[170]](#footnote-171) Therefore, if mediation, for whatever reason, is not working for Uber and its drivers, they can always negotiate a solution themselves; unlike with arbitration, if a party is discontent with a result they are bound by the decision.[[171]](#footnote-172) Therefore, mediation is a better alternative for parties that want to be responsible for their outcome rather than it being dictated by a third party.

When parties engage in private mediation, customarily the fees are split 50/50 between the parties.[[172]](#footnote-173) However, in employment disputes, the burden of employing a mediator is usually placed on the company rather than the employee because in many circumstances most employees cannot afford to pay an attorney by the hour.[[173]](#footnote-174) At the close of mediation, often one party, as part of the compromise, pays the entire fee, which in this case would be Uber because they are the company in an employment dispute situation.[[174]](#footnote-175)

1. What Decides the Outcome?

When parties decide to use arbitration rather than mediation their rights and obligations are determined with reference to one thing: existing law.[[175]](#footnote-176) Just like a trial, an arbitrator is required to follow the law and look to previous court cases and statutes to determine whether one side should be held legally responsible for the other side’s damages.[[176]](#footnote-177) However, in mediation existing law is only a “talking-point”[[177]](#footnote-178) and is not the sole or even primary reference point for deciding an end result.[[178]](#footnote-179) Instead, the parties discuss their *needs and interests* with each other, which are the factors that ultimately drive the outcome.[[179]](#footnote-180) The primary focus is on collaboration and finding a settlement that fits the needs of both parties.[[180]](#footnote-181) For the Uber case, a collaborative, interest-based solution would be one that allowed Uber to keep its sharing economy business platform and compensate those drivers, who use the app as a primary source of income. A mediator can help find a settlement that avoids broad generalizations and acknowledges that each driver uses the Uber’s business platform in different ways. By doing so, the parties could avoid the binary conclusions current 2017 laws give and find a solution that works in both parties best interests.[[181]](#footnote-182)

1. *A Fitting Mediator for the Uber Case*

A mediators’ style can vary based on the parties, case, or the person. However, the most common approaches are usually referred to as “facilitative” and “evaluative.”[[182]](#footnote-183) Under the facilitative approach, the mediator serves as a facilitator for the exchange of views and positions between the parties.[[183]](#footnote-184) For example, this may include encouraging parties to express their feelings and express their needs and wants.[[184]](#footnote-185) It may also include helping each side better understand the points of view of the other side, which helps the parties find mutually beneficial solutions.[[185]](#footnote-186) Under the evaluative approach, the mediator analyzes the parties’ legal evidentiary, and factual positions,[[186]](#footnote-187) and explains to the parties and their attorneys the strengths and weaknesses of each party’s case.[[187]](#footnote-188)

Honing in on the Uber case, this Note suggests the most successful type of mediator would not take the popular back and forth approach, but rather only the evaluative approach, because unlike most circumstances, Uber and its drivers are resorting to a mediator as a last resort rather than employing one during the early stages of a conflict. In most situations, a mediator is employed at the onset of a dispute because the two parties are attempting ADR methods before resorting to litigation.[[188]](#footnote-189) In such conflicts, it is important for both sides to express their discontent with one another and to encourage parties to attempt to better understand the other sides issues and displeasures.[[189]](#footnote-190) Therefore, it is logical for a mediator to begin with a functional approach and then shift toward an evaluative approach in order to avoid litigation.

However, using a mediator in the Uber case would be a rare usage of a mediator. Both Uber and its drivers have been engaged in this dispute for more than several years. Uber and its drivers have already disputed this case in multiple trial courts and even reached a settlement that would still be intact if not for a judge’s decision.[[190]](#footnote-191) As a result of this case being far from its early stages, it would be best if a mediator in this case focused on the evaluative approach. The evaluative approach will allow the mediator to focus on how Uber can keep its business model and how the drivers in the lawsuit can be better compensated for acting as employees rather than independent contractors.[[191]](#footnote-192) If Uber can find a mediator with a background in employment law, they could help Uber find the right settlement based on the legal, evidentiary, and factual positions of the case.

1. Conclusion

Having a mediator can help with the settlement process because in a new economy it is better to have the market participants resolve their disputes rather than have an arbitrator without much guidance give a binding decision. In addition, a mediator that employs the evaluative approach would help Uber significantly with gauging the strengths and weakness of its case and find a settlement that a judge would uphold. Employment law in this area is uncertain because of Uber’s sharing economy business plan, which in theory treats its drivers as independent contractors, but also has thousands of drivers depend on it for fair compensation. By going to arbitration there is no precedent to work off, and therefore, both sides do not have any indication of whether they have a legitimate claim. For the long term, a new statute that defines market participants in a sharing economy can help avoid similar disputes. However, as of 2017, such a law does not exist; therefore, when the law only yields strict interpretations, a mediator is the best resolution to help both sides find a favorable outcome.

Uber must work quickly because thus far, both domestically and abroad, Judges have been extremely favorable towards Uber drivers. At this point, looking at the few precedents seen at trial court,[[192]](#footnote-193) it would be in an Uber driver’s best interest to continue litigating because they have been very successful. In the end, the pressure to come to a resolution through ADR is mostly on Uber. Both sides are already very deep in this dispute and if Uber continues to be unsuccessful through litigation there may be adverse consequences to not only just Uber, but to all companies that use a sharing economy business model.

1. \* Senior Notes Editor, *Cardozo Journal of Conflict Resolution*, Volume 19; B.A. 2014, Binghamton University, State University of New York; J.D. Candidate 2018, Benjamin N. Cardozo School of Law. The author would like to thank his parents, Barry and Michelle Rubin, his sister and brother-in-law, Allie Rubin Luxenberg and Alexander Luxenberg, his niece, Juliana Luxenberg, his brother, Avery Rubin, his girlfriend CeCe Cole, his maternal grandmother, Paula Schallamach, his maternal grandfather who is no longer with us, Arno Schallamach, his paternal grandparents who are no longer with us, Joseph and Rosalind Rubin, his uncle and aunt, Daniel and Sharon Schlusselberg, his aunt who is no longer with us, Arleen Rubin Klores, his uncle, Jeffrey Klores, and all of his cousins and close friends, for their unconditional love, support, encouragement, and guidance throughout his entire life. The author would also like to thank Professor David J. Weisenfeld for his mentoring, advice, and efforts in helping write this note.

   Dan Rivoli, *New York Uber Drivers Win Lawsuit to Obtain Benefits*, N.Y. Daily News (Oct. 13, 2016), http://www.nydailynews.com/new-york/new-york-uber-drivers-win-lawsuit-obtain-benefits-article-1.2830080. [↑](#footnote-ref-2)
2. O’Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015); *see also* Rivoli, *supra* note 1. [↑](#footnote-ref-3)
3. O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016); *see also* Kia Kokalitcheva, *Uber’s Fight Just Got More Complicated*, Fortune (Mar. 4, 2016), http://fortune.com/2016/03/04/uber-driver-unemployment/. [↑](#footnote-ref-4)
4. Chris Isidore, *Judge Rejects $100 Million Settlement Between Uber and Drivers*, CNN (Aug. 19, 2016), http://money.cnn.com/2016/08/19/technology/uber-drivers-class-action-settlement/ (“The deal between Uber and drivers in California and Massachusetts did not compensate drivers enough, the judge ruled.”). [↑](#footnote-ref-5)
5. *Id.* (“The lawsuits had charged that the drivers should be treated as employees, rather than independent contractors. That would have entitled the drivers to a variety of benefits, including overtime and health insurance.”). [↑](#footnote-ref-6)
6. Mike Isaac, *Judge Overturns Uber’s Settlement With Drivers*, N.Y. Times (Aug. 18, 2016), http://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html (“Uber has opposed having its drivers be categorized as employees, a more costly designation that would require the company to pay payroll taxes and ensure that drivers earn at least the minimum wage.”). [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016); *see also* Abigail Tracy, *Thousands of Uber Drivers are Suing Over Their Employment Status*, Vanity Fair (June 2, 2016), http://www.vanityfair.com/news/2016/06/uber-class-action-lawsuit-new-york. [↑](#footnote-ref-9)
9. Isaac, *supra* note 6. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. Steven Musil, *Uber Drivers to Remain Independent Contractors Under Settlement*, C|Net (Apr. 21, 2016), https://www.cnet.com/news/uber-drivers-to-remain-independent-contractors-under-settlement/. [↑](#footnote-ref-12)
12. Rivoli, *supra* note 1. [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. Musil*,* *supra* note 11, at 1(“Uber had always contended … it gave them [drivers] a personal flexibility that allowed them to set their own schedule and be their own boss. ‘Drivers value their independence -- the freedom to push a button rather than punch a clock.’”). [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *Id.*  [↑](#footnote-ref-17)
17. Isidore, *supra* note 4. [↑](#footnote-ref-18)
18. O’Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482, at \*45–49 (N.D. Cal. Sept. 1, 2015); *see also* Isaac, *supra* note 6. [↑](#footnote-ref-19)
19. Isaac, *supra* note 6. [↑](#footnote-ref-20)
20. Emily Badger, *Now We Know How Many Drivers Uber Has—and Have a Better Idea of What They’re Making*, Wash. Post (Jan. 22, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/22/now-we-know-many-drivers-uber-has-and-how-much-money-theyre-making%E2%80%8B/. [↑](#footnote-ref-21)
21. *Id.* [↑](#footnote-ref-22)
22. *Id.* [↑](#footnote-ref-23)
23. *Id.* [↑](#footnote-ref-24)
24. Craig Smith, *By the Numbers 47 Amazing Uber Statistics (August 2016)*, DMR, http://expandedramblings.com/index.php/uber-statistics/ (last visited Aug. 3, 2017). [↑](#footnote-ref-25)
25. Badger, *supra* note 20; *see also* Musil*,* supranote 11 (‘“That said, as Uber has grown – over 450,000 drivers use the app each month here in the US -- we haven’t always done a good job working with drivers,” he wrote. ‘It’s time to change.’”). [↑](#footnote-ref-26)
26. Rivoli, *supra* note 1. [↑](#footnote-ref-27)
27. *Id.* [↑](#footnote-ref-28)
28. Seth Fiegerman, *Uber Drivers to Join Protest for $15 Minimum Wage*, CNN (Nov. 28, 2016), http://money.cnn.com/2016/11/28/technology/uber-drivers-minimum-wage-protest/ (“‘Hundreds’ of drivers will protest alongside fast food workers, airport employees . . . for what is being bill as a ‘Day of Disruption’.”). [↑](#footnote-ref-29)
29. Badger, *supra* note 20. [↑](#footnote-ref-30)
30. *O’Connor*, 2015 N.D. Cal. LEXIS 116482, *supra* note 2; *see also* CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016). [↑](#footnote-ref-31)
31. *See O’Connor*, 2015 U.S. Dist. LEXIS 116482 at \*5–11; *see also CGS Taxi LLC*, 2016 NY Slip Op 30907(U) at 2–5. . [↑](#footnote-ref-32)
32. Aslam v. Uber BV [2017] IRLR 4 (ET); *see also* Tom Mendelsohn, *Court: Uber Drivers are company employees not self-employed contractors*, ars Technica (Oct. 31, 2016), http://arstechnica.com/tech-policy/2016/10/uber-drivers-employees-uk-court-ruling/. [↑](#footnote-ref-33)
33. *Aslam*,IRLR 4 at para 129–130. [↑](#footnote-ref-34)
34. *GMB*, Free Dictionary, http://acronyms.thefreedictionary.com/GMB, (last visited Feb. 5, 2017) (“GMB, British Trade Union, originally General Municipal Boilermakers; now known simply as GMB.”). [↑](#footnote-ref-35)
35. *Aslam*,IRLR 4 at para. 125; *see also* Mendelsohn*,* *supra* note32. [↑](#footnote-ref-36)
36. *Aslam*,IRLR 4 at para. 89; *see also* Mendelsohn*,* *supra* note32. [↑](#footnote-ref-37)
37. Mendelsohn*,* *supra* note32. [↑](#footnote-ref-38)
38. *Id.* [↑](#footnote-ref-39)
39. *Id.* [↑](#footnote-ref-40)
40. *Id.* [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. Mendelsohn*,* *supra* note32 (“Civil cases will sometimes be dealt with by magistrates, but may well go to a county court . . . Appeals will go to the High Court and then to the Court of Appeal – although to different divisions of those courts.”); *see also Structure of the Courts & Tribunal System*, Courts & Tribunals Judiciary (Sept. 2016), https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/; *see also Aslam*, [2017] IRLR 4. [↑](#footnote-ref-43)
43. Mendelsohn*,* *supra* note32. [↑](#footnote-ref-44)
44. *Aslam*,IRLR 4 at para. 90. [↑](#footnote-ref-45)
45. Mendelsohn*,* *supra* note32. [↑](#footnote-ref-46)
46. *Id.* [↑](#footnote-ref-47)
47. *Id.*  [↑](#footnote-ref-48)
48. *Id.* [↑](#footnote-ref-49)
49. Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation Arbitration, and Conflict Management in Fortune 1000 Corporations*, Harv. Negotiation L. Rev., Spring, 2014, at 1–2 (“In 2011, for the second time in fifteen years, leading counsel at many of the world’s largest corporations participated in a landmark survey of perceptions and experiences with alternative dispute resolution (“ADR”)—mediation, arbitration, and other third-party intervention strategies intended to produce more satisfactory paths to managing and resolving conflict . . . Including approaches that may be more economical, less formal, and more private than court litigation, with more satisfactory and more durable results.”). [↑](#footnote-ref-50)
50. David Lipsky, Fortune 1000 and Federal Agencies on Alternative Dispute Resolution (ADR), Cornell Univ. Survey Research Inst. (Oct. 24, 2011), https://www.sri.cornell.edu/sri/projects.project.cfm?projid=123646 (unpublished survey report) (on file with author). [↑](#footnote-ref-51)
51. Stipanowich & Lamare, *supra* note 49 at 2(“[I]ncluding approaches that may be more economical, less formal, and more private than court litigation, with more satisfactory and more durable results.”); *see also* Thomas J. Stipanowich, *ADR and “The Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”*,1 J. Empirical Legal Stud. 843, 845 (2004). [↑](#footnote-ref-52)
52. *Stipanowich & Lamare, supra* note 48 at 2–3 (“Comparing their responses to those of the mid-1990s, substantial evolutionary trends are observable.”). [↑](#footnote-ref-53)
53. *Id.* at 3. [↑](#footnote-ref-54)
54. *Id*.at 3*.* (“Binding arbitration has reached its tipping point: while some longstanding concerns about arbitration processes have lessened, fewer major companies are relying on arbitration to resolve many kinds of disputes (important exception being consumer and products liability disputes), and they are evenly divided regarding its future use.”). [↑](#footnote-ref-55)
55. *Id.*; *see also* Mitchell L. Bach & Lee Appelbaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147 (2004) (discussing the establishment of business and commercial courts around the country for the purpose of increasing confidence in the courts’ ability to handle business litigation). [↑](#footnote-ref-56)
56. Stipanowich & Lamare, *supra* note 49. [↑](#footnote-ref-57)
57. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law in the changing Landscape of Dispute Resolution,* 8 Nev. L. Rev. 427 (2007). [↑](#footnote-ref-58)
58. Stipanowich & Lamare, *supra* note 49 at 5–6 (“The New Survey . . . offers important new insights regarding changes in the way large companies handle conflict.”). [↑](#footnote-ref-59)
59. *Id.* (“Mediation appears to be even more widely used than in 1997 and is today virtually ubiquitous among major companies.”). [↑](#footnote-ref-60)
60. *Id.* [↑](#footnote-ref-61)
61. *Id.* (“[T]he survey offers tangible evidence of corporations’ growing sophistication and increasing emphasis on control of the process of managing conflict.”). [↑](#footnote-ref-62)
62. *Id.*  [↑](#footnote-ref-63)
63. *Id.*  [↑](#footnote-ref-64)
64. Stipanowich & Lamare, *supra* note 49 at 6. [↑](#footnote-ref-65)
65. *Id.* (“This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to managing conflict, particularly in the employment sphere.”). [↑](#footnote-ref-66)
66. Stipanowich & Lamare, *supra* note 49, at 6 (“The Contrasts between frequency of use of mediation and of arbitration are even more striking in data relating to employment disputes.”). [↑](#footnote-ref-67)
67. *Id.*(“The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints.”). [↑](#footnote-ref-68)
68. *Id.*(“Indications are that the great majority of disputes are resolved informally in the early stages and rarely in arbitration or litigation.”). [↑](#footnote-ref-69)
69. NLRB v. Hearst Publs., Inc.,322 U.S. 111, 136–137 64 S. Ct. 851 (1944) [hereinafter NLRB Case]; *see also* Fair Labor Standards Act of 1938 29 U.S.C. § 201 (1938) [hereinafter FLSA]; *see also* National Labor Relations Act of 1935 § 2.03, 29 U.S.C. § 152 (2006) [hereinafter NLRA]. [↑](#footnote-ref-70)
70. NLRB Case at 116. [↑](#footnote-ref-71)
71. *Id.* at 118–119. [↑](#footnote-ref-72)
72. *Id.* at 116. [↑](#footnote-ref-73)
73. NLRA. [↑](#footnote-ref-74)
74. NLRB Case at 125, *see also* FLSA; *see also* NLRA. (“The Court went on to hold that, in determining who is and who is not employee, federal law was determinative and concluded that the legislative history of the Act indicated that Congress did not intend that the board be bound by traditional common law concepts.”). [↑](#footnote-ref-75)
75. NLRA(“Shortly after the 1947 amendments, the Board stated that, in cases involving the independent contractor/employee issue it would use:”). [↑](#footnote-ref-76)
76. *Id.* [↑](#footnote-ref-77)
77. *Id.* [↑](#footnote-ref-78)
78. *Id.* [↑](#footnote-ref-79)
79. NLRA [↑](#footnote-ref-80)
80. *NLRB* Case at 126. [↑](#footnote-ref-81)
81. Ala. Dep’t of Labor, Examples of Independent Contractors, Ala.Gov., https://www.labor.alabama.gov/uc/EXAMPLES\_OF\_INDEPENDENT\_CONTRACTORS\_AND\_COMMON\_LAW\_EMPLOYEES.pdf. [↑](#footnote-ref-82)
82. *Id.* [↑](#footnote-ref-83)
83. The recent expansion of the so-called sharing economy concept is a hybrid market model in which people share access to goods and services. It has led to emerging new business models. [↑](#footnote-ref-84)
84. *Driving Jobs vs. Driving with Uber*, Uber (Feb. 5, 2017), https://www.uber.com/driver-jobs/. [↑](#footnote-ref-85)
85. Jonas Barre, *What are the Main Reasons that Uber is in an Employer-Employee Relationship with its Driver?* Quora (Aug. 13, 2015), https://www.quora.com/What-are-the-main-reasons-that-Uber-is-in-an-employer-employee-relationship-with-its-drivers. (“For example, some detailed instructions, evaluation system and the driver services being core to Uber’s operations point to it being an employer-employee relationship.”). [↑](#footnote-ref-86)
86. *Id.* [↑](#footnote-ref-87)
87. Ryan Frazier, *Sharing is Caring: Are Uber, Lyft Drivers Dependent Contractors?*,KMC Law(May. 2016)*,* http://www.kmclaw.com/newsroom-articles-367.html. [↑](#footnote-ref-88)
88. *Id.* [↑](#footnote-ref-89)
89. *Id.* (“Not only would Uber . . . be required to pay certain taxes and reimburse drivers for expenses, but they would also have to provide other employment-related protections, such as unemployment benefits, health insurance, and workers’ compensation coverage. Drivers would also be protected by federal and state laws guaranteeing minimum wages and overtime.”). [↑](#footnote-ref-90)
90. *Id.* [↑](#footnote-ref-91)
91. FLSA; *see also* Amy Groff et al., *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees*, KLGATES (Dec. 2015), http://www.klgates.com/files/Publication/04dcde30-9c10-4003-b663-f7f5f2cdec32/Presentation/PublicationAttachment/805ddc72-69b2-426b-ad51-fe92be45434e/CLRI\_2016.pdf. [↑](#footnote-ref-92)
92. U.S. Dep’t of Labor, Wage & Hour Div. Admin.’s Interpret. No. 2015-1, Application of FLRA’s “Suffer or Permit” Standard in the Identification of Employees Who are Misclassified as Independent Contractors 3–10 (2015), http://www.blr.com/html\_email/AI2015-1.pdf. [↑](#footnote-ref-93)
93. Groff et al., *supra* note 91. [↑](#footnote-ref-94)
94. Frazier, *supra* note 87. [↑](#footnote-ref-95)
95. Groff et al., *supra* note 91. [↑](#footnote-ref-96)
96. The author of this note proposes to define working individuals as “hybrids.” The reason for this is because participants in a sharing economy share traits of both employees and independent contractors. [↑](#footnote-ref-97)
97. Alison Doyle, *How Many Hours a Week is Full-Time Employment?*,the balance (Oct. 16, 2016) https://www.thebalance.com/how-many-hours-a-week-is-full-time-employment-2063404 (“The standard for full-time employment was typically 40 hours a week in the past. However, many employers now consider employees a full-time when they work fewer hours, i.e. over 30 hours.”). [↑](#footnote-ref-98)
98. Jack Wroldsen, *Article: Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship,* 18 U. Pa. J. Bus. L. 733 (2016)(“Whereas traditionally people would hail a taxi cab on the street, Uber relies on an Internet app that allows riders and drivers to schedule a pickup electronically.”). [↑](#footnote-ref-99)
99. *Id*.*; see also* Bos. Cab Dispatch, Inc. v. Uber Techs, Inc*.*, No. 13-CV-10769, 2015 U.S. Dist. LEXIS 8508, \*1–2 (D. Mass. Jan. 26, 2015). [↑](#footnote-ref-100)
100. *Bos. Cab Dispatch, Inc.*, 2015 U.S. Dist. LEXIS 8508, at \*3. [↑](#footnote-ref-101)
101. *Id.*; *see also* Melkorka Licea et al., *More Uber Cars Than Yellow Taxis on The Road in NYC*, N.Y. Post (Mar. 17, 2015), http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/ (“The company [Uber] has 14,088 black and luxury cars affiliated with it operating in the five boroughs, compared to 13,587 medallion cabs, according to the Taxi and Limousine Commission.”). [↑](#footnote-ref-102)
102. Wroldsen*,* *supra* note 98; *see also* Douglas MacMillan & Telis Demos, *Uber Valued at More than $50 Billion*, WSJ (July. 31, 2015), https://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457. [↑](#footnote-ref-103)
103. Wroldsen, *supra* note 98; *see also* Douglas Macmillan et al., *Uber Snags $41 Billion Valuation*, WSJ (Dec. 5, 2014), http://www.wsj.com/articles/ubers-new-funding-values-it-at-over-41-billion-1417715938. [↑](#footnote-ref-104)
104. Wroldsen, *supra* note 98; *see also* Matthew Panzarino & Alexia Tsotsis, *Uber Wins the 2014 Crunchie for Best Overall Startup*, TechCrunch (Feb. 5, 2015), http://techcrunch.com/2015/02/05/uber-wins-the-2014-crunchie-for-best-overall-startup/ (“Uber has won all kinds of awards and recognition in the entrepreneurial community, and though Uber is more prominent than its competitors, it is far from alone in the electronic ride-hailing market. Outside ride-hailing, other companies in the so-called “sharing economy” are also challenging legal rules with their innovative business models, such as car-sharing firms like Flight Car and Turo (Formerly called RelayRides), and home-sharing platforms like Airbnb.”). [↑](#footnote-ref-105)
105. Wroldsen, *supra* note 98(“From a legal perspective, though, Uber is a poster child for creative destructive legal conflict. Chronicling “Uber’s ongoing legal struggles,” one commentator observes that “Uber is good at two things: running a taxi service and getting on regulators’ nerves.”). [↑](#footnote-ref-106)
106. Wroldsen, *supra* note 98; *see also* Daniel Roberts, *A Brief History of Uber Scandals*, Yahoo Finance (Feb. 22, 2016), https://finance.yahoo.com/news/uber-scandals-timeline-michigan-shooting-140035801.html. *See also* Jacob Kastrenakes*,* *Uber’s Bumpy Road to World Domination*, Verge (Feb. 1, 2016), http://www.theverge.com/2014/12/15/7393693/uber-fights-to-expand-across-the-globe-storystream. [↑](#footnote-ref-107)
107. Wroldsen, *supra* note 98; *see also* Alissa Rubin & Mark Scott, *Clashes Erupt Across France as Taxi Drivers Protest Uber*, N.Y. Times (June. 25, 2015), https://www.nytimes.com/2015/06/26/business/international/uber-protests-france.html. [↑](#footnote-ref-108)
108. Wroldsen, *supra* note 98; *see also* Dan Levine & Edwin Chan, *Uber, Lyft Rebuffed in Bids to Deem Drivers Independent Contractors,* Reuters (Mar. 11, 2015), http://www.reuters.com/article/2015/03/12/lyft-drivers-idUSL1N0WD2T520150312. [↑](#footnote-ref-109)
109. Wroldsen, *supra* note 98; *see also* O’Connor v. Uber Techs, Inc.,2015 WL 1069092, at \*1–4 (N.D. Cal. Mar. 11, 2015). [↑](#footnote-ref-110)
110. Wroldsen, *supra* note 98; *see also* Josh Barro, *New York’s Taxi Medallion Prices Fall Again*, New York Times, (Dec. 2, 2014), https://www.nytimes.com/2014/12/03/upshot/new-york-taxi-medallion-prices-fall-again.html. [↑](#footnote-ref-111)
111. Wroldsen, *supra* note 98, at 769(“These plaintiffs allege that Uber is engaged in unfair competition as an unlicensed taxi company that avoids expenses such as medallion fees, which can be in the hundreds of thousands of dollars for each licensed taxi cab.”). [↑](#footnote-ref-112)
112. *Id.*; *see also* Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers about Their Insurance Coverage*, 56 B.C L. Rev. 11097, 1107–10 (2015). [↑](#footnote-ref-113)
113. Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*,18 J. Bus. L. 733 (2016); *see also* Bos. Cab Dispatch, Inc. v. Uber Techs, Inc*.*, No. 13-CV-10769, 2015 U.S. Dist. LEXIS 8508, at \*1–2 (D. Mass. Jan. 26, 2015). [↑](#footnote-ref-114)
114. Wroldsen, *supra* note 113; *see also* Brian Fitzgerald, *Uber Suspends Operations in Nevada,* WSJ (Nov. 28, 2014), https://blogs.wsj.com/digits/2014/11/28/uber-suspends-operations-in-nevada/. [↑](#footnote-ref-115)
115. Wroldsen, *supra* note 98(“It is the classic story of law and entrepreneurship in which entrepreneurs threaten to upend a stagnant market through ‘disruptive innovation’ and in the process often run afoul of the law.”). [↑](#footnote-ref-116)
116. Wroldsen, *supra* note 98. [↑](#footnote-ref-117)
117. *Id.* [↑](#footnote-ref-118)
118. *Id.* at 762 (“A prominent recent example of creative destructive legal conflict is Tesla, an innovative manufacturer of electric cars.”). [↑](#footnote-ref-119)
119. *Id.* at 762 (“Though such direct sales practices are commonplace in most industries, direct sales of automobiles violate some states’ franchise and car dealership laws, many of which were initially established when Ford’s Model-T was cutting-edge technology.”). [↑](#footnote-ref-120)
120. *Id.*; *see also* Justin Hyde, *In Tesla Sales Fight, Automakers Take the Dealers’ Side*,Yahoo! (Mar. 20, 2014), https://www.yahoo.com/news/bp/in-tesla-sales-fight--automakers-take-the-dealers--side-213905585.html; *see also* David Kravets, *West Virginia is the Latest State to Ban Tesla Direct Sales*, Ars Technica (Apr. 4, 2015), http://arstechnica.com/cars/2015/04/west-virginia-is-the-latest-state-to-ban-tesla-direct-sales/. [↑](#footnote-ref-121)
121. Wroldsen, *supra* note 98. [↑](#footnote-ref-122)
122. *Id. See also* Mass. State. Auto. Dealers Ass’n v. Tesla Motors MA, Inc.*,* 15 N.E.3d. 1152, 1156–62 (2014), *see also* Greater N.Y. Auto. Dealers Ass’n. v. DMV of N.Y., 969 N.Y.S.2d 721, 724–25 (Sup. Ct. 2013). [↑](#footnote-ref-123)
123. Wroldsen, *supra* note 98. [↑](#footnote-ref-124)
124. *Id.* [↑](#footnote-ref-125)
125. *Id.* [↑](#footnote-ref-126)
126. *Id.* (“Following Tesla’s victories in New York and Massachusetts, however, the Michigan legislature took action to preempt a similar result in the heartland of traditional U.S. car manufacturers.”). [↑](#footnote-ref-127)
127. 2010 Bill Text MI H.B. 6100, Trade; Vehicles, Regulation of New Motor Vehicle manufacturers, distributors, and dealers and their relationships and dealings; *see also* Wroldsen, supra note 98; *see* Vince Bond Jr., *Tesla’s Sales Limits in Michigan Tightened by One Word of Law,* Automotive News (Oct. 20, 2014), http://www.autonews.com/article/20141020/RETAIL/141029995/teslas-sales-limits-in-michigan-tightened-by-one-word-of-law. [↑](#footnote-ref-128)
128. *Wroldsen, supra* note98*.* [↑](#footnote-ref-129)
129. *Id.* [↑](#footnote-ref-130)
130. *Id.* at 764(“Regardless of the particularities of state car dealership rules or antitrust law, the root of Tesla’s legal conflict is disruptive innovation, which is manifested in two related ways.”). [↑](#footnote-ref-131)
131. *Id.* (“First, Tesla’s technology for manufacturing electric vehicles is a paradigm shift from the technology involved in producing gas-powered automobiles.”). [↑](#footnote-ref-132)
132. *Id.* (“Second, Tesla’s business model for selling and maintaining its cars flies in the face of the way new cars have been distributed since the invention of the automobile.”). [↑](#footnote-ref-133)
133. Rick Schmitt, *The Sharing Economy: Can the Law Keep Pace with Innovation?* SLS | Stanford Lawyer (May. 31,2017) https://law.stanford.edu/stanford-lawyer/articles/the-sharing-economy-can-the-law-keep-pace-with-innovation/. [↑](#footnote-ref-134)
134. *Id.* [↑](#footnote-ref-135)
135. Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016); *see also* Guan v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 255839 (E.D.N.Y. Feb. 23, 2017) (affirming the duty to read a contract, even where there is need for help understanding the terms); *and see* Mohammed v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 20274 (N.D. Ill. Feb. 14, 2017) (distinguishing where consent is given by another, third party). *See also* Paresh Dave, *In stinging decision for Uber drivers, appeals court says they must go to arbitration*, L.A. Times (Sept. 7, 2016), http://www.latimes.com/business/technology/la-fi-tn-uber-lawsuit-20160907-snap-story.html. [↑](#footnote-ref-136)
136. *Mohamed*, 836 F.3d at 1102. [↑](#footnote-ref-137)
137. NLRA. [↑](#footnote-ref-138)
138. Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. Ill. Rev. 695 (2001). [↑](#footnote-ref-139)
139. *Id.* at 745 (“[A]rbitration (1) reduces dispute-resolution costs and increases deterrence benefits.”). [↑](#footnote-ref-140)
140. Balbir, *Arbitrator: His appointment, powers and duties*, Preserve Articles, http://www.preservearticles.com/201104065087/arbitrator-his-appointment-powers-and-duties.html (last visited Aug. 16 2017) (“An arbitrator is person selected by mutual consent of the parties to settle the matters in controversy between them. A person appointed to adjudicate the difference is called an arbitrator.”). [↑](#footnote-ref-141)
141. Drahozal, *supra* note 139. [↑](#footnote-ref-142)
142. NLRA. [↑](#footnote-ref-143)
143. Balbir, *supra* note 140. [↑](#footnote-ref-144)
144. NLRA. [↑](#footnote-ref-145)
145. Wroldsen, *supra* note 98. [↑](#footnote-ref-146)
146. O’Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015). [↑](#footnote-ref-147)
147. Paul Fisher, *All You Need to Know About Mediation But Didn’t Know to Ask-A Parachute for Parties in Litigation*, Mediate.Com (Nov. 2000), http://www.mediate.com/articles/fisher2.cfm. [↑](#footnote-ref-148)
148. *Id.* [↑](#footnote-ref-149)
149. *Id.* (“Each participant in the mediation has a critical role . . . each party benefits by helping plan the mediation process, and each needs to help his attorney says in her opening statement.”). [↑](#footnote-ref-150)
150. *Id.* [↑](#footnote-ref-151)
151. Joel Rosenblatt, *Uber’s $100 Million Driver Pay Settlement Rejected by Judge*, Bloomberg (August. 18, 2016), http://www.bloomberg.com/news/articles/2016-08-18/uber-s-100-million-driver-pay-settlement-is-rejected-by-judge (“A legal scholar who’s been following the case said Uber may now decide it’s better off trying to force the vast majority of drivers covered by the accord into arbitration, where the company can fight them one-on-one.”). [↑](#footnote-ref-152)
152. *Id.* [↑](#footnote-ref-153)
153. Fisher, *supra* note 147. [↑](#footnote-ref-154)
154. *Id.* [↑](#footnote-ref-155)
155. *Id.*  [↑](#footnote-ref-156)
156. Rosenblatt, *supra* note 151. [↑](#footnote-ref-157)
157. *Is Mediation a Better Choice than Arbitration?*, Neiman Mediation, http://www.neimanmediation.com/is-mediation-a-better-choice-than-arbitration/ (last visited Oct. 30, 2016) (“Mediation and Arbitration are often mentioned in the same sentence . . . but in fact are very different. When considering whether mediation is a better choice than arbitration, it is helpful to consider these six topics: (1) Time, (2) Money, (3) History Lessons, (4) Who Decides the Outcome, (5) What Decides the Outcome, (6) Amicability.”). [↑](#footnote-ref-158)
158. Fisher, *supra* note 146. [↑](#footnote-ref-159)
159. Is Mediation a Better Choice than Arbitration?, *supra* note 157. [↑](#footnote-ref-160)
160. *Id.* [↑](#footnote-ref-161)
161. *Id*. [↑](#footnote-ref-162)
162. Is Mediation a Better Choice than Arbitration?, *supra* note 157. [↑](#footnote-ref-163)
163. *Id.* [↑](#footnote-ref-164)
164. *Id.* (“The majority of time is spent collaborating on a solution and reaching an agreement.”). [↑](#footnote-ref-165)
165. *Id*. [↑](#footnote-ref-166)
166. *Id.* [↑](#footnote-ref-167)
167. *Id*. [↑](#footnote-ref-168)
168. *Is Mediation a Better Choice than Arbitration?*, *supra* note 157 (“Mediation works differently. The parties themselves determine the outcome by working with a facilitator who helps them negotiate a mutually-acceptable resolution.”). [↑](#footnote-ref-169)
169. *Id.* [↑](#footnote-ref-170)
170. *Id.* [↑](#footnote-ref-171)
171. *Id.* [↑](#footnote-ref-172)
172. *Who Pays for Mediation?*, JABURG WILK, http://www.jaburgwilk.com/news-publications/who-pays-for-mediation (last visited Mar. 11, 2017). [↑](#footnote-ref-173)
173. Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. Pa. J. Lab. & Emp. L. 487, 500 (“Most employees cannot afford, as can their opponents, to pay an attorney by the hour.”). [↑](#footnote-ref-174)
174. *Who Pays for Mediation?*, *supra* note 171. [↑](#footnote-ref-175)
175. *Is Mediation a Better Choice than Arbitration?*, *supra* note 156(“When parties use arbitration, their rights and obligations are determined with reference to one thing: existing law.”). [↑](#footnote-ref-176)
176. Fisher, *supra* note 146. [↑](#footnote-ref-177)
177. *Is Mediation a Better Choice than Arbitration?*, *supra* note 156. [↑](#footnote-ref-178)
178. *Id.* (“Mediation works differently. Existing law is sometimes a consideration in the negotiations, but it isn’t the sole or even a primary reference point for deciding the end result.”). [↑](#footnote-ref-179)
179. Fisher, *supra* note 146. [↑](#footnote-ref-180)
180. *Id.* [↑](#footnote-ref-181)
181. FLSA. [↑](#footnote-ref-182)
182. Wayne R. Outten, Representing the Executive (Yale D. Tauber & Donald R. Levy eds., 2003). The author of the note recognizes that Wayne Outten is a very well known, high profile employee-side lawyer. [↑](#footnote-ref-183)
183. *Id.* [↑](#footnote-ref-184)
184. *Id*. at 5 (“This may include, for example, encouraging parties to “vent” their feelings and express their needs and wants.”). [↑](#footnote-ref-185)
185. *Id*. [↑](#footnote-ref-186)
186. *Id.* [↑](#footnote-ref-187)
187. *Id.* [↑](#footnote-ref-188)
188. *Id.* [↑](#footnote-ref-189)
189. *Id.* [↑](#footnote-ref-190)
190. *O’Connor*,2015 U.S. Dist. LEXIS 116482, *supra* note 2; *see also* CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016); *see also* Aslam v. Uber BV [2017] IRLR 4 (ET). [↑](#footnote-ref-191)
191. Outten, *supra* note 182. [↑](#footnote-ref-192)
192. *O’Connor*, 2015 U.S. Dist. LEXIS 116842, *supra* note 2. *See* Rivoli, *supra* note 1; *see also* Mendelsohn*,* *supra* note37. [↑](#footnote-ref-193)