

## Independent Contractors or Employees?

By Lee J. Hurwitz

**As the law struggles to keep pace with rapid advances in ridesharing technology, individuals and businesses struggle to assess risk.**

# An Overview of Rideshare Drivers

As technology rapidly advances, the law struggles to keep up, leaving individuals and businesses in precarious situations where risk is difficult to estimate, and defenses must be shaped based on evolving (or absent) law.

This is particularly true within the framework of ridesharing, which involves utilizing a smartphone application to arrange transportation of individuals or goods. Ridesharing applications (or “apps”) have transformed modern day transportation in a short amount of time, but the law has not adapted in a uniform manner. Therefore, states are inconsistent on how to treat individuals who work for ridesharing companies, such as Lyft and Uber, and whether they should be classified as employees or independent contractors. The result can be an uncertain landscape for attorneys and insurance companies regarding how to classify these drivers if an automobile accident occurs at some point in the process of transporting a passenger or good.

At this point in time, each state has a different take on how ridesharing drivers’ employment is legally classified. This can provide subtle but important differences when insuring or defending a driver who utilizes a ridesharing app or the transportation network company (“TNC”) itself. Unfortunately, it remains inevitable that auto accidents will occur; therefore, the guide below provides a short summary of each state’s current treatment of ridesharing drivers. Indeed, while a handful of states consider rideshare drivers as employees—therefore potentially subjecting their employers to litigation arising from automotive accidents—more than

two dozen states have not clarified a rideshare driver’s status by statute. Thus, the classification of rideshare drivers as employees or independent contractors will continue to evolve across the country as more states enact legislation, or as the courts develop case law through litigation. Please note that the law is constantly changing, so it is always advisable to contact legal counsel and do your own research before making any final decisions. A summary of the current statutory landscape is below:

*Alaska* classifies its drivers as independent contractors by a statute that became effective in 2017. A driver is an independent contractor and not an employee if the TNC:

- (1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the digital network of the transportation network company;
- (2) does not impose restrictions on the ability of the driver to use the digital network of other transportation network companies;
- (3) does not restrict a driver from engaging in any other occupation or business; and
- (4) enters into a written agreement with the driver stating that the driver is an independent contractor for the transportation network company.”

Alaska Stat. §28.23.080.



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**Arizona** enacted legislation in 2016 creating a presumption that rideshare drivers are independent contractors. The statute allows employers to request that its drivers sign a declaration stating that they are independent contractors. A.R.S. §23-1601(B).

**Arkansas** classifies its drivers as independent contractors by statute with a slightly different framework than Alaska. A driver is an independent contractor, not an employee, of a TNC if:

- (1) The transportation network company does not prescribe specific hours during which a transportation network company driver must be logged into the transportation network company's website, digital platform, or software application;
- (2) The transportation network company imposes no restrictions on the transportation network company driver's ability to utilize a website, digital network, or software application of other transportation network companies;
- (3) The transportation network company does not assign a transportation network company driver a particular territory in which transportation network company services may be provided;
- (4) The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and
- (5) The transportation network company and transportation network company driver agree in writing that the transportation network company driver is an independent contractor of the transportation network company."

A.C.A. §23-13-719.

**Colorado** classifies its drivers as independent contractors by statute. The statute regulating TNCs says a driver "need not be an employee." Colo. Rev. Stat. §40-10.1-602 (Lexis Advance through Chapter 3 of the 2021 Regular Legislative Session).

**Connecticut** classifies its drivers as independent contractors by statute. "Transportation network company driver' or 'driver' means an individual who is not an employee of a transportation network company, but who uses a transportation network company vehicle to provide prearranged rides." Conn. Gen. Stat. §13b-116.

**Delaware** classifies its drivers as independent contractors if all of the following conditions are met:

- (1) The TNC does not prescribe specific hours during which a TNC driver must be logged into the TNC's digital platform;
- (2) The TNC imposes no restrictions on the TNC driver's ability to utilize digital platforms from other TNCs;
- (3) The TNC does not assign a TNC driver a particular territory in which to operate;
- (4) The TNC does not restrict a TNC driver from engaging in any other occupation or business; and
- (5) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor of the TNC.

2 Del. C. §1911.

**Florida** appears to classify its drivers as independent contractors based on administrative case law and unpublished persuasive authority; however, there does not appear to be binding authority mandating that result. For example, based on the contractual agreement and a review of the working relationship between the parties, Uber drivers are not employees and therefore are not entitled to reemployment assistance. *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017). Of significant note, Florida courts have declined to make binding decisions as ridesharing companies frequently use arbitration agreements to remove cases from litigation. For example, the United States District Court for the Southern District of Florida found that, "Pursuant to the arbitration agreement's delegation clause, the question of whether the driver was an employee covered by the NLRA or an independent contractor who was not covered was left to the arbitrator." *Lamour v. Uber Techs., Inc.*, No. 1:16-CIV-21449, 2017 U.S. Dist. LEXIS 29706, at \*1 (S.D. Fla. Mar. 1, 2017). A bill was introduced in 2017 to make TNC driver's independent contractors if certain conditions were met, but the bill failed. 2017 Legis. Bill Hist. FL S.B. 340. TNC drivers are regulated by statute, but drivers' employment status is not classified. Fla. Stat. Ann. §627.748 (LexisNexis, Lexis Advance through all 2020 general legislation).

**Hawaii** has legislation pending. A pending bill was introduced in January of 2021 that would classify TNC drivers as independent contractors if conditions are met. 2021 Bill Text HI H.B. 699. Of note, a bill was introduced in 2019 that would make TNC driver's independent contractors if conditions were met, but the bill failed. 2019 Bill Text HI

H.B. 2002. In the interim, similar to Georgia, cases will likely be handled on a fact-specific analysis by a court forced to make the determination.

**Ridesharing applications** (or "apps") have transformed modern day transportation in a short amount of time, but the law has not adapted in a uniform manner.

**Indiana** classifies its drivers as independent contractors by statute with exceptions. Except as otherwise established by a written contract, a TNC driver is an independent contractor. Ind. Code Ann. §8-2.1-19.1-4 (Burns, Lexis Advance through Public Law 23, 25, and 26 of the 2021 First Regular Session of the 122nd General Assembly).

**Massachusetts** has legislation pending. The bill was introduced in March 2021 stating that "Transportation Network Company drivers and food delivery network drivers are entitled to the benefits and protections granted to an employee under section 148C of Chapter 149" and "[n]o provision in this chapter shall be interpreted as to determine that transportation network company drivers or food delivery network company drivers are not employees under state law." 2021 Bill Text MA H.B. 1094. Previously, the Massachusetts Supreme Court found that taxicab drivers were not employees of the "Radio Association" and explained that, when the employer disputes the worker's characterization of the usual course of business, the court must determine the reality of the "actual business operations." *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 327, 28 N.E.3d 1139 (2015). Therefore, Massachusetts courts will likely turn to *Sebago* as guidance for ridesharing matters unless and until the pending legislation is passed.

Moreover, a recent Federal court opinion provides insight into how Massachusetts' courts may rule: *Cunningham v. Lyft, Inc.*, Civil Action No. 1:19-cv-11974-IT, 2020 U.S.

Dist. LEXIS 90333, at \*29 (D. Mass. May 22, 2020) (denying a preliminary injunction but finding a substantial likelihood of success on the merits that “[t]he ‘realities’ of Lyft’s business are no more merely ‘connecting’ riders and drivers than a grocery store’s business is merely connecting shoppers and food producers, or a car repair shop’s business is merely connecting car owners and mechanics”). Of note, a bill was introduced in 2015 that stated that drivers need not be employees of a TNC, but the bill failed. 2015 Bill Text MA H.B. 3537.

**Michigan** classifies its drivers as independent contractors by statute. TNC drivers are independent contractors—not employees—if all the following conditions are met:

- (1) The transportation network company does not prescribe the specific hours during which the transportation network company driver is required to be logged in to the transportation network company’s digital network.
- (2) The transportation network company does not impose any restrictions on the transportation network company driver’s ability to use other transportation network companies’ digital networks.
- (3) The transportation network company does not assign a transportation network company driver a particular territory within this state in which he or she may provide transportation network company prearranged rides.
- (4) The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business.
- (5) The transportation network company and the transportation network company driver agree in writing that the transportation network company driver is an independent contractor.

MCL §257.2137.

**Mississippi** classifies its drivers as independent contractors by statute. Drivers are independent contractors and not employees if all of the following conditions are met:

- (1) The transportation network company does not prescribe specific hours during which a transportation network company driver must be logged into the transportation network company’s digital platform;
- (2) The transportation network company imposes no restrictions on the transpor-

tation network company driver’s ability to utilize digital platforms from other transportation network companies;

- (3) The transportation network company does not assign a transportation network company driver a particular territory in which to operate;
- (4) The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and
- (5) The transportation network company and transportation network company driver agree in writing that the driver is an independent contractor of the transportation network company.

Miss. Code Ann. §77-8-21.

**Missouri** classifies its drivers as independent contractors by statute. TNC drivers are independent contractors—not employees—if all the following conditions are met:

- (1) The TNC does not prescribe specific hours during which a TNC driver must be logged into the TNC’s digital network;
- (2) The TNC imposes no restrictions on the TNC driver’s ability to utilize digital networks from other TNCs;
- (3) The TNC does not restrict a TNC driver from engaging in any other occupation or business; and
- (4) The TNC and TNC driver agree in writing that the driver is an independent contractor with respect to the TNC.

§387.414 R.S. Mo.

Except as described in section 387.433, transportation network companies shall not be considered employers of transportation network company drivers for purposes of chapters 285, 287, 288, and 290, except when agreed to by written contract. If the parties agree to the applicability of one or more of such chapters in a written contract, the transportation network company shall notify the appropriate agency of the election to cover the driver. If the parties subsequently change this election, the transportation network company shall notify the appropriate agency of the change.

§387.432 R.S. Mo.

**New Hampshire** classifies its drivers as independent contractors by statute. TNC drivers are presumed to be independent contractors—not employees—if all of the following conditions are met:

- (1) The TNC does not prescribe specific hours during which a TNC driver must be logged into the TNC’s digital platform;
- (2) The TNC imposes no restrictions on the TNC driver’s ability to utilize digital platforms from other TNCs;
- (3) The TNC does not assign a TNC driver a particular territory in which prearranged rides can be provided;
- (4) The TNC does not restrict a TNC driver from engaging in any other occupation or business; and
- (5) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor of the TNC.

RSA 376-A:20.

**North Carolina** drivers are classified as independent contractors by statute with an interesting twist: “A rebuttable presumption exists that a TNC driver is an independent contractor and not an employee. The presumption may be rebutted by application of the common law test for determining employment status.” N.C. Gen. Stat. §20-280.8. Therefore, drivers are assumed to be independent contractors, but the court may apply case law to determine the employment status to prove otherwise. Typically, a rebuttable presumption requires clear and convincing facts to prove the opposite of the presumption which is a higher-than-normal standard in an employee determination case.

**Ohio** drivers are classified as independent contractors (not employees) by statute. Except as established by written contract, TNC drivers are not employees. Ohio Rev. Code Ann. §4925.10 (Page, Lexis Advance through File 8 of the 134th (2021-2022) General Assembly; all acts passed as of April 10, 2021). “A driver is not an employee for purposes of sections 4113.51 and 4113.52 of the Revised Code. Nothing in this division shall be construed to create an employer and employee relationship between a transportation network company driver and a transportation network company.” ORC Ann. 4925.10.

**Rhode Island** drivers are classified as independent contractors by statute. However, Rhode Island incorporates Federal statutes related to the determination of an independent contractor in the tax code. “TNC drivers shall be independent contractors and not employees of the TNC if they are determined to meet federal and state law and regulation relating to independent contractors, in-



cluding, but not limited to, 26 U.S.C. §3401(a), 26 U.S.C. §3402(a)(1), §§28-29-17.1 and 28-42-7, and the TNC and TNC driver agree in writing that the TNC driver is an independent contractor of the TNC.” R.I. Gen. Laws §39-14.2-16

**Texas** sets forth statutory guidance to determine whether a driver is an independent contractor. A TNC driver is an independent contractor—not an employee—if:

- (1) the company does not:
  - (A) prescribe the specific hours during which the driver is required to be logged in to the company’s digital network;
  - (B) impose restrictions on the driver’s ability to use other transportation network companies’ digital networks;
  - (C) limit the territory within which the driver may provide digitally prearranged rides; or
  - (D) restrict the driver from engaging in another occupation or business; and
- (2) the company and the driver agree in writing that the driver is an independent contractor.

Tex. Occ. Code §2402.114.

**Utah** classifies its drivers as independent contractors per statute. A TNC driver is an independent contractor and not an employee. Utah Code Ann. §13-51-103 (LexisNexis, Lexis Advance through April 27, 2021).

**West Virginia** classifies its drivers as independent contractors. If the following conditions are met, drivers are independent contractors of the transportation network company and not employees:

- (1) The transportation network company does not prescribe specific hours during which a transportation network company

Driver must be logged into the transportation network company’s digital network;

(2) The transportation network company imposes no restrictions on the transportation network company driver’s ability to utilize digital networks from other Transportation Network Companies;

(3) The transportation network company does not assign a transportation network company driver a particular territory in which to operate;

(4) The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and

(5) The transportation network company and transportation network company driver agree in writing that the driver is an independent contractor of the transportation network company.

W. Va. Code §17-29-11 (LexisNexis, Lexis Advance through enacted legislation effective March 21, 2021). Enacted in 2016.

**Wyoming** classifies its drivers as independent contractors by statute. Drivers are independent contractors—and therefore not subject to the Wyoming Worker’s Compensation act—if:

(1) The transportation network company does not unilaterally prescribe the hours during which a driver must be available to receive requests for prearranged rides;

(2) The transportation network company imposes no restrictions on the driver’s ability to use digital networks of other transportation network companies to provide prearranged rides;

(3) The transportation network company does not restrict a driver from engaging in commercial activities unrelated to providing prearranged rides; and

(4) The transportation network company and driver agree in writing that the driver is an independent contractor with respect to the transportation network company.

Wyo. Stat. §31-20-110. Enacted in 2017.

Currently, more than half of the country does not discern whether ridesharing drivers are considered employees or independent contractors. Those states are:

- Alabama
- Georgia
- Idaho
- Illinois
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Minnesota
- Montana
- Nebraska
- Nevada
- New Jersey
- New Mexico
- New York
- North Dakota
- Oklahoma
- Oregon
- Pennsylvania
- South Carolina
- South Dakota
- Tennessee
- Vermont
- Virginia
- Washington
- Wisconsin

## Conclusion

While a minority of states have enacted legislation clarifying the employee/independent contractor status of ridesharing drivers, more than half of state legislatures have not yet done so. As such, insurers must stay abreast of this issue and communicate with counsel in order to determine whether rideshare drivers are or are not covered following auto accidents involving personal injury or property damage. Attorneys defending rideshare drivers or rideshare companies must also stay up to date on this topic. This is clearly an evolving state of law, regulation, and potential risk, and future legislation and case law updates are expected as more litigation and lobbying occurs.