

# Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying

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## I.

### INTRODUCTION

Employment laws by their very terms depend on the identification of an employee and an employment relationship. However, these laws are frequently baffling in defining who is an “employee” or what constitutes “employment.” A typical example is the Fair Labor Standards Act (FLSA),<sup>1</sup> which defines “employee” as “any individual *employed* by an *employer*.”<sup>2</sup> An “employer,” the Act continues, is a person “acting . . . in the interest of an *employer* in relation to an *employee*,”<sup>3</sup> thus bringing the matter around full circle. One might seek an answer in the definition of “employ,” which is to “suffer or permit to work.”<sup>4</sup> Yet, if this definition were taken seriously it would erase any distinction at all between employment and other service relationships, such as those involving independent contractors. Is it obvious that this series of definitions explains nothing? Perhaps not, since Congress and many state legislatures have copied the FLSA definitions innumerable times.<sup>5</sup>

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1. 29 U.S.C. §§ 201-219 (1994).

2. *Id.* § 203(e)(1) (emphasis added).

3. *Id.* § 203(d) (emphasis added).

4. *Id.* § 203(g).

5. For examples of federal laws’ definitions provision adopting this method of definition, see, e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(5)-(6) (1994); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (1994); Employee Polygraph Protection Act, 29 U.S.C. § 2001(2) (1994); Civil Rights Act of 1964, Title VII § 701, 42 U.S.C. § 2000e(f) (1994); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (1994). Other federal employment laws were enacted as amendments to the Fair Labor Standards Act (FLSA) and are therefore subject to the FLSA’s definitions. See, e.g., Equal Pay Act, 29 U.S.C. § 206(d) (1994); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994).

The states are also fond of circular definitions of “employee” and “employer” and the vacuous definition of “employ.” A representative sampling of laws from states A through H includes ALASKA STAT. § 23.30.395 (Michie 1996) (workers’ compensation law); ARIZ. REV. STAT. ANN. §§ 41-1461 (West 1999) (anti-discrimination law); COL. REV. STAT. ANN. §§ 24-34-301 (West 1973 & 1997 Supp.) (anti-discrimination law); CONN. GEN. STAT. ANN. § 46a-51(a) (West 1995 & 1997 Supp.) (anti-

If all people who work are therefore employees, the usual statutory definitions of “employ” or “employee” would suffice, and determining the coverage of these laws would be a simple matter, but of course the world is not so simple. To be sure, the great majority of workers are employees of some employer.<sup>6</sup> A significant number, however, are not.<sup>7</sup> Some workers, particularly “independent contractors,” are clearly employers or business owners in their own right and are not employees of the persons they serve. Still others labor in ambiguous relationships that might be employment or independent contracting. It is these workers who force the question, “what is an employee?”<sup>8</sup> Since many laws regulating working relationships depend on employee status as a test of coverage, important rights and duties depend on how courts and administrative agencies choose to resolve ambiguity.

The ambiguities surrounding employee classification are shown in the recent case of *Vizcaino v. Microsoft Corp.*<sup>9</sup> In this case, Microsoft first classified as “independent contractors” certain workers whose compensation was not subject to tax withholding, unemployment taxes, or the employer’s share of social security taxes. Perhaps even more importantly to Microsoft, the decision to classify these workers as independent contractors led to their exclusion from pension and other employee benefits plans.<sup>10</sup> Had the workers asserted rights under employee benefits laws or other laws granting rights to employees, their status as independent contractors (if accurate) would have placed them beyond the protection of these laws. The Court found that Microsoft erred. The contractors were employees after all, and Microsoft’s misclassification ended in a migraine of tax and employee benefits problems.<sup>11</sup> This case illustrates how much a

discrimination law); FLA. STAT. ANN. § 448.07(1)(a)-(b) (West 1997) (anti-discrimination law); GA. CODE ANN. § 34-5-2(3)-(4) (Michie 1997) (anti-discrimination law); HAW. REV. STAT. ANN. §§ 387-1, 388-1 (Michie 1994 & Supp. 1997) (wage and hour law).

6. The number of workers who are independent contractors by most definitions appears to be less than 12% of the workforce. See Government Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce*, Report No. GAO/HEHS-00-76, 14 (2000) available at <http://www.gao.gov>.

7. The number of workers who are independent contractors by any definition is a matter of speculation, but estimates of “contingent workers,” who include independent contractors as well as other atypical employees (e.g., temporary employees) range no higher than 30% of the total workforce. See *id.* at 4.

8. Occasional trouble is also presented by some workers who combine characteristics of “employees” and of “non-employee volunteers,” corporate “officers,” or even business “owners.” But these situations are rare in comparison to the much greater and fast growing problem of workers who combine characteristics of employees and independent contractors.

9. 97 F.3d 1187 (9th Cir. 1996) (“*Vizcaino I*”), *rev’d in part*, *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc) (“*Vizcaino II*”).

10. See *Vizcaino I*, 97 F.3d at 1189.

11. After the Internal Revenue Service determined that the workers were employees and not independent contractors, Microsoft agreed to issue retroactive W-2 forms, to pay overdue taxes relating

worker's status has come to matter in the modern business world. For Microsoft, the workers' status as employees triggered potentially enormous liability for unpaid payroll taxes, pension benefits and other employee benefits. It might also have exposed Microsoft to liability for discrimination, sexual harassment and work-related injuries.

Unfortunately, the distinction between employees and independent contractors is no clearer after *Vizcaino* than before.<sup>12</sup> Indeed, in the case of employee status, the law encourages ambiguity. On the one hand, employers often crave the control they enjoy in a normal employment relationship. On the other, the advantages (to employers) of employing workers who are plausibly not employees motivate a good deal of arbitrary and questionable "non-employee" classification. It is not uncommon to find employees and putative contractors sitting side by side, performing the same work without any immediately visible distinguishing characteristics.<sup>13</sup> And the trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships.<sup>14</sup>

Our employment statutes, however, rarely accept the challenge posed by this problem. The real work of identifying "employees" and their employment relationships has always been in the courts. Statutory non-definitions, such as those in the FLSA, might well be viewed as mandates for the courts to continue in this mission.<sup>15</sup> But the courts have scarcely

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to the workers' employment, and to pay overtime compensation required by applicable employment laws. *See id.* at 1190-91. Some of the other federal benefits and tax law implications of Microsoft's error are outlined in *Vizcaino II*. *See Vizcaino II*, 120 F.3d at 1010-14. Microsoft continued to resist the claims of many of the workers for benefits they might have received but for their misclassification as contractors. *See Vizcaino v. U.S. Dist. Court*, 173 F.3d 713 (9th Cir. 1999).

12. Microsoft never contested the Internal Revenue Service's determination that the workers were employees. *See Vizcaino I*, 97 F.3d at 1190-91. The ensuing litigation involved only the consequences of this determination on the benefits rights of the workers. Judge Trott, dissenting in *Vizcaino I*, lamented this result by quoting a Government Accounting Office report that "Until the classification rules are clarified, we are not optimistic that the confusion over who is an independent contractor and who is an employee can be avoided." *Id.* at 1202 (quoting General Accounting Office, *Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors*, Report No. GAO/T-GGD-96-130, 5 (1996)).

13. In *Vizcaino I*, for example, Microsoft's contractors (or "freelancers") performed the same work as employees, during the same working hours at the same worksite and in the same work teams under the same supervisors. *See Vizcaino I*, 97 F.3d at 1189-1190.

14. There are of course many worthy business reasons for the hiring of truly independent contractors. If the work is short term and highly specialized it is often more efficient for an employer to rely on an independent contractor than on its own workforce. A true independent contractor needs no supervision, brings her own tools and equipment to the job and does not expect continued employment when the task is complete. There are also many advantages in claiming an employee is something else if there is enough ambiguity to make the claim plausible. *See infra* Section V(A).

15. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (finding that the ERISA version of the circular definition of "employee" is not really a definition at all, and that under these circumstances a court must resort to the "common law" test of employee status).

been any more clear or precise, and probably could not be, in developing definitions or rules for this purpose. While judges frequently speak of the “common law” test of employee status and employment relations, they have generally failed to articulate any consistent rule or test.<sup>16</sup> Instead, they have perpetuated an ever-expanding catalogue of “factors” useful in distinguishing employees from non-employee workers or in determining who is an employee’s employer.<sup>17</sup> The lists typically stated are admittedly nonexhaustive<sup>18</sup> and, as courts identify new factors, the resulting multi-factored analysis becomes more complex and its outcome less predictable.<sup>19</sup> After nearly two hundred years of evolution, the multi-factored “common law” test begs the question of employee status as much as answers it.

The difficulty of defining “employee” also leads to what *ought* to have been the first question for legislators: why should employee status matter at all? In a simpler world in which “employees” were naturally equated with

16. See, e.g., *Eisenberg v. Advance Relocation Storage, Inc.*, 237 F.3d 111,113 (2d Cir. 2000) (determining whether worker is an employee requires applying the “common law of agency[‘s]” multi-factor test).

17. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (listing ten factors for determining whether a person is an employee of another person). The U.S. Supreme Court listed *thirteen* factors in *Community for Creative Non-Violence v. Reid*. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989). The Internal Revenue Service offers a list of *twenty* factors. See Rev. Rul. 87-41, 1987-1 C.B. 296, 298-299.

Restatement factors include the following:

- (a) [T]he extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

The Court’s factors include the following:

[T]he hiring party’s right to control the manner and means by which the product is accomplished; . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Cnty. for Creative Non-Violence*, 490 U.S. at 751-52 (footnotes omitted).

18. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (introducing ten factors, “among others,” that bear on the question of employee status).

19. In *Eisenberg* for example, the court cited 13 factors and added that “other relevant factors” may also be included. *Eisenberg*, 237 F.3d at 114 n.1. No single factor is dispositive according to the court. See *id.* at 114. Factors that are part of the common law test must be ignored if they are irrelevant or of indeterminate weight in light of the unique facts of each case. See *id.* Obviously the formula is not one of mathematical precision.

persons needing statutory protection, and non-employees equated with persons needing none, the effort necessary to distinguish these two groups of workers might be worth the trouble. In reality, independent contractors frequently resemble employees in ways that make them equally in need of protection. Moreover, the very existence of a multi-factor analysis for determining what is an “employee” leads naturally to the conclusion that there is nothing inherent in the character of either employees or independent contractors that makes one group more or less deserving of protection than the other.

A different approach, which some courts already practice on a limited scale, would focus on the purpose of a law, and provide for its application irrespective of traditional distinctions of status, and without the need for identifying a particular employment relationship. This proposal is not entirely new; for instance, the Supreme Court first articulated its own judicial version of a “statutory purpose” approach more than half a century ago in *National Labor Relations Board v. Hearst Publications*.<sup>20</sup> In *Hearst*, the Court held that employee status is relative and might change from one case to the next, depending on the goal of the statute the parties had called into question.<sup>21</sup> This notion of variable status based on statutory purpose has not prevailed. Instead of evolving into a useful alternative solution to the problem of statutory coverage, the statutory purpose rule is now dismissed by the Court that once elevated it.<sup>22</sup>

The *Hearst* Court’s statutory purpose approach failed for several reasons. Politics played a role in its demise,<sup>23</sup> but there were also conceptual flaws in the Court’s approach. First, the best forum for marking the limits of coverage is in the law-making body that makes the statute. Second, any test that is still substantially dependent on a multi-factored analysis that can only be applied case-by-case is likely to suffer from the same problems of ambiguity as the common law test. The solution is to accept that consideration of employee status is seldom, if ever, essential to a rule of coverage for any law, and that a law is likely to apply with greater precision and more appropriate scope if employee status is abandoned in favor of a test based more particularly on the purpose and intended effect of the law.

The courts, of course, cannot abandon employee status as a test as long as Congress and state legislatures continue to make employee status the clearly stated basis of statutory coverage. *Hearst*, at the very least, was an

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20. 322 U.S. 111 (1944).

21. *See id.* at 129.

22. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (rejecting the argument that the common law factor approach would thwart congressional intent). *See also infra* notes 217-243 and accompanying text for discussion of *Nationwide Mutual*.

23. *See infra* text accompanying notes 149-157.

early signal of the flaws of status-based coverage, but instead of encouraging more thoughtful drafting it provoked a stubborn retrenchment by Congress, which purported to overrule *Hearst* and restore the common law.<sup>24</sup> The result has been continued wasteful litigation of the employee status issue, manipulation of working relations by employers seeking to avoid employment regulations, and never-ending uncertainty about the status of the growing number of workers who toil in the gray area between “employee” and “independent contractor.”

This article proposes an approach to statutory coverage based on the character of the transactions between the parties instead of the status of the parties. It proposes to regulate compensation for services rather than “employee” wages, workplaces rather than places where “employees” work, and discrimination in the selection and retention of individuals to work instead of discrimination against “employees.” This article begins with a summary of the origin of our status-based system of statutory coverage and of the “common law” test of employee status. It then describes the Supreme Court’s failed effort to replace the common law test with a judicially crafted statutory purpose rule. Next, this article examines the reasons why the common law test fails so badly to serve as a useful basis for statutory coverage, and why judicial attempts to design a statutory purpose approach to employee status are doomed to fail. Finally, this article outlines a strategy for Congress and other legislatures to draft rules of coverage eliminating, in most instances, any need for distinguishing employees from independent contractors.

## II.

### WHY EMPLOYEE STATUS MATTERS: THE LEGISLATIVE SEARCH FOR A RULE OF COVERAGE

Employee status and the distinctions it requires are important today mainly because of modern social welfare legislation. The classification of individual workers as employees and non-employees seems to have mattered very little before lawmakers sought extensively to protect workers with collective bargaining laws, social security benefits, minimum wage regulations, and anti-discrimination rules.<sup>25</sup> And until the industrial revolution there was little reason to wonder about the classification of any particular worker: fewer types of work, fewer occupations, simpler organization of work, and a pre-established and static view of relationships

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24. See *infra* Section III(B).

25. Blackstone, for example, included a chapter on master and servant relations in his *Commentaries on the Laws of England*, but the most important legal rights or duties he identified in connection with this relationship involved a master’s liability for the servant’s negligence. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 410-420 (1765).

left little ground for variation, experimentation or ambiguity.<sup>26</sup>

### A. Pre-Industrial Origins of Worker Classification

Even the pre-industrial world had some need for classification. The “master-servant” relationship, which is widely regarded as the pre-industrial precursor of the “employer-employee” relationship,<sup>27</sup> was important mainly for social reasons but also for the purpose of imposing a set of paternalistic and very personal obligations on the parties. Thus, for example, Blackstone’s Commentaries treated master-servant relations much the same as family relations. Indeed, Blackstone included the master-servant relationship among “the three great relations in private life,” the other two being husband and wife, and parent and child.<sup>28</sup>

Like these basic family relationships, the master-servant relationship conferred a predetermined set of rights and responsibilities. Once the relationship was formed or imposed by mandatory employment orders, the law frequently dictated the rate and method of pay, the term of employment, and the grounds for which the relationship could be terminated.<sup>29</sup> In Blackstone’s view, however, the relationship was no mere exchange of work for pay. It also established the worker’s dependence on the master, and the master’s domination over and paternalistic interest in the worker, with rules that resembled the relationship between a husband/father and his family.<sup>30</sup> Thus the label “master-servant” connoted a relationship of very broad authority and control for one party and general subservience for the other. The servant was a member of the household, at least in Blackstone’s somewhat romantic view. In an era when most work was still “domestic,” and most workers were attached to a particular “master,” there was probably little occasion or need for doubt about a worker’s status. Blackstone, at least, did not identify any potential

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26. See generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Marc Linder, *What Is An Employee? Why It Does, But Should Not, Matter*, 7 LAW & INEQ. 155 (1989). Most of the cases described in this article involve occupations that simply did not exist before the Industrial Revolution, or they involve the centralization of work in a modern factory that restricted the independence of workers in ways that would not have been possible in the pre-industrialized world.

27. To this day, the West Digest system collects basic employment law cases under the heading “Master-Servant.”

28. BLACKSTONE, *supra* note 25, at 410.

29. See BLACKSTONE, *supra* note 25, at 414-15; ROSS CRANSTON, LEGAL FOUNDATIONS OF THE WELFARE STATE 117 (1985).

30. The master possessed a privilege to maintain an action on the servant’s behalf against those who injured the servant, or to sue for himself to recover damages for the loss of the servant’s services. See BLACKSTONE, *supra* note 25, at 416-17. The servant could commit a legally justifiable assault in defense of the master (“because it is part of his duty”), *id.* at 417, and the master, likewise, in defense of the servant (to protect the master’s right to the servant’s services). See *id.* at 416-17.



doubtfulness of a worker's status.<sup>31</sup>

Not that all workers were "servants." Some were not exclusively in the service of one master but were available for service to the general public.<sup>32</sup> These unattached workers apparently were not subject to any of the obligations or protection provided by the master-servant relationship,<sup>33</sup> although a worker might be a master of his own servant. Not surprisingly, the earliest reported controversies about a worker's status led to examination of a master's lordly authority and control and the worker's primary or exclusive dependence on the master for his livelihood.<sup>34</sup> In contrast, the term "independent contractor" appears to have been associated in early times with the idea of an "independent calling" or a distinct occupation, and early sources suggest that the person in question was not devoted to a single master but was free to serve several clients simultaneously or in seriatim.<sup>35</sup> He was, in essence, his own master. But the possibility of difficulty in distinguishing these non-servants does not appear to have troubled the courts until the industrial revolution and modern tort law.<sup>36</sup>

Little of Blackstone's simple portrait of master-servant relations survived into the industrial revolution, especially in America. The feudal and authoritarian qualities of the ancient master-servant relationship and the English practices of compelled employment and regulated wages were out of character with American life and culture or the factory system of work.<sup>37</sup> Moreover, the old master-servant model was predicated on simple and direct relationships without much variation in legal rights and duties. The Industrial Revolution, with its accompanying explosion of new occupations and ways of organizing work, shattered this simplicity.<sup>38</sup>

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31. Blackstone systematically categorized various types of "servants" but said nothing of the existence of or means of distinguishing servants from independent workers or contractors. *See id.* at 410-20.

32. For example, The Ordinance of Labourers, which was Parliament's first effort to impose terms of employment, did not apply to persons "living in merchandize [or] . . . exercising any craft . . ." 23 Edw. III (1349).

33. *See id.*

34. *See e.g.*, *Singer Mfr. Co. v. Rahn*, 132 U.S. 518, 522 (1889) (finding it "significant" evidence of a master/servant relationship that a salesman "'agrees to give his exclusive time and best energies to said business,' and is to forfeit all his commission under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company"); *Sadler v. Henlock*, 119 Eng. Rep. 209 (1855). *See also* Gerald M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189-191 (1939) (discussing the *Sadler* case and other early versions of the "control" test).

35. *See Bennett v. Truebody*, 6 P. 329, 330 (Cal. 1885); *McCarthy v. Second Parish of Portland*, 71 Me. 318 (1880); *Milligan v. Wedge*, 113 Eng. Rep. 993 (1840). *See also* Benjamin S. Asia, *Employment Relations: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76, 77 (1945).

36. *See infra* notes 41-48 and accompanying text.

37. *See* MATTHEW W. FINKEN ET. AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 3-10 (2d ed. 1996).

38. *See id.*

By the mid-nineteenth century, industrialization had produced a number of new or newly important issues that required differentiation between categories of workers whose degree of dependence made them more or less needful of protection, or made the public more or less needful of the employer's financial responsibility for risks associated with the work. The most important of these issues was whether an employer was liable to third parties injured by the worker's negligence.<sup>39</sup> The earliest cases, however, show no consensus as to any basic means of distinguishing servants from other types of working people.<sup>40</sup> For example, some courts applied the doctrine of *respondeat superior* and imputed financial responsibility to parties who resembled "masters" only because they were paying for the negligent party's work.<sup>41</sup> Of course, continuing down this path would have resulted in substantial liability for the growing number of middle class consumers of specialized services who could neither effectively control details of a worker's performance nor efficiently insure against his negligence.

The rule that prevailed was based on an original facet of Blackstone's master-servant model: a master was liable for an act of the servant commanded by the master or committed in the course of the servant's service controlled by his master.<sup>42</sup> The courts' emphasis on "control" or "right of control" protected many consumers who had purchased a worker's services but lacked any realistic means of supervising the worker. It was also driven by the courts' sense of the need to declare some fault on the part of an employer, for having actually commanded or controlled the particular act that caused injury, for having failed to object to work done badly, for having failed to supervise the details of the work, or for having carelessly selected the negligent worker.<sup>43</sup>

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39. See Stevens, *supra* note 34, at 188-89.

40. See *id.* at 189-93.

41. See, e.g., *Bernhauer v. Hartman Steel Co.*, 33 Ill. App. 491 (1889) (finding employer hired plumber for specific project liable for negligence of plumber's assistant); *Slone v. Codman*, 32 Mass. 297 (1 Pick.) (1834) (finding *respondeat superior* to apply in case of mechanic who was hired for particular project and who employed his own assistants, procured the material for the work, and was paid for his work plus disbursements); *Brackett v. Lubke*, 86 Mass. 138 (4 Allen) (1862) (finding *respondeat superior* liability for negligence of carpenter hired for particular task). But see *Boswell v. Laird*, 8 Cal. 469 (1857) (finding landowner not liable for contractor's negligence in construction of dam, because landowner did not control the work); *Hilliard v. Richardson*, 69 Mass. 349 (3 Gray) (1855) (finding building owner not liable for carpenter's negligence because owner did not control the work); *Morgan v. Bowman*, 22 Mo. 538 (1856) (finding building owner not liable for negligence of roofers, whose work was beyond his control); *Wiswall v. Brinson*, 32 N.C. 554 (10 Ired.) (1849) (Ruffin, J., dissenting) (listing and reviewing English cases denying liability of employer as to work he did not control).

42. See BLACKSTONE, *supra* note 25, at 417-420.

43. See Stevens, *supra* note 34, at 190-198. See also *Boswell v. Laird*, 8 Cal. 469, 489-490 (1857) ("The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any

Initially the control test depended on an apparent (though usually unstated) comparison of the employer's supervision or opportunity to supervise on the one hand, and the worker's independence and self-sufficiency on the other. Courts seldom actually explained the factual basis for a conclusion that the employer had or did not have "control" over the work. Their conclusions simply followed from analyzing a list of facts that included any specific instructions by the employer, his opportunity to control (e.g., because the work was on his property or within his view), the duration of the relationship, and the relative size and sophistication of the parties' respective businesses (although these facts were usually implied, rather than expressly stated, by the character of each business, such as a steel factory versus a plumber).<sup>44</sup> These were some of the "factors" courts ultimately included in the multi-factored test of modern times.<sup>45</sup>

Ironically, the courts' focus on the master's control as the basis for *respondeat superior* liability signaled the death of the old master-servant model. The control test was consistent with the dominant/subservient model in the abstract, but in the real world control is relative, either because of the variety of agreements the parties might negotiate in the modern commercial and industrial world, or because of the wide range of power one party might exercise over the other by virtue of superior knowledge or economic dominance. A highly skilled worker, for example, might be beyond much control by his employer, regardless of the terms of the contract, simply because the employer lacks the knowledge that makes the worker a professional. More importantly, if the degree of control exercised by an employer is a *test* of legal employee status rather than a *result*, the possibilities for ambiguity and manipulation by the parties are immediately endless.

Originally the "control test" primarily served one purpose: to explain one person's liability for another's negligence. Beyond this, the uncertainty of a worker's status was of limited consequence in the largely unregulated working world of the nineteenth century. The dearth of compulsory labor statutes or wage regulations meant that a finding of servant status had no particular importance beyond the matter of third-party liability in the event of an accident. That the control test served a very narrow purpose at this time is illustrated by the special situation of the servant who employed other servants who were known as "underservants". In early *respondeat*

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injury resulting from the want of skill, or want of care of the person employed."); *Sproul v. Hemmingway*, 31 Mass. (14 Pick.) 1, 3-4 (1833) (Brooke, J., dissenting).

44. See, e.g., *Bernhauer v. Hartman Steel Co.*, 33 Ill. App. 491 (1889); *Hilliard v. Richardson*, 69 Mass. 349 (3 Gray) (1855); *Wiswall v. Brinson*, 32 N.C. 554 (10 Ired.) (1849) (Ruffin, J., dissenting) (reviewing English cases).

45. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

*superior* cases, courts frequently held the master liable for accidents by underservants, on the theory that the master controlled their work, or controlled the servant and could have objected to his servant's delegation of work to underservants.<sup>46</sup> On the other hand, courts also frequently held that an underservant had no claim against the master for wages, and that the duty to pay was owed by the hiring servant alone, without any evident regard for the extent of the master's control over the underservant.<sup>47</sup> What counted was identification of the party who made the promise of payment for services, and if the hiring servant made the promise then the underservant's only recourse was against the hiring servant.<sup>48</sup>

### B. Worker Status Under Early Employment Statutes

The insecurity of any worker's right to wage payments became more obvious as employment relations became less domestic and paternalistic, and grew more industrial, complex and impersonal. Securing compensation for workers became one of the earliest goals of legislation protecting the

46. See, e.g., *Bernhauer v. Hartman Steel Co.*, 33 Ill. App. 491 (1889) (finding employer liable for negligence of plumber's assistant); *Wichtrecht v. L&S Fasnacht*, 17 La. Ann. 166 (1865) (finding brewers liable for negligence of driver hired by employee); *Kimball v. Cushman*, 103 Mass. 194, 198 (1869); *Southern Exp. Co. v. Brown*, 7 So. 318 (Miss. 1890) (finding master liable for negligence of servant's servant, where master failed to prove servant had exclusive control over the work); *Hill v. Sheehan*, 20 N.Y.S. 529 (1892) (finding master liable for negligence of servant's servant based on fact that servant's servant was performing work for master); *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446 (Minn. 1893) (finding employer liable based on evidence of the employer's implied or express consent to the hiring and selection of helpers). See also cases summarized in *Haluptzok*, 55 Minn. at 448-50. On the other hand, the fact that a worker employed assistants also sometimes served as evidence that the worker was an independent contractor, so that the doctrine of *respondeat superior* did not apply against the hiring party. See, e.g., *Bennett v. Truebody*, 6 P. 329 (Cal. 1885); *Wadsworth Howland Co. v. Foster*, 50 Ill. App. 513 (1893).

47. See, e.g., *Walters v. Western & A.R. Co.*, 69 F. 679 (N.D. Ga. 1895); *Hill v. Lowden*, 33 Ill. App. 196 (1889); *Plymouth Coal Co. v. Komminsky*, 9 A. 646 (Pa.1887). In some cases the underservant's claim against the employer was denied because the worker who hired him was a "contractor" or "subcontractor." See, e.g., *Guthrie v. Horner*, 12 Pa. 236 (1849). Nevertheless, the hiring worker sometimes enjoyed protection under laws securing the payment of wages or other compensation, especially if the coverage of the law in question did not depend on the existence of a traditional master-servant relationship. See, e.g., *Penn. Coal Co. v. Costello*, 33 Pa. 241 (1859); *Smith v. Brooke*, 49 Pa. 147 (1856) (finding hiree's wages for his own labor protected, although payment for subordinate workers' efforts were attachable).

48. Today of course, it seems natural to hold an employer responsible for the consequences of an employee's accidents or for the employee's right to wages, no matter how many layers of employees lie between the top and bottom of an enterprise, if all the intermediate employees really are employees and not independent contractors responsible for their own employees. While any employer of significant size is likely to delegate hiring authority to some of its employees, wise business practices and the complexity of payroll obligations make it important for an employer to centralize the payment of wages in a single payroll system. Of course, the fact that a worker is able to hire his own assistants and pays them out of his *own* pocket, under modern circumstances, is very persuasive evidence that the worker is an independent contractor who bears all the responsibilities of an employer with respect to those he has hired. See, e.g., *People v. Remington*, 10 N.Y. St. 310 (1887). See also *infra* text accompanying notes 312-315.

common worker, and it provided the next important occasion for distinguishing persons entitled to protection by virtue of their dependency on a master or employer. However, neither the control test nor any other single test or standard predominated for purposes of early statutory coverage. Indeed, early protective legislation reflects a lack of agreement even as to the basic style or vocabulary of coverage.

Some laws, such as those granting preferences to “wages” in bankruptcy, or creating liens to secure indebtedness based on unpaid “wages,” appeared by their terms to depend on the nature of the payment rather than on the employer’s control over performance or the employee’s dependence on the employer.<sup>49</sup> “Wages” connoted payment for personal services based on units of time (by the hour, day or week) during which the worker performed whatever reasonable task pleased the master, in contrast with task-based payments or commissions (for which the task was defined in advance) or annualized salaries paid to workers of such skill, judgment and professional standing that they were regarded as their own masters.<sup>50</sup> The courts, therefore, sometimes denied protection to a worker who earned a salary or commission,<sup>51</sup> or extended it to one who worked for an hourly or daily rate, without any consideration of employer control over performance.<sup>52</sup>

Delineating statutory coverage based on the method of compensation was a strategy completely different from tort law’s emphasis on control. One could certainly generalize that a worker who receives “wages” is likely (but not necessarily) an employee or servant, and that a worker who receives payment by the task is likely (but not necessarily) an independent contractor. Thus, indebtedness for wages is a rough, if imperfect, proxy and an alternative test for a master-servant relationship.<sup>53</sup> But since many

49. See, e.g., *Pierce v. Whittlesey*, 19 A. 513 (Conn. 1889); *Avent Beattyville Coal Co. v. Commonwealth*, 28 S.W. 502 (Ky. 1894) (involving law regulating payments to “wage earners”); *State v. Loomis*, 20 S.W. 332 (Mo. 1892).

50. See *In re New York Locomotive Works*, 26 N.Y.S. 209, 212 (1893). See also *Morgan v. Bowman*, 22 Mo. 538, 548-550 (1850) (noting payment of daily wage as evidence of master-servant relationship for purposes of respondeat superior). The dichotomy between totally submissive wage earners and relatively independent salary earners was more a legal fiction than a workplace reality. See James Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 968 (1997); John Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467, 1473 (1998).

51. See, e.g., *New York Locomotive Works*, 26 N.Y.S. at 212 (denying preference for “wages” to certain salaried personnel).

52. See, e.g., *First Nat’l Bank v. Kirby*, 32 So. 881 (Fla. 1901) (applying a wage lien statute applicable to “bookkeepers, clerks, agents, reporters and other employees,” and finding that it extended to a worker who used his own team to haul logs for a sawmill at a stated daily rate).

53. To the extent that a salary was not regarded as “wages,” the wages test further distinguished managerial or professional workers from lesser skilled and more easily exploited wage earners. See, e.g., *People ex rel. Van Valkenburg v. Myers*, 11 N. Y. Supp. 217 (1890); *Coffin v. Reynolds*, 37 N.Y. 640 (1868).

independent contractors, lawyers among them, charge according to an hourly rate, and some employee/servants work according to a “piece rate” or some other task-oriented rate of compensation, the “wage” test was never a completely reliable guide to status.

In lieu of, or in addition to, the “wage” qualification, some early protective legislation described coverage by listing workers by occupation (e.g., miners).<sup>54</sup> Other laws addressed a particular industry or employment sector (e.g., railroads, mines, factories).<sup>55</sup> These approaches, which may have been a product of lobbying by particular labor organizations and industries more than a search for ideal language, tended to negate the relevance of the control test. If the worker did a particular type of work or worked in a particular industry, then he enjoyed the benefit of the law’s protection without regard to the extent of the employer’s control over the performance of the work.<sup>56</sup> Miners, for example, were early favorites of protective legislation, although they often worked with independence and individualism that defied the old master-servant model or the control test.<sup>57</sup>

When legislatures sought a broader or more general coverage, they had an assortment of vague and uncertain terms from which to choose: “servant” and “employee” were only two of the choices. Other possible terms were “workman,” “laborer,” “wage earner,” “operative,” or “hireling.”<sup>58</sup> The common drafting strategy of combining several of these and other terms of coverage for good measure suggests a general uncertainty whether any was broad enough in meaning for the desired effect.<sup>59</sup> Indeed, the courts tended to find important limitations in words such as “laborer” and “workman,” which connoted *manual* laborer and excluded the fast-growing class of clerical and office workers.<sup>60</sup>

54. See, e.g., *Jones v. People*, 110 Ill. 590 (1884) (applying Illinois law of 1883 regarding payment of wages to miners); *Hancock v. Yoder*, 23 N.E. 253 (Ind. 1890) (applying an Act of February 14, 1887 regarding payment of wages to miners).

55. See, e.g., *Commonwealth v. Marsh*, 3 Pa. D. 489 (1894) (applying an Act of May 20, 1891 regarding mining and manufacturing).

56. See, e.g., *Vane v. Newcombe*, 132 U.S. 220, 234 (1889) (distinguishing two statutes, one creating a lien in favor of “employees,” which by this term denied such protection to independent contractors, and another creating a lien in favor of “miners and other persons employed and working in and about the mines,” which secured the wages of miners irrespective of their status as employees or contractors). See generally C. B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT, vol. V, §§ 1941-1975 (1913).

57. See Pope, *supra* note 50, at 968; Witt, *supra*, note 50, at 1473.

58. *Emerson v. Hedricks*, 42 Ark. 263 (1883) (“laborers”); *Avent Beattyville Coal Co. v. Commonwealth*, 28 S.W. 502 (Ky. 1894) (“wage earners”); *Cumberland Glass Mfg. Co. v. State*, 33 A. 210 (N.J. 1895) (“workmen”); *Lehigh Coal & Navig. Co. v. Central R. Co.*, 29 N.J. Eq. 252 (1878) (“laborers”).

59. See LABATT, *supra* note 56, at 6081 (noting that “employee,” when used as a term of statutory coverage, “is invariably associated with other expressions which serve to show more or less precisely the meaning which the legislature intended to attach to it”).

60. See, e.g., *Flournoy v. Shelton*, 43 Ark. 168 (1884) (finding farm overseer not a “laborer”);

“Operative,” on the other hand, connoted a skilled worker or artisan, but not a professional or managerial employee.<sup>61</sup> A “hireling” was equated with a servant in the traditional sense.<sup>62</sup> Although “servant” was (and is) sometimes used in a very broad sense to include most industrial era employees, it also carried the historical baggage of a class system and connoted a feudal relationship of domination and dependence that was offensive to the American culture. Thus, some courts confined the meaning of “servant” to household servants.<sup>63</sup>

Out of all those terms, “employee” prevailed, if only by default, and the choice was confirmed by the next wave of protective legislation—workers’ compensation laws in the early years of the Twentieth Century.<sup>64</sup> “Employee,” being derived from the verb “to employ,” might have suggested application to any person engaged to render services. Instead “employee” served mainly as a near substitute for “servant,”<sup>65</sup> and it seems

Hinton v. Goode, 73 Ga. 233 (1884) (finding that clerk might be “laborer” if he performs manual labor); *In re Sayles*, 32 N.W. 637 (Mich. 1892) (finding inspector, who did not perform manual labor, not in the class of “laborers” protected by statute); *Jones v. Avery*, 15 N.W. 494 (Mich. 1883) (finding traveling salesman not a “laborer”); *Brockway v. Innes*, 39 Mich. 47 (1878) (finding assistant chief engineer not a “laborer”); *In re New York Locomotive Works*, 26 N.Y.S. 209 (1893) (finding “employees . . . and laborers,” as used in statute creating preference for wages of such persons, not to apply to salaried administrative and managerial personnel, instead finding “employees” limited by the term “laborers” with which it was associated in the statute); *Wakefield v. Fargo*, 90 N.Y. 213 (1882) (finding salaried bookkeeper and general manager not a “laborer” or “servant” within meaning of statute making shareholders liable for wages owed to such persons); *Pa. R. Co. v. Leuffer*, 84 Pa. 168 (1877) (finding civil engineer not a “laborer” or a “workman”). *But see In re Black*, 47 N.W. 342 (Mich. 1890) (finding that a person employed to run a mill, and who required a high degree of skill, was nevertheless within the class of beneficiaries of a statute regarding employer “debts . . . for labor”).

61. See LABATT, *supra* note 56, at 6089.

62. See *St. Louis, I. M. & S. Ry. v. Yonley*, 13 S.W. 333 (Ark. 1890), *rev'd on other grounds*, 14 S.W. 800 (Ark. 1890).

63. See LABATT, *supra* note 56, at 6083-6087. See also *Wakefield v. Fargo*, 90 N.Y. 213 (1882) (finding salaried bookkeeper/general manager not a “servant” within the meaning of a statute regarding personal liability of corporate shareholders for wages).

64. See Stevens, *supra* note 34, at 189 (suggesting that the widespread adoption of “employee” as a term of coverage a product of the early workers’ compensation laws). The primary reasons for these laws were to override common law defenses such as acceptances of risk, and to provide insurance coverage for the growing number of workers injured in factory and other industrial work. See MARK A. ROTHSTEIN, ET. AL., *EMPLOYMENT LAW* 535-39 (1999). Even today, some workers’ compensation laws include archaic terms of coverage such as “workman” or “worker.” See, e.g., KAN. STAT. ‘ 44-508(b) (1996) (defining covered “workman”, “employee” and “worker”); N. M. STAT. ANN. ‘ 52-1-16 (Michie 1991 & Supp. 1997) (defining covered “worker”); ORE. REV. STAT. ‘ 656.027 (1999) (applying law to all “workers”); VT. CODE ANN. 21 ‘ 601(14) (1987 & Supp. 1999) (defining covered “worker” and “employee”).

65. See *Sproul v. Hemmingway*, 31 Mass. (1 Pick.) 14 (1833) (discussing the facts that “establish the relation . . . master and servant, or employer and employee . . .”). However, “servant” and “employee” are not perfectly synonymous. “Servant” has the broader meaning and includes noncontractual relations. For example, the Restatement (Second) of Agency defines “servant” as a person whose relation to a “master” may be “informal” rather than “contractual,” as where the owner of a car invites a guest to drive the car temporarily in his presence or to assist him in making minor repairs. RESTATEMENT (SECOND) OF AGENCY § 220 cmts. a-b (1958). Thus, a person who works without

always to have been accepted by the courts that neither term extends to persons of “independent employment” or “independent contractors” as such persons came to be known.<sup>66</sup> Employer control, which was the best-established basis for distinguishing servants from independent contractors for purposes of *respondeat superior*, emerged as the most important factor in determining employee status under protective legislation.<sup>67</sup>

However, control over work was never the exclusive test of status for either *respondeat superior* or other statutory purposes. Indeed, by the end of the nineteenth century the courts had already identified and assembled most of the other basic “factors” recognized today as evidencing one or the other type of worker status.<sup>68</sup> Courts considered new factors to take account of the reality and variability of working relationships, but in doing so they compounded the uncertainty of their tests. For example, in *Waters v. Pioneer Fuel Co.*,<sup>69</sup> a *respondeat superior* case in which a third party sued the employer for the negligence of the worker who delivered the employer’s coal, the Supreme Court of Minnesota considered not only the usual simple tests of control but also a long list of additional factors. These included the manner of compensation, the continuous nature of the employment, the exclusivity of the relationship (the worker had served no other employer during the period of his relationship with the defendant), the employer’s control over the important circumstances of the work (e.g., the quantity of coal to be delivered, and the time and place of delivery), the worker’s control over starting and quitting time, relative contributions of equipment and resources for the work, the length of the employment, and a comparison of the employer’s general treatment of the worker in comparison with other

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compensation may be a “servant,” but employment law views such a worker as a “volunteer” and not an “employee.” Cf. *Hill v. Morey*, 26 Vt. 178 (1854) (applying *respondeat superior* in case of volunteer).

66. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (stating that “employee” as used in federal employment law is presumed to have its common law meaning and is to be distinguished from “independent contractor”).

67. See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 521 (1926) (“Control or right of control by the employer . . . characterizes the relation of the employer and employee and differentiates the employee or servant from the independent contractors.”).

68. In *Vane v. Newcombe*, for example, the U. S. Supreme Court considered a worker’s rights under a statute that provided for a lien in favor of the “employees” of a corporation. See *Vane v. Newcombe*, 132 U.S. 220 (1889). The worker, however, was “a mere contractor, bound only to produce, or cause to be produced, a certain result—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party.” *Id.* at 229. For *respondeat superior* cases, see, e.g., *Texas & P. Ry. Co. v. Juneman*, 71 F. 939 (5th Cir. 1895) (finding worker to be an employee, not an independent contractor); *Harris v. McNamara*, 12 So. 103 (Ala. 1892) (finding worker who employed his own assistants to be an independent contractor); *St. Louis, I. M. & S. Ry. Co. v. Yonley*, 13 S.W. 333 (Ark. 1890) (finding worker to be an independent contractor), *rev’d on other grounds*, 14 S.W. 800 (Ark. 1890); *McCarthy v. Second Parish of Portland*, 71 Me. 318, 322 (1880) *Waters v. Pioneer Fuel Co.*, 55 N.W. 52 (1893) (finding worker to be a servant, not an independent contractor); *Hexamer v. Webb*, 4 N.E. 755 (N.Y. 1886) (finding worker to be an independent contractor).

69. 55 N.W. 52 (Minn. 1893).



workers who were apparently regular employees.<sup>70</sup>

But if *Waters* is an early example of a court's appreciation of the complexity and variability of personal services relationships, it is also an early confession that the judiciary lacks a set of definitions that will clearly distinguish an "employee/servant" from an "independent contractor." Rather, a court must hope to know each when it sees it:

It is not easy to frame a definition of the terms independent contractor that will satisfactorily meet the conditions of different cases as they arise, as *each case must depend so largely upon its own facts*. One text writer declares such contractor to be one who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work . . . . So it is said [by another] that an independent contractor is one who exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work . . . . *The plaintiff is not concluded by these definitions*. But, without attempting to discuss abstract definitions, we feel satisfied that, upon the undisputed facts in the case, the court was right in holding that the relation . . . was that of master and servant.<sup>71</sup>

Thus, while control over the work was a basic premise of *respondeat superior*, it competed with an increasing number of other factors when the courts turned to the question of coverage under social welfare and protective legislation. Courts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers.<sup>72</sup> Indeed, it has probably always been the case that a worker could be an independent contractor for tort purposes, but an employee for purposes of some protective legislation.<sup>73</sup>

A good example of the courts' tendency to define "employee" expansively for purposes of protective legislation, and quite possibly the earliest clear statement of the "economic realities" and "statutory purpose" theories, is *Lehigh Valley Coal Co. v. Yensavage*,<sup>74</sup> where Judge Learned Hand articulated many of the ideas subsequently adopted by the U.S. Supreme Court.<sup>75</sup> The employer in *Lehigh Valley Coal*, like its modern-day imitator Microsoft,<sup>76</sup> purported to assign the very heart of its mining

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70. See *id.* at 52.

71. *Id.* at 52-53.

72. See *infra* text accompanying notes 74-85.

73. See *id.*

74. 218 F. 547 (2d Cir. 1914).

75. See *infra* text accompanying notes 96-129.

76. See *Vizcaino v. Microsoft*, 120 F.3d 1006 (9th Cir. 1997) (*Vizcaino I*), discussed at *supra* text accompanying notes 9-11.

business to a corps of independent contractors.<sup>77</sup> It then denied the plaintiff's claim as an "employee" under a statute that apparently provided compensation for work-place accidents.<sup>78</sup> If the company were to be believed, it was nothing more than a buyer and distributor of the miners' coal.<sup>79</sup> Judge Hand thought the miners were actually employees.<sup>80</sup> But instead of looking to the employer's control as a matter of contractual right (which was easily subject to manipulation by the employer),<sup>81</sup> Judge Hand focused on the employer's domination of its relationship with the miners as a matter of economic power and on the integration of the miners into the employer's business.<sup>82</sup> He began with a simple comparison of the nature of a miner's work and the essence of the employer's business.<sup>83</sup> The company's business, he observed, was inconceivable without a miner: "By him alone is carried on the company's only business; he is their 'hand,' if any one is."<sup>84</sup> Judge Hand's underlying fear may have been that if the mining company's transformation of this large workforce from "employees" to "independent contractors" succeeded, then the nation's basic industries might cease to be "employers" at all while still continuing their businesses with the very same unprotected workers in their service. The distinction he implied, which avoided this result, was that a worker is more likely to be an "employee" if he continuously carries on the work that is the very business of the employer, whereas providers of peripheral or episodic services might legitimately be regarded as independent contractors.<sup>85</sup>

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77. See *Lehigh Valley Coal*, 218 F. at 552.

78. The exact nature of the statute is unclear. The claim was for injuries suffered in an accident at the mine, and Judge Hand refers only once to the underlying statute, without citation: "It is true the statute uses the word 'employed,' but it must be understood with reference to the purpose of the act." *Id.*

79. See *id.* at 552.

80. See *id.*

81. See *infra* note 271 and accompanying text. The court's decision says almost nothing about the terms of the contract between the parties. The employer, however, apparently argued that it lacked the usual master/servant domination over the miners because they worked for a piece rate. See *Lehigh Valley Coal*, 218 F. at 552-53. In other words, the employer exchanged a payment of money for nothing more than a specific quantity of coal, in contrast with the master's payment of wages for services under the master's direction.

82. See *Lehigh Valley Coal*, 218 F. at 552-53. Judge Hand was not necessarily the first judge to consider the relationship of a worker's work to the employer's business, or the reality or illusion of the worker's own separate business. Some nineteenth century judges had considered, as an alternative to a simple control test, whether a worker's work was merely part of the employer's business or was rendered as part of some truly separate business or enterprise. See, e.g., *Sproul v. Hemmingway*, 31 Mass. (1 Pick.) 1 (1833). In other words, responsibility for the work would attach to the worker if he owned a legitimately separate enterprise serving the public, to the client employer if he owned the only real enterprise, or to some third party enterprise that controlled the worker.

83. *Lehigh Valley Coal*, 218 F. at 553.

84. *Id.*

85. See *id.* at 552-53.

Judge Hand's "economic realities" approach, as it came to be known in later decisions,<sup>86</sup> also compared the superficial contractual independence of the miners with the practical limitations of the miners' freedom to operate as independent businesspersons.<sup>87</sup> To strengthen the appearance of the miners' independence, the employer had stressed their freedom to employ their own "helpers" who were then subject to the supervision of the hiring miners.<sup>88</sup> The employer asserted that this chain of working relationships showed that all the miners were either employer-businessmen in their own right or the employees of other independent miners who hired them.<sup>89</sup> Judge Hand dismissed this theory as a thin veil to disguise the employer's actual domination over the miners at every link in the chain.<sup>90</sup> In reality, the hiring miners were foremen in the mining company's multi-layered workforce. The company's control, Judge Hand noted, was by virtue of its control over the whole business that was the miners' work and over the stream of wages that provided for their subsistence.<sup>91</sup>

The economic realities served as one basis for Judge Hand's decision. Another was the "statutory purpose" approach, which minimized the importance of vague distinctions of worker status and sought to extend the reach of a statute to all workers whose economic circumstances appealed for protection.<sup>92</sup> In *Lehigh Valley Coal*, the purpose of the statute was to provide financial security against the risks of occupational injuries.<sup>93</sup> Coal miners, regardless of common law status, were exactly the class of workers who needed this security:

The laborers, under [the company's] contention, are to have recourse as an employer [sic] only to one of their own [i.e., the miner that hired them], without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole point of such statutes, which are meant to protect those who are at an economic disadvantage. . . . It is true that the statute uses the word 'employed,' but it

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86. See, e.g., *United States v. Silk*, 331 U.S. 704 (1947).

87. See *Lehigh Valley Coal*, 218 F. at 552-53.

88. See *id.* at 552.

89. See *id.*

90. See *id.* at 552-53.

91. See *id.* An analogous arrangement (with analogous problems) is still common in the construction industry. Thus, even when some construction workers clearly qualify as independent contractors, federal wage and hour laws and state workers' compensation laws are sometimes drafted to include them within the scope of protection. See, e.g., *Special Ins. Fund v. Ind'l Com'n. of Arizona*, 836 P.2d 1029, 1032 (Ariz. 1992) (applying "statutory employer rule," which treats a general contractor as the employer of a subcontractor's employees, for workers' compensation purposes); Davis-Bacon Act, 40 U.S.C. § 276a (1994) (requiring payment of prevailing wages to "laborers and mechanics").

92. See *Lehigh Valley Coal*, 218 F. at 553.

93. The claim was based on an accident in the course of the plaintiff's work for the defendants. See *id.* at 553 (Rogers, J., dissenting). See *supra* note 78.

must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given.<sup>94</sup>

Remarkably, the idea of “control” over a worker’s performance of services, which was and remains the factor most frequently associated with the “common law test” of employee status, scarcely appears in the entirety of Judge Hand’s opinion. Judge Hand notes the company’s “control” over the *capital* on which the whole enterprise was based, and he distinguishes cases finding independent contractor status based on an employer’s lack of “control” over a specific, specialized project (e.g., drilling an air vent) outside the employer’s core business (mining coal).<sup>95</sup> The “control test,” which began as a simple analysis of employer control and supervision of the worker’s specific activity, had expanded to a much broader analysis of control of the mutual enterprise and livelihood of the parties.

### III.

#### HOW EMPLOYEE STATUS CONFOUNDED THE LAW: THE SUPREME COURT AND CONGRESS ARGUE THE QUESTION, *WHAT IS AN “EMPLOYEE?”*

##### A. *The Court Endorses the Expansive View*

By the early part of the twentieth century, the judicial approaches to determining worker status, now known as “statutory purpose” and “economic reality,” were already widely if not consistently in use. There was, however, no clear dividing line between the common law control test and the modern economic realities test. Both have control and domination as their central concern; the former purporting to focus on control over the worker’s performance of services for the employer as a matter of contractual right, and the latter purporting to look at an employer’s sources of power that give it true, if not contractually specified, control. Of course, the wider the range of facts a court entertains as evidence of employer control and domination, the more likely the court will find a worker to be an employee. Indeed, any individual worker who serves one client exclusively or nearly exclusively is likely to be an employee if the “realities” of the relationship are as important as the actual terms of the contract. If one then considers the “statutory purpose” of any law designed to protect workers, the likelihood of a finding of employee status is greater still.

Initially, an expansive view of employee status would have been little cause for anxiety for employers. Employers may have resented rules

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94. *Id.* at 552.

95. 218 F. at 552-53. *See also* *Welsh v. Charles Parrish & Co.*, 24 A. 86 (Pa. 1892); *Welsh v. Lehigh & Wilkesbarre Coal Co.*, 5 Atl. 48 (Pa. 1886).

regarding payment of wages or requiring insurance for occupational injuries (which was just as likely to protect an employer from common law liability for negligence) and creditors might well have complained of the preferences granted to workers. But worker status was truly important only in the event of the occasional accident for which the employer might be held liable.<sup>96</sup> Indeed, the first significant and authoritative statement addressing the problem of worker status, contained in the Restatement (First) of Agency of 1933, distinguished “servants” from “independent contractors” for purposes of *respondeat superior* liability.<sup>97</sup> The Restatement’s definition of “servant” served the matter of imputed tort liability only, and offered no definition of “employee.”

The importance of the employee status issue increased dramatically with the wave of New Deal federal legislation, especially the new law of collective bargaining, which affected the employer’s relationship with its workers in the most profound way ever seen. Suddenly, the stakes involved in the question of employee status were greatly compounded. This issue gained special prominence as a matter of important federal labor policy in *National Labor Relations Board v. Hearst Publications*.<sup>98</sup>

*Hearst* involved one of the key federal employment laws of the nineteen-thirties, the Wagner Act.<sup>99</sup> Like many federal laws before and after it, the Wagner Act avoided any useful definition of employee. Instead it simply stated that “[t]he term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise.”<sup>100</sup> The same provision excluded workers in a few specific occupations or special situations, such as agricultural laborers, domestic servants, and children employed by their parents.<sup>101</sup>

Under the authority granted by the Wagner Act, the National Labor

96. Nearly all the discovered cases before 1880 involving an issue of worker status were tort cases. See *supra* notes 49-63 and accompanying text. Cases involving worker status for statutory purposes scarcely appeared at all until 1880. See *supra* notes 64-91 and accompanying text.

97. RESTATEMENT (FIRST) OF THE LAW OF AGENCY, § 220 cmt. c (1933). By its terms (i.e., “servant”) the First Restatement was concerned with the common law rules of the master/servant relation, rather than “employee” protective legislation. However, it gave at least passing and indirect acknowledgement to the idea of a statutory purpose rule: “Statutes have been passed in which the words ‘servant’ and ‘agent’ have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this Subject.” *Id.* cmt. d.

98. 322 U.S. 111 (1944).

99. Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-68 (1998)) (also called the National Labor Relations Act (NLRA)).

100. 29 U.S.C. § 152(3) (emphasis added). The main function of this definition appears to have been to clarify that the Act protected an employee even if his status as such was based on his relationship with an employer other than the respondent employer. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-65 (1978).

101. See 29 U.S.C. § 152(3).

Relations Board (NLRB) attempted to assert authority over disputes between four Los Angeles newspapers and a union of “newsboys”<sup>102</sup> who hawked newspapers on the streets.<sup>103</sup> Since the Wagner Act requires an employer to bargain with the authorized representative of its “employees,” the Board’s jurisdiction depended on a decision whether the newsboys were employees, entitled to the benefits of the Act, or rather independent contractors beyond the Act’s reach.<sup>104</sup>

Under the common law control test, the newsboys might well have been employees. They worked full-time, frequently for several years.<sup>105</sup> Their compensation was subject to the newspapers’ control over the price the newsboys paid to receive newspapers, the price at which the papers could be sold, and the number of papers the newsboys could sell.<sup>106</sup> Furthermore, the Court observed, the newspapers “prescribe[d], if not the minutiae of daily activities, at least the broad terms and conditions of work.”<sup>107</sup> The newspapers assigned the “spots” from which newsboys worked, approved transfers (or required them, sometimes as a means of discipline), and set the hours of work.<sup>108</sup> Such details as the manner of displaying papers, placing advertising placards, and the manner of soliciting customers were regulated or at least advised by the newspapers.<sup>109</sup> The limited equipment that was required (racks, boxes, change aprons) was provided by the newspapers.<sup>110</sup> Finally, “the newsboys . . . feel they are employees of the papers; and . . . [their supervisors] regard them as such.”<sup>111</sup> The Court was plainly unimpressed by evidence of the newsboys’ freedom from the newspapers’ control or their opportunity for profit or risk of loss<sup>112</sup> and only acknowledged this evidence of independent contractor status in a single footnote.<sup>113</sup>

The Court might have stopped here, and declared the common law control test fulfilled, but then its decision would have amounted to very little. Instead, the Court proceeded to endorse the same expansive approach Judge Hand had described thirty years earlier in *Lehigh Valley Coal*.<sup>114</sup> The

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102. The “newsboys” were in fact mostly mature men, some of whom supported families on their earnings from the sale of newspapers. See *Hearst*, 322 U.S. at 116.

103. See *id.* at 117.

104. See *id.* at 113.

105. See *id.* at 116.

106. See *id.* at 117.

107. *Id.* at 117-18.

108. See *Hearst*, 322 U.S. at 118.

109. See *id.* at 118-119.

110. See *id.* at 119.

111. *Id.*

112. See *id.* at 118-119.

113. See *id.* at 119 n.17.

114. See *supra* text accompanying notes 74-95.

first aspect of this approach, which the Court later christened the “economic realities” test,<sup>115</sup> was that an employment relationship might be evidenced by the economic interdependence between workers and an employer, leading to employer domination of the employee, even in the absence of control based on contract.<sup>116</sup> In *Hearst*, the newsboys were “an integral part” of the newspapers’ business, and of their distribution and circulation system in particular.<sup>117</sup> The newsboys were integrated into the newspapers’ businesses as thoroughly as any workforce of employees who performed a regular, essential day-to-day function upon which the newspapers depended.

Conversely, the newsboys depended on the newspapers in a way characteristic of an employment relationship. The newspapers dominated the newsboys, with or without a contractual right to direct the newsboys’ performance or alleged business, by fixing the price and quantity of supplies, and by fixing the resale price of newspapers.<sup>118</sup> Despite a superficial appearance that newsboys earned a profit and risked a loss by the resale of newspapers, the reality was that remuneration from their activity was predetermined and standardized to much the same degree as where an employer sets wage or piece rates for an entire class of employees.<sup>119</sup> There was no more room for individual bargaining in this relationship than in a typical wage-based employment relationship. Newsboys were also subject to the same “inequality of bargaining power in controversies over wages, hours and working conditions” as employees,<sup>120</sup> and collective bargaining offered an appropriate and effective means of resolving disputes between the newspapers and newsboys.<sup>121</sup>

The second important aspect of the Court’s decision was a direct attack against the “common law” test, which the Court dismissed as uncertain in form, and inconsistent and unreliable in result.<sup>122</sup> In language reminiscent of Judge Hand’s decision in *Lehigh Valley Coal*, Justice Rutledge declared that the question of whether the newsboys were employees was to be determined “primarily from the history, terms and purposes of the legislation.”<sup>123</sup> Therefore, the term “employee” as used in the National Labor Relations Act “must be read in the light of the mischief to be

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115. The Court made this proposition more explicit three years later in *Bartels v. Birmingham*. See *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (noting that the workers at issue “as a matter of economic reality are dependent upon the business to which they render service”) (emphasis added).

116. See *Hearst*, 322 U.S. at 118-119.

117. See *id.* at 119.

118. See *id.* at 117.

119. See *id.*

120. *Id.* at 127.

121. See *id.*

122. See *id.* at 120.

123. *Id.* at 124.

corrected and the end to be attained.”<sup>124</sup> The task of identifying “employees” within the meaning of the Act was first and foremost for the NLRB, and in this instance, the Court concurred with the Board’s judgment.<sup>125</sup>

The Court surmised (perhaps wrongly, in retrospect)<sup>126</sup> that Congress “was not thinking solely of the immediate technical relation of employer and employee . . . [or] the narrow technical relation of ‘master and servant.’”<sup>127</sup> Instead, they saw the key to the scope of the NLRA, and the meaning of “employee,” in the Act’s goal of “substituting . . . the rights of self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.”<sup>128</sup> If the NLRB were confined to applying the common law test, and restrained from offering the Act’s benefits to any non-employee workers, the NLRB might be administratively encumbered by the difficulties of applying the common law test, and large sectors of the labor market populated by independent contractors would be relinquished to continued disruption and unrest caused by unregulated labor disputes.<sup>129</sup>

Moreover, the situation between the publishers and newsboys was the very sort the Wagner Act<sup>130</sup> was designed to address: inequality of bargaining power and the dependence of a class of workers on a single employer or group of employers in a setting likely to lead to strikes and disruptive work stoppages.<sup>131</sup> In other words, the Court seemed to say, the scope of the Wagner Act should be determined with regard to the likelihood that certain workers would strike, and not merely according to those workers’ common law status.<sup>132</sup> “In short,” the Court concluded, “when . . .

124. *Id.* at 124 (quoting *S. Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

125. *See Hearst*, 322 U.S. at 130.

126. *See infra* text accompanying notes 150-154.

127. *Hearst*, 322 U.S. at 124.

128. *Id.* at 125.

129. *See id.*

130. 29 U.S.C. § 151 (1994).

131. *See Hearst*, 322 U.S. at 127.

132. The Court found the common law control test to be an arbitrary and misdirected measure of statutory coverage, in view of the Act’s purposes:

[I]t cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically “independent contractors” and their employers as from disputes between persons who, for those purposes, are “employees” and their employers . . . . Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as “helpless in dealing with an employer,” as “dependent . . . on his daily wage” and as “unable to leave the employ and to resist arbitrary and unfair treatment” as the latter. For each, “union . . . (may be) essential to give . . . opportunity to deal on equality with their employer.” And for each, collective bargaining may



the economic facts of the relation make it more nearly one of employment . . . with respect to the ends sought to be accomplished by the legislation," those facts "may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections."<sup>133</sup>

*Hearst* thus declared the primacy of the economic realities and statutory purpose approaches to the question of employee status. In most cases, including *Hearst*, these approaches were perfectly complementary. Most protective employment legislation was designed to alleviate the consequences of employer domination of a workforce, or to use the employment relationship to deliver certain social welfare benefits (such as social security) to the great mass of common workers, and so the economic realities test usually pointed in the same direction—expansive coverage—as the statutory purpose test.<sup>134</sup> On the other hand, these approaches did not automatically result in coverage for all workers.<sup>135</sup> The Court clearly recognized the continuing existence of independent contractors, even in the form of individual workers, who were unsuitable for the new process of collective bargaining.<sup>136</sup> While the Court's method tended to expand employee-based statutory coverage, it was not a complete abandonment of the common law premise that there are employees on the one hand and independent contractors on the other.

The Court's commitment to a distinction between employees and independent contractors, as well as its endorsement of a modern, policy-oriented method for explaining the distinction, were confirmed three years after *Hearst* in a trio of cases deciding the status of certain workers under other New Deal era employment laws. First, in *United States v. Silk*,<sup>137</sup> a consolidation of two appeals involving application of the Social Security Act,<sup>138</sup> the Court considered the status of "unloaders" who unloaded coal for a coal yard (the alleged employer), and of "truckers" who owned and operated their own trucks and made deliveries for their alleged employer. The Court began by observing that, like the NLRA, the Social Security Act lacked any helpful definition of "employee." The SSA required the payment of taxes on any remuneration for "employment," and it defined

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be appropriate and effective for the "friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."

*Id.* at 127 (footnotes and citations omitted).

133. *Id.* at 127-128.

134. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151-168 (1998); Fair Labor Standards Act, 29 U.S.C. §§ 202-219 (1994); *United States v. Silk*, 331 U.S. 704, 710 (1947) (discussing the goals of the Social Security Act).

135. See *infra* text accompanying notes 137-148.

136. See *Hearst*, 322 U.S. at 126-30.

137. 331 U.S. 704 (1947).

138. 49 Stat. 636 and 639 (1935).

employment to mean “any service, of whatever nature, performed . . . by an employee for his employer . . . .”<sup>139</sup>

The Court recalled the statutory purpose doctrine announced in *Hearst*, but it also emphasized that where statutory coverage depends on a finding of employee status, true independent contractors are necessarily outside the statute’s reach.<sup>140</sup> While control over the performance of the work was still an important factor, the Court stated that control was to be viewed in relation to the economic realities of the parties’ working relationship.<sup>141</sup> In the case of the unloaders, the realities of their relationship pointed clearly toward employee status for purposes of statutory coverage. But the drivers, a majority of the Court concluded, were properly deemed to be independent contractors. In this case, the workers’ contractual independence coincided with real economic and business independence:

These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.<sup>142</sup>

On the same day that the Court announced its decision in *Silk*, it also decided *Rutherford Food Corp. v. McComb*,<sup>143</sup> finding that “boners” employed by a meat processing firm were employees subject to coverage under the Fair Labor Standards Act.<sup>144</sup> But only a week later, the Court reaffirmed the distinction between employees and independent contractors in *Bartels v. Birmingham*.<sup>145</sup> In *Bartels*, the Court held that musicians in a band were not the employees of the dance hall operators for whom they performed, but were employees of the bandleader, who was an independent contractor.<sup>146</sup> Thus, the Court held that the Internal Revenue Service Commissioner had improperly charged the dance hall operators for social security taxes with respect to the musicians.<sup>147</sup> Of course, *Bartels* also presaged a different but related problem that has grown in significance since that decision: who is the “employer” when more than one party exercises employer-like control over a worker’s performance.<sup>148</sup>

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139. *Silk*, 331 U.S. at 711.

140. *See id.* at 714-15.

141. *See id.*

142. *Id.* at 718-719.

143. 331 U.S. 722 (1947).

144. *Rutherford Food*, 331 U.S. at 729-30 (applying Fair Labor Standards Act, U.S.C. §§ 201-219 (1994)).

145. 332 U.S. 126 (1947).

146. *See id.* at 132.

147. *See id.*

148. *See* Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of*

### B. Congress Restores the Traditional View

Arguably, *Hearst* and its progeny did nothing more than expand the factors included in the common law control test (in the very manner that many state and lower federal courts had done for many years) to account for the “realities” of the modern ways in which work was organized and managed, and to assure that important social and economic reforms reached their intended beneficiaries. Otherwise, as the Court observed in *Silk*, the constricted approach urged by the employers in those cases would invite adroit schemes to evade their obligations.<sup>149</sup>

Congress, however, saw things differently, and signaled its disapproval in the course of the general post-war backlash, represented foremost by the Taft-Hartley Act.<sup>150</sup> First, Congress amended the National Labor Relations Act to state that “employee,” as used in the Act, “shall not include any individual having the status of an independent contractor.”<sup>151</sup> Of course, the language of this amendment, standing alone, was entirely consistent with the Court’s rulings that “independent contractors” were beyond the reach of “employee” protective legislation.<sup>152</sup> Since Congress proposed no alternative test for distinguishing independent contractors from employees, one might have viewed the Taft-Hartley Act as a confirmation of the judiciary’s mandate to solve a problem that had escaped legislative solution. But hiding behind this innocuous language lay a more definitive expression of Congressional intent: a House report that excoriated the National Labor Relations Board, and in more delicate terms reprimanded the Court, for the far-fetched analysis of the *Hearst* case.

An “employee”, according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in . . . *Hearst* . . . , the Board expanded the definition of the term “employee” beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic “expertness” of the Board, upheld the Board . . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up . . . . To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board’s expertness, has approved, the

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*Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 688-696 (1996).

149. See *United States v. Silk*, 331 U.S. 704, 712 (1947).

150. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 137 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1994)). See *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1622-1625 (Patrick Hardin ed., 3d ed. 1992).

151. 29 U.S.C. §152(3).

152. See e.g., *Silk*, 331 U.S. at 718-19.

bill excludes "independent contractors" from the definition of "employee."<sup>153</sup>

The underlying assumption was that there was an ordinary sense of the word "employee" that was understood by everyone, save for the NLRB and Supreme Court. But what was this widely accepted "ordinary" meaning?

In the law, there has always been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.<sup>154</sup>

The conventional wisdom is that the Taft-Hartley Act, as thus described in the House Report, overruled *Hearst*<sup>155</sup> and resurrected a pre-existing common law "control" test.<sup>156</sup> But in the modern industrial era it was no more possible to return to simple notions of "control" than to return to the feudal world of "master-servant" relations. Long before *Hearst*, the measurement of "control" had already fractured into countless other factors, whether under the label of a modern but "ordinary" control test or the "economic realities" approach.<sup>157</sup>

What, then, was the effect of the Taft Hartley Act on the definition of "employee?" If it was Congress's intention to overrule *Hearst*, it did so with no clear instructions to guide the Court's return to an imagined pre-Wagner Act definition of "employee." One might note the House Report's assertion that "employees work for wages or salaries under direct supervision"<sup>158</sup> and conclude that the amendment was designed to simplify the test of employee status by focusing on little more than the form of compensation and direct supervision of the work.<sup>159</sup> However, this would mean that an employer could avoid coverage under the National Labor Relations Act and most other federal employment legislation either by paying employees a piece rate or commission, or by permitting employees

153. H.R. REP. NO. 80-245, at 3020 (1947).

154. *Id.*

155. 322 U.S. 111 (1944).

156. See Hardin, *supra* note 150, at 1622-1625; ROBERT GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 29 (1976).

157. See *supra* text accompanying notes 68-95.

158. H.R. REP., *supra* note 153. To suggest that a person could not be an employee if he hired others to work for him contradicted the widely accepted practice in old master-servant law that a servant could employ an "underservant" to assist in the performance of work assigned by the master, and that the master would be liable in *respondeat superior* for the negligence of either the servant or the underservant. See *supra* text accompanying notes 46-48.

159. In one decision immediately after the amendment, the NLRB appeared to take this view. See *Kansas City Star Co.*, 76 NLRB 384, 388 (1948).

to work without direct supervision.<sup>160</sup> Fortunately, neither the NLRB nor any other regulatory agency or court ever read Congress' definition of "employee" in this restrictive fashion,<sup>161</sup> or most of us who work would be commissioned or piece-rated by now.

Perhaps the amendment was meant to signal Congress's disapproval of the "statutory purpose" aspect of *Hearst*.<sup>162</sup> After all, the Court's consideration of statutory purpose was one legitimate cause for Congress's concern that *Hearst* had empowered the judiciary and federal administrative agencies such as the NLRB to stretch the meaning of "employee" to cover persons who would be independent contractors under any version of the common law test (minus any consideration of statutory purpose). On the other hand, by the time the Court had decided *Hearst*, it was hardly necessary to consult the statutory purpose of the NLRA, which invariably was to protect economically subordinate workers from economically dominant employers, because various other factors, such as comparative investment and opportunity for profit, were virtual proxies for statutory purpose.<sup>163</sup> In *Hearst*, for example, economic dependency was the cause of inequality of bargaining power. Thus, even if the Court had not decided the case based on statutory purpose, it might have achieved the same result by finding that the newsboys were employees in view of their economic dependency on the publishers.<sup>164</sup>

The NLRB, appearing to bow to Congress' instructions, subsequently observed that by virtue of the amendment, the term "employee" was to have its "conventional" meaning.<sup>165</sup> The Board's acquiescence was tinged with cynicism. In its first application of the "traditional" test after Taft-Hartley, the Board acknowledged that "[a]pparently, the test thus contemplated is

160. The House Report also observed that independent contractors were to be identified by their investment in "goods, materials, and labor." H.R. REP., *supra* note 153. But if non-wage earning employees were to be distinguished from independent contractors by their lack of such investment, then even the newsboys in *Hearst* might still have been "employees." See *NLRB v. Hearst Publ's*, 322 U.S. 111 (1944). Even the ability to hire one's own assistants, which the House Report suggested was a decisive factor, see H.R. REP., *supra* note 153, was much less important in old master-servant law, see *supra* text accompanying notes 46-48. There the traditional rule was that a servant could employ an "underservant" to assist in the performance of work assigned by the master, and the master would be liable in respondeat superior for the negligence of either the servant or the underservant. See *supra* text accompanying notes 46-48.

161. See, e.g., *Steinberg & Co.*, 78 NLRB 211, 220-21 (1948). The IRS, for example, adheres to a twenty-factor test to determine employee status, and control and form of compensation are just two of these factors. See Rev. Rul. 87-41, 1987-1 C.B. 296, 298-299.

162. The Court suggested this view in *NLRB v. United National Insurance Co.*, where it stated that "there is no doubt that we should apply the common law agency test" in determining employee status under the Act. *NLRB v. United Nat'l Ins. Co.*, 390 U.S. 254, 256 (1968).

163. See *supra* text accompanying notes 74-95.

164. See *supra* text accompanying notes 102-113.

165. See *Steinberg & Co.*, 78 NLRB 211, 220-21 (1948); 23 NLRB ANN. REP. 40 (1958).

the familiar 'right-of-control test . . . .'<sup>166</sup> The Board then recited the usual Restatement of Agency laundry list of factors,<sup>167</sup> and cited, audaciously, *Silk* and *Rutherford*,<sup>168</sup> which had endorsed the statutory purpose and economic realities approaches but, unlike *Hearst*, were not *explicitly* mentioned in the Congressional report. Similarly, when the Supreme Court finally returned to the question of employee status under the NLRA in *NLRB v. United National Insurance Co.*,<sup>169</sup> it recited simply that "the obvious purpose of this amendment was to have the Board and the courts apply . . . the common-law agency test."<sup>170</sup> But the Court's application of "the common law agency test" included most of the modern economic realities analysis of *Hearst*,<sup>171</sup> *Silk*<sup>172</sup> and *Rutherford*,<sup>173</sup> minus statutory purpose.<sup>174</sup>

In the end, the practical effect of the Taft-Hartley amendment's exclusion of "independent contractors" amounted to nothing more than a caution for courts and agencies to lean somewhat more toward non-employee status in any close case. Whether the Board and courts took this instruction to heart is unclear. The multi-factored, open-ended test the Board and courts have continued to use is sufficiently ambivalent in many close cases; and because each case is unique, it is impossible to know whether the Taft-Hartley Act has actually affected the outcome in any particular case or for any general classification of workers. And despite Congress's particular disapproval of *Hearst*, it is still possible that even "newsboys" are employees.<sup>175</sup>

The attention span of Congressional hostility against expansive judicial and administrative interpretation of "employee" lasted long enough to affect

166. *Steinberg*, 78 NLRB at 221.

167. *See id.* at 221-22, 221 n.33 (citing RESTATEMENT OF AGENCY (FIRST) §220 (1933)).

168. *See id.* at 221 n.33 (citing *United States v. Silk*, 331 U. S. 704 (1947) and *Rutherford Food Corp. v. McComb*, 331 U. S. 722 (1947)).

169. 390 U.S. 254 (1968).

170. *Id.* at 256.

171. *See supra* text accompanying notes 102-133.

172. *See supra* text accompanying notes 137-142.

173. *See supra* text accompanying note 143.

174. Including the facts that "the agents . . . perform functions that are an essential function of the company's normal operations;" performed their work "with considerable assistance and guidance from the company;" were paid according to uniform policies "promulgated and changed unilaterally by the company." *United National Insurance*, 390 U.S. at 259. According to *Hearst*, this makes such a body of employees particularly suitable for collective bargaining and the protection of the NLRA. *See NLRB v. Hearst Publ'ns*, 322 U.S. 111, 118 (1944).

175. *See, e.g.*, *A.S. Abell Co.*, 185 NLRB 144 (1970) (finding newsboys employees, not independent contractors); *Citizen News Co.*, 97 NLRB 428 (1951) (finding carrier boys employees). Indeed, when one reviews the facts and the Board's reasoning in the original *Hearst* case, (which was devoid of reliance on statutory purpose), one wonders whether the Board might still have concluded that the newsboys in that case were employees, given a safe passage of time after the amendment and the curving of NLRB law back to a sometimes less inhibited application of the economic realities test. *See Hearst Publ'ns, Inc.*, 39 NLRB 1256 (1942), *aff'd* 322 U.S. 111 (1944).

only one other piece of legislation. In 1948, on the heels of the Taft-Hartley Act,<sup>176</sup> Congress amended the Social Security Act<sup>177</sup> in a manner that implied reversal of the Court's decisions in *Silk*<sup>178</sup> and *Bartels*.<sup>179</sup> This amendment included a proviso that the term "employee" would not include "any individual who, under the usual *common-law* rules applicable in determining the employer-employee relationship, has the status of an independent contractor."<sup>180</sup> But the subsequent history of the Social Security Act has enormously diluted any potential impact of this restriction. During the last half century, Congress has dictated through legislation the status of one narrow worker classification after another as if to acknowledge that the common law rules are inadequate to serve the Social Security Act's purpose.<sup>181</sup> There are now special rules for at least thirty-two different types of workers: some are employees regardless of the common law rules, and some are independent contractors regardless of the common law rules.<sup>182</sup> For example, the Act provides for coverage, regardless of common law status, of any "agent-driver" or "commission-driver" engaged in the delivery of food, laundry or dry-cleaning services; any "full-time life insurance salesman," and any "home worker" working on materials according to specifications provided by the same party who furnished the materials.<sup>183</sup>

One might have expected Congress to amend the third major piece of New Deal Era employment legislation, the Fair Labor Standards Act of 1938,<sup>184</sup> under which the Court had decided the *Rutherford Food*<sup>185</sup> part of its statutory purpose trilogy. But here the Congressional backlash stopped short. Thus, to add to the confusion, one of the Court's decisions endorsing consideration of statutory purpose remained untouched.<sup>186</sup> Half a century

176. 61 Stat. 136 (1947).

177. 49 Stat. 636 and 639 (1935).

178. See *supra* text accompanying notes 137-142.

179. See *supra* text accompanying notes 145-148.

180. Social Security Act of 1948, ch. 468, § 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. § 3121(d) (1994)) (emphasis added). See also *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 183 n.5 (1970).

181. See 26 U.S.C. § 3121(d). See generally John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*, 8 HOFSTRA LAB. & EMP. L.J. 337, 343-344 (1991).

182. 26 U.S.C. § 3121(d). See also the Federal Unemployment Tax Act, 26 U.S.C. § 3306(i) (incorporating by reference the Social Security Act's "common law rules" provision).

183. 26 U.S.C. § 3121(d)(3).

184. 29 U.S.C. §§ 201-219 (1998).

185. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). See also *supra* note 143 and accompanying text.

186. The FLSA, however, had an agenda that arguably required coverage beyond the "traditional" test of employee status by its very terms. For one thing, the FLSA was specifically designed to apply to homework by workers who performed their services without direct supervision and who received their compensation in the form of a piece rate—decisive indicia of independent contractor status under the simple test suggested by the House Report that accompanied the Taft-Hartley Act. See 29 U.S.C. §

later, the Court would postulate that this asymmetry had a purpose, because the FLSA grew out of child labor laws which were designed to prohibit labor of any sort by children, whether as employees or independent contractors.<sup>187</sup> This explanation is far from persuasive. The child labor provisions are but one part of a much larger regulation of hours and wages in a law that systematically tailors the rules of coverage depending on the type of regulation. Congress could easily have preserved expansive coverage under the child labor provisions while imposing the common law rules definition of “employee” on the other provisions. Its failure to do so served as the best argument for those who maintained for many years later that the statutory purpose rule, as well as the expansive economic realities approach, were alive and well.<sup>188</sup> And there was still plenty of room for continued application of the statutory purposes doctrine, not only in state employment law but also in many areas of federal employment law.<sup>189</sup> Not only had Congress failed to amend the FLSA to impose the “common law” definition, it regressed and failed to provide any definition of “employee” at all in the next great wave of federal employment legislation.<sup>190</sup>

For most of the next half-century, state and federal courts continued the mundane task of sorting out employees and independent contractors without any particular direction except toward gradual enlargement of identified “factors” of employee status.<sup>191</sup> Some federal courts continued to apply the statutory purpose approach wherever Congress had failed to prohibit such application.<sup>192</sup> Following suit were some state courts, which

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211(d) (1994). More importantly, the FLSA was designed to prohibit many forms of child labor, and the thought that employers might circumvent this prohibition by engaging the services of youthful “independent contractors” must have disturbed even the most dedicated pro-business lawmakers. See 29 U.S.C. § 212; Bruce Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1041-1046 (1999). See also Swartz v. H.M. Eberly Herr & Co., 212 F. Supp. 32, 35-36 (E.D. Pa. 1962) (discussing the rule that an employer does not necessarily avoid liability for employment of an underage child simply by proving the child was an “independent contractor”); Clark v. Arkansas Democrat Co., 413 S.W.2d 629 (Ark. 1967) (finding employer liable for work-related injuries suffered by child, despite child’s alleged independent contractor status).

187. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992).

188. See, e.g., *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 405 (Cal. 1989); *Woody v. Waibel*, 554 P.2d 492, 494-97, 496 n.7 (Ore. 1976).

189. Congress continued to enact employment laws during the next half century without specifying the common law control test or any other test for purposes of coverage. See, e.g., *supra* statutes cited in note 5.

190. See, e.g., Civil Rights Act of 1964, Title VII, Section 701, codified as amended at 42 U.S.C. § 2000e(f) (1994)) (“The term ‘employee’ means an individual employed by an employer . . .”).

191. See generally Patricia Davidson, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203 (1984) (discussing the various tests and lists of factors that evolved after *Hearst*).

192. See, e.g., *United States v. Capanegro*, 576 F.2d 973, 978-79, 980 n.6 (2d Cir. 1978); *Cavazos v. Foster*, 822 F. Supp. 438, 444 (W.D. Mich. 1993); *Penland v. Connecticut Mut. Life Ins. Co.*, 63 Empl. Prac. Dec. P 42,632, 1993 WL 204257, at \*4 (N.D. Cal. June 9, 1993) (interpreting both federal



enjoyed the freedom to choose their own path for purposes of state employment laws.<sup>193</sup> Other federal courts and many state courts applied various forms of the economic realities test, which was sometimes labeled more conservatively the “hybrid” test, to emphasize its solid lineage in the “common law.”<sup>194</sup> A few state courts clung to laconic statements of the common law control test, at least in the incantation if not in the result.<sup>195</sup> Sorting through the precedents in search of a rule, some courts not only compiled lists of factors relevant to employee status, they compiled lists of the tests used to determine employee status.<sup>196</sup>

Every test, however, was open-ended in application, freely incorporating all sorts of factors, and thus all led to more or less the same multi-factored analysis.<sup>197</sup> The real differences lay in the personal

and California law and requiring consideration of the “remedial statutory purpose” of the law); *Reith v. Swenson*, 64 Empl. Prac. Dec. P 43,125, 63 Fair Empl. Prac. Cas. [BNA] 885,1993 WL 108056, at \*7 (D. Kan. March 30, 1993) (“Congress intended for common law principles to be applied . . . . [But] these are remedial statutes, and for that reason [courts] use liberal interpretations to accomplish the statutory purpose.”).

193. *Seafus v. Northern Gas Co.*, 472 P.2d 966, 969 (Alaska 1970); *Purdy v. Livingston*, 559 S.W.2d 24 (Ark. 1977); *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 405 (Cal. 1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970); *Keith v. New & Sun Sentinel Co.*, 667 So.2d 167, 171 (Fla. 1995); *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193, 196 (Mo. App. 1979); *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1330 (N.M. 1996) (noting that Awe need persuasive evidence of legislative intent in order to justify departing from the common-law meanings of such terms”); *Woody v. Waibel*, 554 P.2d 492, 494-95 (Ore. 1976).

194. *See, e.g., Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994).

195. *See, e.g., Martin v. Goodies Distribution*, 695 So.2d 1175, 1177 (Ala. 1997); *Dumont v. Teets*, 262 P.2d 734, 735 (Colo. 1953) (involving salesmen, which would likely have been independent contractors under any test); *Casey v. Sevy*, 921 P.2d 190, 192 (Idaho 1996); *LaFleur v. LaFleur*, 452 N.W.2d 406, 408 (Iowa 1990); *Hartford Ins. Group v. Mile High Drilling Co.*, 292 N.W.2d 232, 234 (Mich. 1980); *Lancaster Colony Corp. v. Limbach*, 524 N.E.2d 1389, 1391 (Ohio 1988); *Buckel v. Nunn*, 883 P.2d 878, 880 (Ore. 1994).

196. *See, e.g., Reith v. Swenson*, 64 Empl. Prac. Dec. P 43,125, 63 Fair Empl. Prac. Cas. [BNA] 885,1993 WL 108056, at \*11 (D. Kan. March 30, 1993) (“Federal courts have used three different tests for assessing employment relationships: the common law right to control test, the hybrid economic realities-common law test, and the economic realities test.”).

197. Courts periodically acknowledge, as they have for over a century, that any test of employee status is open-ended and thus subject to the same factors, depending on the evidence and arguments offered by the parties. *See, e.g., Frankel v. Bally, Inc.*, 987 F.2d 86, 89-90 (2d Cir. 1993). In *Frankel*, the Second Court stated that:

[I]n practice there is little discernible difference between the hybrid and the common law agency test. Both place their greatest emphasis on the hiring party’s right to control the manner and means by which the work is accomplished and consider a non-exhaustive list of factors as part of a flexible analysis of the “totality of the circumstances.” . . . In appropriate circumstances, factors relating to an individual’s economic dependence upon the hiring party may be taken into account under the common law agency test . . . .

*Frankel*, 987 F.2d at 90.

Similarly, when the Supreme Court eventually revived the common law test for purposes of federal law in *Nationwide Mutual Insurance Co. v. Darden*, it cited different authoritative but “nonexhaustive” lists of criteria, without endorsing any particular test as the final word. *See infra* text accompanying notes 233-243. After describing a few of the usual factors, the Court concluded with the familiar

tendencies of individual judges to favor some factors at the expense of others, and their comparative eagerness or reluctance to extend coverage to workers in the gray area between employee and independent contractor.<sup>198</sup>

The only clear and potentially important feature distinguishing the courts was their acceptance or rejection of the relevance of “statutory purpose.”<sup>199</sup> But even in this matter courts rarely if ever consciously divided themselves into separate camps. For example, Section 220 of the Restatement (Second) of Agency, routinely cited as the embodiment of the modernized common law rule (without statutory purpose as a factor),<sup>200</sup> actually took an ambivalent position with respect to statutory purpose.<sup>201</sup> Section 220, as its Commentary emphasized, was designed to identify “servants” whose torts could be imputed to a “master” under the doctrine of *respondeat superior*.<sup>202</sup> It did not define employee. Of course, “statutory purpose” had no usefulness as a “factor” in the context of *respondeat superior*, and was therefore omitted from the list of relevant factors.<sup>203</sup> But the Commentary further observed that the term “employee” had displaced “servant” as a basis for coverage by many social welfare statutes, and while these terms were generally synonymous for purposes of workers’

admission that “the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (citing *NLRB v. United Ins. Co. of America*, 390 U.S., 254, 258 (1968)). The Court’s difficulty in describing the test is reminiscent of the Minnesota Supreme Court’s observations 100 years earlier in *Waters v. Pioneer Fuel Co.* See *Waters v. Pioneer Fuel Co.*, 55 N.W. 52 (Minn. 1893). See also *supra* text accompanying notes 69-71.

198. Any attempt to compare two cases with apparently similar facts but opposite results is subject to the criticism that a single fact, perhaps not clearly described by the judges, was enough to account for the difference. A better measure of the subjectivity of the test of employee status is the number of appellate cases in which a panel of judges heard the same facts and reached different conclusions, with one or more judges then writing a dissent. See cases collected in *infra* note 277.

199. For examples of cases explicitly recognizing relevance of statutory purpose, see, e.g., *U.S. v. Capanegro*, 576 F.2d 973, 978 (2d Cir. 1978); *Purdy v. Livingston*, 559 S.W.2d 24, 28 (Ark. 1977); *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404-405 (Cal. 1989); *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167, 171 (Fla. 1995); *Jack Bradley, Inc. v. Dep’t of Employment Sec.*, 585 N.E.2d 123, 129-30 (Ill. 1991); *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1329-30 (N. M. 1996); *Rutherford v. Modern Transp. Co.*, 320 A.2d 522, 524-25 (N.J. Superior Ct. 1974); *Woody v. Waible*, 554 P.2d 492, 494-95 (Ore. 1976). For examples of cases that rely on a simple statement of the common law control test and reject or omit any consideration of statutory purpose, see, e.g., *Ex Parte Curry*, 607 So.2d 230, 232-33 (Ala. 1992); *DaSilva v. Dansbury Publ’g Co.*, 666 A.2d 440, 442 (Conn. 1995); *White v. Gulf Oil Corp.*, 406 A.2d 48, 51-52 (Del. 1979); *Locations, Inc. v. Hawaii Dep’t of Labor and Indus. Relations*, 900 P.2d 784, 787 (Haw. 1995); *Snyder v. Smith*, 381 P.2d 508, 509 (Kan. 1963); *Brady v. Ralph Parsons Co.*, 520 A.2d 717, 724 (Md. 1987); *Chase v. Indep. Practice Ass’n*, 583 N.E.2d 251, 253 (Mass. App. 1991); *Boily v. Comm’r of Econ. Sec.*, 544 N.W.2d 295, 296 (Minn. 1996); *Hemmerling v. Happy Cab Co.*, 530 N.W.2d 916, 917 (Neb. 1995).

200. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

201. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. g (1958).

202. *Id.* § 220 cmt. c.

203. See *id.* § 220(2).

compensation statutes and federal employers' liability statutes, "beyond this there is little uniformity of decision."<sup>204</sup> In fact, under "federal and state wages and hours acts . . . persons working at home at piece rates and choosing their own time for work have been held to be employees, although certainly not servants as the word is herein used."<sup>205</sup>

### C. The Return of Taft-Hartley

Forty years after Congress rebuked the Court for straying from the "common law" test of employee status, one might have assumed the issue was a forgotten muddle. But the real impact of Congress's reprimand against the Court's *Hearst* decision was simply postponed by the lack of clear-cut opportunities for the Court to consider the meaning of what Congress had done. In a series of decisions between 1959 and 1974 under the Federal Employers Liability Act (FELA)<sup>206</sup>, the Court reaffirmed in dicta the century-old rule that the term "employee," as used in this federal workers' compensation statute, had the usual common law meaning. Even this reaffirmation was stated in terms that seemed indirectly to accommodate consideration of economic realities and statutory purpose, however.<sup>207</sup>

204. *Id.* § 220 cmt. g.

205. *Id.*

206. 45 U.S.C. §§ 51-60 (1994).

207. In two FELA cases, the Court reaffirmed its long-standing decision in *Robinson v. Baltimore & Ohio R. Co.* that FELA "employee" coverage is based on the common law meaning of "employee." See *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915). First, in *Baker v. Texas & Pacific R. Co.*, the Court held that employee status is the jurisdictional key to FELA, and it offered Section 220 of the Restatement (Second) of Agency as a guide for determining status. See *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228-29 (1959) (citing RESTATEMENT (SECOND) OF AGENCY § 220 cmt. c, § 227 cmt. a (1958)). This multi-factored test combines the old control test and many aspects of the "economic realities" test. See *infra* text accompanying notes 237-242. The second case, *Kelly v. Southern Pacific Co.*, involved a worker whose status as an employee was undisputed, but who asserted that he was the borrowed employee or temporary employee of another employer other than his regular employer at the time of the accident. See *Kelly v. S. Pac. Co.*, 419 U.S. 318, 318 (1974). In rejecting the employee's claim, the Court reiterated that the test for determining who employed an employee was based on the "common law" approach, but it went to some length to relate this approach to Congress' evident statutory purpose in FELA. See *id.* at 324-26.

Of course, in the case of FELA, an extension of coverage to any group of workers is not clearly in their interest or for their protection, because workers excluded from FELA coverage might gain from their resulting eligibility for inclusion in state workers' compensation laws or for remedies under traditional tort law. Some workers' compensation laws apply to workers who would certainly be independent contractors under the "common law" test. See, e.g., *Grothe v. Olafson*, 659 P.2d 602 (Alaska 1983) (rejecting common law control test and adopting the "relative nature of the work" test, which is even more expansive than the economic realities test). But workers' compensation laws routinely exempt employees covered by FELA. See, e.g., TEX. LAB. CODE ANN. § 406.091(a)(2) (1994) (exempting employees "covered by a method of compensation established under federal law" from workers' compensation law). Coverage under state workers' compensation law is frequently advantageous to a worker. For example, a worker covered by state law may be entitled to a remedy for "retaliation," whereas FELA provides no such remedy. See *Texas Mexican Ry. Co. v. Bouchet*, 963

Two other employee status decisions by the Court touched on the issues of economic realities and statutory purpose in ways that were consistent with *Hearst* but fell far short of clear reaffirmations. In *United States v. W.M. Webb, Inc.*,<sup>208</sup> the Court held that a question of employee status in an admiralty case should be decided by reference to admiralty law rather than general common law.<sup>209</sup> *W.M. Webb* was again a dubious precedent for rejecting the common law test, however. It might just as easily be explained as a case in which the custom and practice of the industry was determinative, and community or trade custom is a well-recognized factor included in the expanded version of the common law test.<sup>210</sup> Moreover, once it is determined that an employee works in "admiralty," the question of status might necessarily be the same regardless of the precise statute or legal issue involved.

Finally, in *Community for Creative Non-Violence v. Reid*,<sup>211</sup> the Court considered the meaning of "employee" as used in the Copyright Act,<sup>212</sup> in a dispute between an artist and his client over ownership of the copyright for a sculpture commissioned by the client. Under the Copyright Act, one way in which the copyright for an artist's work may become the property of the artist's client is when the work constitutes a "work made for hire."<sup>213</sup> A work is "for hire" when it is created by an employee in the scope of his employment, or when its creation fits within several other situations listed by the Copyright Act.<sup>214</sup> A finding of employee status does not extend any sort of protection to the artist. To the contrary, such a finding is more likely to diminish the artist's property rights in his work. Thus in *Community for Creative Non-Violence*, the usual roles were reversed as the worker/artist was seeking independent contractor status and the employer/client wanted to classify him as an employee.<sup>215</sup> In this instance, there was no worker protection goal to be served by expansive coverage. In any event, the relevance of statutory purpose appears to have been taken for granted by the parties in this case. Indeed, the Court resorted at length to the legislative

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S.W.2d 52 (Tex. 1998). Thus, it is far from clear that the interests of employees or the possible underlying protective purposes of FELA would be served by expansive coverage. Employees, their attorneys and unions as a class would likely be ambivalent about any expansive "economic realities" view of coverage.

208. 397 U.S. 179 (1970).

209. *See id.* at 190-94.

210. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

211. 490 U.S. 730 (1989).

212. Copyright Act of 1976, 17 U.S.C. §§ 101-1101 (1994).

213. 17 U.S.C. § 201(b).

214. *See id.* § 101 (defining a "work made for hire").

215. The artist urged the court to adopt a narrow view that would include only a "formal, salaried" employee. *Community for Creative Non-Violence*, 490 U.S. at 739. The client/employer, on the other hand, sought a broader interpretation in which the artist would be an "employee" if the employer "actually wielded control with respect to the creation of a particular work." *Id.*

history of the Copyright Act to confirm that Congress had used the term "employee" in the "common law" sense, and it found that the artist was an independent contractor.<sup>216</sup> Since the statutory history and purpose pointed clearly toward the common law test, the Court again avoided the question whether statutory purpose might override the common law test if these two approaches were in clear conflict.

Not until the Court's 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*<sup>217</sup> did the question of statutory purpose come squarely before the Court, in a case as good as any for demonstrating the limitations of using employee status as the basis for coverage. *Nationwide Mutual* involved the meaning of "employee" under the Employee Retirement Income Security Act (ERISA),<sup>218</sup> which grants employees a number of rights under federal law with respect to the formation and administration of employee benefit plans. The purpose of this massive federal intrusion into an area once governed by state common laws of trusts and contracts is not hard to see. Benefits paid as part of a plan are not negotiated by any process envisioned by the common law of contracts. They are legislated by the employer, frequently in language and detail unintelligible to the non-lawyer, on a take it or leave it basis, and subject to unilateral modification by the employer. Benefit plans are necessarily contracts of adhesion because of the impossibility of providing or managing benefits efficiently on an individually negotiated basis. But the federal interest in benefit plans goes far beyond the mere taming of these adhesive contracts or of their inherent imbalance of bargaining power. In fact, our entire system of social welfare depends considerably on the existence of such private plans.

Benefit Plan participation need not be tied to employee status within an employer's workforce. Business associations, professional organizations, or (as in *Nationwide Mutual*) independent contractors working for a single employer might also form or be formed into groups for the purpose of a benefit plan. Nevertheless, when Congress enacted ERISA, it followed a long tradition of using employee status as the lynchpin of coverage for important social welfare legislation.<sup>219</sup> If a plan is for employees, it enjoys the protection of, and bears the duties stated in, ERISA.<sup>220</sup> Otherwise, it exists in the pre-ERISA world of common law contracts and trusts.

*Nationwide Mutual* illustrates the importance of this distinction. The

216. See *id.* at 752-53.

217. 503 U.S. 318 (1992).

218. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

219. See *supra* text accompanying notes 99-148.

220. See 29 U.S.C. § 1003(a) (providing that the relevant subchapter applies to any "employee benefit plan" that satisfies the other conditions of coverage); 29 U.S.C. § 1002(7) (defining a plan "participant" as an "employee or former employee").

plaintiff, Darden, was a sales agent<sup>221</sup> and therefore a member of a profession that often finds itself in the gray area between employee and independent contractor.<sup>222</sup> He sold insurance policies for Nationwide Mutual, which paid him commissions in return but also prohibited him from serving any competitor.<sup>223</sup> Then, after eighteen years of service, the company “exercised its contractual right to end its relationship” with Darden.<sup>224</sup> Denied authorization to sell Nationwide Mutual policies, Darden began to sell insurance for a number of other companies, whereupon Nationwide Mutual invoked the non-competition/forfeiture clause in his pension plan.<sup>225</sup> Because Darden continued his profession by selling for others, Nationwide Mutual declared it would not pay his pension.<sup>226</sup>

Such a forfeiture clause is unenforceable under ERISA,<sup>227</sup> hence the decisive issue: should Darden and other plan beneficiaries be treated as “employees” and the plan as an employee retirement plan, for purposes of ERISA coverage? As usual, Congress had simply failed to define the term “employee” in the relevant statute<sup>228</sup> and the Court was left to choose between the common law control test, which might exclude Darden, and a more expansive approach that invited consideration of statutory purpose and an array of economic reality factors.

An expansive view of ERISA coverage would certainly seem to fulfill some important goals of the legislation, which was designed to provide security and stability in the provision of work-based retirement and health benefits.<sup>229</sup> Whether Darden and his fellow plan participants were

221. See *Nationwide Mutual*, 503 U.S. at 320.

222. In New York alone, during the 26-month period from January 1999 to February 2001, there were eleven reported decisions regarding the employee status of sales workers. See *In re Rios*, 719 N.Y.S.2d 718 (App. Div. 2001); *In re Fratello*, 706 N.Y.S.2d 517 (2000); *In re Atac*, 697 N.Y.S.2d 398 (App. Div. 1999); *In re Esposito*, 696 N.Y.S.2d 100 (1999); *Koren v. Zazo*, 691 N.Y.S.2d 549 (App. Div. 1999); *In re Kientle*, 689 N.Y.S.2d 768 (App. Div. 1999); *In re American Home Improvement Prods., Inc.*, 689 N.Y.S.2d 759 (App. Div. 1999); *In re Nielsen*, 689 N.Y.S.2d 746 (App. Div. 1999); *In re Voss*, 689 N.Y.S.2d 733 (App. Div. 1999); *In re Lee*, 688 N.Y.S.2d 791 (App. Div. 1999); *In re Kaplan*, 684 N.Y.S.2d 352 (App. Div. 1999).

Sales workers are particularly prone to such disputes because they frequently work outside the employer’s property, beyond the employer’s direct oversight, and with a comparatively significant amount of freedom in scheduling their work. On the other hand, as the above cases demonstrate, employers frequently attempt to control these workers regarding their work methods and performance of services for other clients. Moreover, sales workers usually have an insubstantial investment in equipment aside from the use of their own car.

223. See *Nationwide Mutual*, 503 U.S. at 319-20.

224. *Id.* at 320.

225. See *id.*

226. See *id.*

227. 29 U.S.C. § 1053(a) (1994).

228. See *id.* § 1002(6) (“The term ‘employee’ means any individual employed by an employer.”). ERISA lacks any attempt to define non-employees such as independent contractors.

229. See *id.* § 1001.

independent contractors or “employees,” they were equally exposed to the risks of an employer’s self-interested manipulation of group welfare benefits. Employer use of forfeiture clauses is potentially a more serious problem for contractors than employees. Contractors are more likely to be restrained by such clauses because they frequently have professional or other specialized skills an employer might wish to deny to competitors. Highly specialized contractors are particularly at risk under such clauses, because their value may be greatly diminished outside the specific industry in which they acquired their skill.

As a matter of “economic realities,” an independent contractor who depends on a group welfare plan created and managed by a single client/employer is probably in no better position to avoid such oppression than an employee. Indeed, an employer’s imposition of a no-competition clause that, in effect, holds a worker’s retirement earnings as security, is powerful evidence of the employer’s dominant position in the relationship.<sup>230</sup> There seems to be no good reason why employees should enjoy federal protection with respect to their private group welfare benefits while independent contractors in plans managed by their exclusive clients should not. One can easily imagine the *Hearst* court invoking statutory purpose and economic realities to find that Darden was the functional equivalent of an employee for purposes of this protective legislation.

But one can just as easily imagine all sorts of ways Congress could have drafted ERISA to cover workers such as Darden without relying on indistinct concepts of worker status. For example, Congress could have based coverage on the existence of a “group plan” established as a form of compensation for services, without regard to any particular status of the beneficiaries. What should one make of Congress’s choice? The Court, remembering how Congress had reproached it half a century earlier, confirmed the death of the statutory purpose doctrine as a means of resolving worker status. It dismissed *Hearst* and *Silk* as “feeble precedents for unmooring the term [employee] from the common law”<sup>231</sup> and asserted that its abandonment of the doctrine had been signaled three years earlier by *Community for Creative Nonviolence*.<sup>232</sup>

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230. The Supreme Court itself had made this observation in the “common law” days. See, e.g., *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (finding it significant evidence of a master/servant relationship that a salesman “‘agrees to give his exclusive time and best energies to said business,’ and is to forfeit all his commission under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company”).

231. *Nationwide Mutual*, 503 U.S. at 324.

232. See *id.* at 322-23. It doubtful that the Court intended to eliminate other applications of the statutory purpose test, such as where courts have held that a person no longer employed by an employer may still be an “employee” entitled to statutory protection. See, e.g., *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997) (declaring only a few years after *Nationwide Mutual* that denying coverage to former employees would subvert the law’s purpose of “[m]aintaining unfettered access to statutory remedial

The elimination of statutory purpose as a factor did not, however, spell the end of Darden's claim. The court of appeals had initially opined that Darden "most probably would not qualify as an employee" under a traditional test,<sup>233</sup> but then avoided the issue by resolving the case on statutory purpose grounds.<sup>234</sup> The Supreme Court remanded the case to allow the lower courts to reconsider Darden's status under the traditional test,<sup>235</sup> begging the question, what *is* the traditional test? The answer was not so far from the *Hearst* case after all.<sup>236</sup> Indeed, the Court's opinion in *Nationwide Mutual* may have been just as fatal to the old "control" test as it was to the statutory purpose rule.

Despite the Court's clearly announced restoration of the common law test for purposes of federal statutory coverage, its description of that test included every aspect of the economic realities test.<sup>237</sup> The Court expressly approved the relevance of "the source of the instrumentalities and tools; . . . the location of the work; . . . the duration of the relationship; . . . [and] whether the work is part of the regular business of the hiring party . . ." <sup>238</sup> It also cited as a factor Section 220 of the Restatement (Second) of Agency,<sup>239</sup> which lists, among other things, "whether or not the one employed is engaged in a distinct occupation or business."<sup>240</sup> Finally, it cited the Internal Revenue Service's famous twenty-point checklist,<sup>241</sup> which adds the integration of the worker's services in the business operations of the employer, the possibility of profit or loss for the worker, the worker's freedom to work for other persons and the availability of the worker's services to the general public.<sup>242</sup> In case of any lingering doubt whether it had rejected the simple control test of the past, the Court recalled its words from earlier days that "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"<sup>243</sup>

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mechanisms").

233. *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 705 (4th Cir. 1986), *rev'd*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

234. *See Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 707 (4th Cir. 1986).

235. *See Nationwide Mutual*, 503 U.S. at 319.

236. *See supra* text accompanying notes 98-133.

237. *See Nationwide Mutual*, 503 U.S. at 323-24.

238. *Id.* at 323.

239. *See id.* at 324.

240. RESTATEMENT (SECOND) OF AGENCY § 220(2)(b) (1958).

241. *See Nationwide Mutual*, 503 U.S. at 324.

242. *See Rev. Rul. 87-41*, 1987-1 C.B. 296, 298-99.

243. *Nationwide Mutual*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).



## IV.

## THE LIMITATIONS OF RULES BASED ON WORKER STATUS

A. *Is Uncertainty of Worker Status Cause for Concern?*

However courts state the test of employee status, they routinely concede its failure to produce predictable results for many workers whose status is ambiguous.<sup>244</sup> The complaint is no newer than complaints about the weather and, like the weather, this unpredictability is accepted as part of landscape that is given to us, rather than created by us. We have accepted that the status of some individuals will be uncertain, even within a single workforce of individuals performing the same job,<sup>245</sup> and that the usual rules of *res judicata* and collateral estoppel cannot apply because slight changes in circumstances over time or slight variations in a court's statement of the test can shift an individual from one status to the other.<sup>246</sup>

Of course, it might be said that the test of employee status is simply one of many imprecise rules or tests in the law: "just cause" for termination of an employee, "outrageous" conduct by an alleged tortfeasor, or "best

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244. See, e.g., *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) (pointing out that "as a practical matter the [economic realities] test cannot be rigidly applied" in determining the existence of an employment relationship); *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 150 (Miss. 1994) ("[T]he various tests to determine the type of relationship are themselves generalities which can be viewed quite differently, depending upon which judge is applying them."); *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss. 1988) (stating that the difference between employees and independent contractors "is not a line at all but a twilight zone filled with shades of gray"); *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1334 (N.M. 1996) ("A fact found controlling in one combination may have a minor importance in another.").

245. See, e.g., *Smith v. Braden*, 765 So.2d 546, 555 (Miss. 2000) ("[W]hether an individual is considered an employee or an independent contractor is an incredibly fact-sensitive determination which can hardly be rubber-stamped by a holding that applies across-the-board to all physicians on salary at the University."); *Burns v. Labor & Indus. Relations Comm'n*, 845 S.W.2d 553, 556-57 (Mo. 1993) (noting that the worker in question, a roofer, could be an employee even if the approximately thirty other fellow roofers hired by the same employer were independent contractors, because there were at least some facts unique to that particular roofer).

246. See, e.g., *McGuiggan v. CPC Int'l*, 84 F.Supp.2d 470, 476-77 (S.D.N.Y. 2000) ("[T]he standard for determining 'employee' status under the [Fair Labor Standards Act] differs from that under the common law or ERISA. Thus, the precise question raised . . . has not yet been addressed by any court."). Instead of invoking *res judicata* or collateral estoppel, a court is likely to consider prior judicial or administrative rulings about a worker's status to be evidence, or one more factor, regarding the worker's status for purposes of the dispute then before the court. See, e.g., *In re Fox*, 500 N.Y.S.2d 212 (N.Y. App. Div. 1986) (finding NLRB determination that driver was independent contractor did not preclude state agency from determining whether driver was employee for purposes of unemployment compensation law), *rev'd on other grounds sub nom. In re Claim of Rivera*, 512 N.Y.S.2d 14 (1986); *Engel v. Calgon Corp.*, 498 N.Y.S.2d 877, 878-79 (N.Y. App. Div. 1986) (finding that one agency's determination that worker was employee under one state law did not preclude another agency from determining that worker was independent contractor under another state law). *But see* *McFadden Bus. Publ'ns, Inc. v. Guidry*, 341 S.E.2d 294, 297 (Ga. App. 1986) (applying *res judicata* where prior determination of independent contractor status related to the same worker's status "at the time of his injury" in accident that was basis of subsequent proceeding).

interests” of a child, to name only a few. Important questions frequently depend on tests that can yield different results depending on the personal views of judges or jurors. In many instances we accept such uncertainty as the price of a system that permits treating each case as unique. In the case of worker status, however, the law’s uncertainty is objectionable for two reasons. First, such uncertainty is not necessary, because for nearly any “employment” law there are alternative tests of coverage that would better suit the legislative purpose with a much higher degree of clarity. This point will be addressed in Part V of this article. Second, legal uncertainty encourages and rewards employer conduct that tests the limits of the law, ultimately to the detriment of both employers and their employees.

The latter objection stems from the system of rewards granted to employers who create ambiguous working relationships. For an employer, the best of all possible worlds includes effective control over the worker without any of the obligations or liabilities of an employment relationship. This was the lure that tempted Microsoft in *Vizcaino*.<sup>247</sup> Where Microsoft failed,<sup>248</sup> however, other employers have frequently succeeded, and this success, in turn, tempts others.<sup>249</sup> An employer can succeed by reserving control over the things that count most to the employer, while using other “factors” of independent contractor status as a counterbalance. For example, a newspaper publisher’s primary concerns are that newspapers are delivered on time to the right place and are placed in plastic in bags in case of rain. If the publisher prescribes rules to assure these requirements, its control factor may seem slight in comparison to other factors, such as the carrier’s use of his own automobile and his right to deliver pizzas for another company in the evening.<sup>250</sup>

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247. See *supra* text accompanying notes 9-12.

248. While Microsoft chose not to contest the IRS’s determination that the computer specialists in question were employees, decisions of courts and agencies in other cases suggest that computer professionals will continue to be at the center of disputes over worker status. Their special skills often place them beyond close supervision of their employers, and can serve as the basis for an argument that they have professional or trade skills typical of independent contractors. See *Enforcement Guidance on Equal Employment Opportunity Commission & Walters v. Metropolitan Enterprises* 519 U.S. 202 (1997), 6 (May 2, 1997), available at <http://www.eeoc.gov/policy/guidance.html>. Interestingly, the goals of programmers and their employers are frequently reversed, with employers claiming programmers are employees whose work is for hire under copyright law, and programmers claiming independent contractor status and copyright ownership. See, e.g., *Kirk v. Harter*, 188 F.3d 1005, 1009 (8th Cir. 1999) (finding computer program developer to be independent contractor, not employee, and owner of the copyright); *Aymes v. Bonelli*, 980 F.2d 857, 864 (2d Cir. 1992) (finding computer programmer to be independent contractor entitled to the copyright of the program he designed).

249. See Government Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce*, Report No. GAO/HEHS-00-76, 34-36 (2000), available at <http://www.gao.gov>; *Current Law on Independent Contractors Criticized at House Subcommittee Meeting*, Daily Lab. Rep. (BNA), at D-12 (June 9, 1993).

250. See *Landmark Cmty. Newspapers of Kentucky, Inc. v. Kentucky Unemployment Ins. Comm’n*, No. 97-CI-00521, 2000 WL 1252540 (Ky. App. Sep 1, 2000) (finding carriers to be

There are plenty of incentives for an employer to place its workers in the independent contractor zone. The costs of payroll taxes, the administrative costs and liabilities of wage and benefits laws, the risks of employment discrimination law, the obligation to bargain with unions, the burden of providing family or medical leave, and the general uncertainty that many employers feel with respect to the law, are reason enough for many employers to consider loosening a few strings in order to convert employees to independent contractor status. Even if an employer must have at least some employees, it may be able to avoid “employer” coverage under many laws by maintaining a small workforce of employees and much larger workforce of independent contractors.<sup>251</sup>

Admittedly, most workers remain neatly in the employee zone. For most business situations, an employer has no practical alternative to the classic model of employer control over the work of a subordinate employee. Employers frequently must exercise a high degree of control to coordinate the work of a number of different workers with limited skills and open-ended assignments. For most workers, an employer has no choice but to exercise the kind of detailed supervision, time-based compensation, and unilateral scheduling that make the workers “employees” beyond a doubt. However, there are some occupations that have always been fertile fields of ambiguity:<sup>252</sup> sales,<sup>253</sup> transportation,<sup>254</sup> and various professional services such as entertainment<sup>255</sup> are a few examples. Moreover, if it is true, as some observers have worried, that there is a trend toward more aggressive use of independent contractors in ambiguous situations,<sup>256</sup> this trend is probably also due to the acceleration of employment lawmaking<sup>257</sup> and the rapid

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independent contractors).

251. Title VII is just one example of an employment law that applies only to employers with a certain number of employees. *See* 42 U.S.C. § 2000e (defining “employer” as a person employing at least 15 employees). Of course, independent contractors are only one alternative. Many employers, especially small ones, have essentially “contracted out” their employer functions to employee “leasing” agencies, “professional employer” organizations or temporary employment agencies. But while staffing services merely shift the cost of employer status and gain certain economies of scale, the employment of independent contractors avoids many of the costs entirely.

252. *See generally* Stevens, *supra* note 34; Alanson W. Wilcox, *The Coverage of Unemployment Compensation Laws*, 8 VAND. L. REV. 245 (1955); Asia, *supra* note 35.

253. *See, e.g.*, *Lowen Corp. v. United States*, No. 93-6350, 1993 WL 245960 (D. Kan. June 14, 1993); *Farmers Ins. Co.*, 209 NLRB 1163 (1974); *Locations, Inc. v. Hawaii Dep’t of Labor and Indus. Relations*, 900 P.2d 784 (Haw. 1995).

254. *See, e.g.*, *Nat’l Freight*, 146 NLRB 144 (1964); *Hemmerling v. Happy Cab Co.*, 530 N.W.2d 916 (Neb. 1995); *C&H Taxi Co. v. Richardson*, 461 S.E.2d 442 (W. Va. 1995).

255. *See, e.g.*, *Harrah’s Club v. NLRB*, 446 F.2d 471 (9th Cir. 1971); *Nevada Resort Ass’n*, 250 NLRB 626 (1980).

256. *See More Reporting Requirements Needed for Independent Contractors*, ABA Session Told, Daily Lab. Rep. (BNA), at A-10 (August 10, 1992).

257. *See* Government Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce*, Report No. GAO/HEHS-00-76, 35-36 (2000), available at

creation of entirely new high skilled occupations, such as computer technology professionals, and of new ways of organizing work with less supervision, such as telecommuting.

Competition tends to reinforce the rewards of avoiding employer status, and the incentive is particularly strong for small employers who lack the resources to manage employment responsibilities efficiently. The result is a growing number of workers left unprotected by laws that are reserved for “employees.” On the other hand, if an employer errs by miscalculating how a court might categorize its workforce, the resulting liability for the employer—including back taxes and penalties, backpay liability for unpaid overtime or minimum wages, and unexpected benefits obligations or disqualification of employee benefits plans—can be crushing.<sup>258</sup>

### B. Is a Modern Version of the Traditional Test Any Clearer?

As noted earlier, in *Nationwide Mutual*<sup>259</sup> the Supreme Court approved versions of the “traditional” test that include many of the economic realities factors from *Hearst*,<sup>260</sup> *Silk*<sup>261</sup> and *Rutherford Foods*.<sup>262</sup> But the Court’s endorsement of a modern version of the test did not bring any clarity to the issue. The effect of *Nationwide Mutual* was merely to eliminate once and for all the “statutory purpose” factor. With its extended list of factors, all of which “must be assessed and weighed with no one factor being decisive,” the *Nationwide Mutual* test is quite possibly even less predictable than the oldest and simplest control test.<sup>263</sup> A closer inspection of factors routinely cited by the courts before and after *Nationwide Mutual* reveals why a worker’s status is so often uncertain.

#### 1. Employer Control

Employer control over the details of the work has been the factor most courts place at the heart of any test of worker status, including the test

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<http://www.gao.gov>; *Current Law on Independent Contractors Criticized at House Subcommittee Meeting*, Daily Lab. Rep. (BNA), at D-12 (June 9, 1993); *More Reporting Requirements Needed for Independent Contractors*, ABA Session Told, Daily Lab. Rep. (BNA), at A-10 (August 10, 1992).

258. See discussion of *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) at *supra* notes 9-12.

259. See *supra* text accompanying notes 217-243.

260. See *supra* text accompanying notes 98-136.

261. See *supra* text accompanying notes 137-142.

262. See *supra* text accompanying note 143.

263. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992). Ironically, the lack of predictability was a problem for which the Court criticized the lower court’s “statutory purpose.” See *id.* at 326. The Court stated that “the Fourth Circuit’s analysis reveals an approach infected with circularity and unable to furnish predictable results.” *Id.* at 326. See also *supra* text accompanying notes 217-243.

described in *Nationwide Mutual*. Indeed, one could argue that nearly all the other factors listed by courts are merely different ways of evidencing the employer's means of control. But employer control is not a trait unique to employer/employee relationships or wholly absent from employer/contractor relationships. An employer controls either an employee or a contractor when the employer orders services, declares her specifications, negotiates the terms, urges greater speed in performance, complains about the work, or rejects the work and demands corrections. What is it, then, that distinguishes employer control over employees from employer control over independent contractors?

The answer of the courts has been that an employer controls the *details* of an employee's work, but only the *results* of a contractors work.<sup>264</sup> Therefore a general, unskilled servant who performs any assigned task, whenever and however he is instructed, and an assembly line worker who performs a single, specific part of a job which is finished by many individuals working together, are both employees under the details versus results test. The employer remains the ultimate authority of how the work will be done, and the employee may not have even a full understanding of the end goal or result of his work. A lawyer or other professional or craftsman, on the other hand, is hired to accomplish a certain result. The details are not only beyond the client's control, they are beyond his knowledge, and thus such professionals frequently are deemed independent contractors.

The details versus results distinction has always left some cases in doubt, and its effectiveness has declined in proportion to the growing diversity of skills and work methods of the industrial and post-industrial world.<sup>265</sup> Employers sometimes allow their employees freedom to decide certain methods of performance,<sup>266</sup> and independent contractors sometimes allow employers to control parts of their performance.<sup>267</sup> Even the basic

264. See, e.g., *Martin v. Goodies Distrib.*, 695 So.2d 1175, 1178 (Ala. 1997); *Glenn v. Stoneload Delivery Co.*, 894 S.W.2d 713, 716 (Mo. App. 1995); *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1330 (N.M. 1996); *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 589 (Tex. 1964). See also RESTATEMENT (SECOND) OF AGENCY, §220 cmt. e (1958).

265. See generally, Katherine Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA LAW REV. 519, 535-549 (2001).

266. The Restatement provides as an example a cook whose contract provides that the employer will exercise no control over the cooking. See RESTATEMENT (SECOND) OF AGENCY, § 220 cmt. d (1958).

267. For example, a general contractor might retain authority to control the order and timing of performance in order to coordinate the work of many parties. See, e.g., *Hix v. Minnesota Workers' Comp. Assigned Risk Plan*, 520 N.W.2d 497, 502 (Minn. App. 1994) (finding trucking firm's instructions to drivers where to pick up and drop off loads insufficient to show control, because such instructions are necessary for the drivers to serve the client). Employers of independent contractors frequently need to control certain details in order to assure the reputation of its own product or services. See, e.g., *Ware v. United States*, 67 F.3d 574, 578 (6th Cir. 1995) ("In this era of exclusive licensing

distinction between details and results may be illusory, since it depends on how one defines the task, and how one judges the importance of any issue in the work. The narrower and more specifically the goal is stated, the more likely it is that the person who does the work will be an independent contractor. A plumber, for example, might be a contractor if installing good plumbing is a discrete end the parties seek to achieve, and where the owner or general contractor wishes to have no involvement in the details of the plumbing. Conversely, if the goal is stated in larger and more general terms, it is more likely that everyone involved in executing the details in reaching the goal will be counted as employees. If building a house is the goal, for example, there is an argument that the plumber's entire work is but a detail under the general contractor's control, and the plumber is therefore an employee.

There are even more reasons why the degree and nature of employer control is hopelessly elusive. Assuming that control over the details is sufficiently distinguishable from other types of control, how is control to be measured, and how much control is enough to create an employer/employee relationship? Control does not exist in discrete, measurable and comparable units. If the only purpose of measuring control was to determine an employer's responsibility for a particular accident, which was the original purpose of the control test, the problem might be easier. But in modern employment law, control is not a mere link in the chain of causation or culpability, it is the touchstone for a worker's status as an employee.<sup>268</sup> The importance of some particular exercise of control cannot be gauged by reference to an accident or any other specific event. For modern employment law purposes, control is an indistinct cloud that may or may not cross a vague line set arbitrarily by a judge or agency as the boundary of employee status.

One might measure control, as the courts always have, by looking to an employer's direct supervision over and express instructions to the worker in the performance of his work. This, after all, was the traditional manner in which courts determined an employer's tort liability for a worker's negligence.<sup>269</sup> But does it follow that the *absence* of supervision and express instructions should indicate independent contractor status? A lack

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agreements and widespread franchising, a contract dictating the details of a business down to the color of its napkins and pens may be more an indicator of bargaining power or business practice than of an actual employer-employee relationship.").

268. Under the Supreme Court's decision in *Nationwide Mutual*, if the same common law test of status governs the coverage of every federal employment statute that does not otherwise define "employee," a judicial or administrative determination of employee status affects the legal rights and duties of the parties under nearly every federal statute, including tax, discrimination, benefits and safety laws, and it will likely have at least some weight in the determination of employee status for state law purposes as well. See *supra* note 5.

269. Stevens, *supra* note 34, at 197-198.

of direct supervision and instruction might be due to the worker's actual independence, or it might be due to other factors: the employer's trust in the worker, earned by many years of experience and good work; the worker's special skills (such as computer maintenance and troubleshooting) that provide the basis for his employment but lie outside the employer's own knowledge; or the physical impossibility of supervising a worker who performs his work outside the employer's place of business (e.g., offsite sales work). In the modern workplace, it is increasingly typical for a business to rely on a large number of sales, technical, managerial and professional workers, employed on a regular basis, but without close supervision and instruction by a foreman.<sup>270</sup> The employer's control might take the form of "goals" subject to annual review, such as sales goals for sales employees or writing goals for law professors. If such workers know what is expected and how it is to be done, there may be few instances in which the employer finds it necessary to tell them what to do. Should the infrequency of the employer's *actual* exercise of control over a trusted and skilled worker lead to the conclusion that the worker is not an employee?

One of the courts' early solutions to this problem was consideration of the contractual right to control, even if never exercised.<sup>271</sup> Many workers who have earned the right to work without close supervision understand that the employer is still in charge. However, proving this understanding, especially after the parties have found a reason to dispute the worker's status, presents a new set of difficulties. Most employees lack written contracts that would show clearly that they are subject to an employer's control as there is little, if any, incentive for an employer to make a written agreement that confirms a worker's employee status. An employer is more likely to use a written contract to show that a worker is an independent contractor, by disclaiming any right to control the worker's performance.<sup>272</sup>

Unfortunately, a test of statutory coverage giving significant weight to a written contract between the parties raises the risk that employers will create the appearance of an independent contractor relationship on paper simply to avoid employment laws. A contractual disclaimer of control may be a sham, because the power to control can emanate from economic

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270. See generally, Stone, *supra* note 265, at 535-549.

271. See, e.g., Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889); Martin v. Goodies Distrib., 695 So.2d 1175 (Ala. 1997); Hunte v. Blumenthal, 680 A.2d 1231, 1236 (Conn. 1996); Averett v. Grange, 909 P.2d 246, 249 (Utah 1995); Falls v. Scott, 815 P.2d 1104, 1112 (Kan. 1991); Pickens & Plummer v. Diecker & Brother, 21 Ohio St. 212, 215 (1871) ("It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties.").

272. See, e.g., Sloan v. Bankers' Life & Casualty Co., 1 S.W.3d 555 (Mo. App. 1999); Alvarado v. Old Republic Ins. Co., 951 S.W.2d 254, 261 (Tex. App. 1997). See also AMERICAN JURISPRUDENCE LEGAL FORMS, vol. 9B § 143:13 (1996) (providing drafting tips for creating an independent contractor relationship and negating an employer-employee relationship).

circumstances as much as from a contract. A worker who enjoys contractual freedom from control may still find it hard to resist the employer's meddling if he knows or believes his contract will not be renewed unless the employer is pleased. An employer can also create other levers of control, like the employer's provision of pension benefits in *Nationwide Mutual*, subject to forfeiture if the worker serves a competitor.<sup>273</sup> A contractor under these circumstances may be even more dependent on the employer than the usual at-will employee whose pension benefits are protected by law.

A contractual disclaimer of control might also give a false appearance of wide ranging freedom when there is really nothing for the worker to control and nothing for the employer to relinquish. The newsboys in *Hearst*, for example, enjoyed the theoretical right to manage their own businesses; however, the publishers' control over the number of newspapers delivered, their freedom to appoint as many newsboys as they wished in a neighborhood, the fungibility of the product, and the improbability that any newsboy could add value other than the simple delivery of a newspaper left nothing of importance for any newsboy to manage.<sup>274</sup> On the other hand, the publishers sacrificed almost nothing, since the nature of sales and delivery work makes it difficult for an employer to exercise any greater control than the publishers retained.

The Supreme Court's solution in *Hearst*<sup>275</sup> was the economic realities test, authorizing courts to look beyond the terms of a contract or the presence of specific episodes of supervision. The economic realities of a relationship include the whole range of factors that might reveal an employer's domination over a worker: the contract, control over the key aspects of the business, relative bargaining power, the importance of the employer's business to the worker's putative business, and any other matter affecting the worker's independence. The economic realities test also provides a solution to the problem of distinguishing control over details from control over results, because it focuses on a wider picture: the nature of the employer's business, the degree to which the worker's activity is integrated into or a natural and regular part of the employer's business, and whether the worker has a legitimate and substantial business of her own.

The economic realities test certainly allows the inclusion of some workers within a modern meaning of "employee", but the test is no more predictable, and probably less so, than a simple control test. By exploring the economic realities of working relationships, courts and agencies have

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273. See *supra* text accompanying notes 217-243.

274. See *supra* text accompanying notes 111-113.

275. See *supra* text accompanying notes 114-121.



listed such an abundance of factors (twenty, according to the IRS)<sup>276</sup> that they have obtained wider protection for workers at the expense of greater complexity and probably greater uncertainty. As a result, the zone of ambiguity has simply moved outward in favor of wider inclusion of workers. Thus, dissenting opinions are common in appellate court decisions about employee versus independent contractor status.<sup>277</sup> These dissenting opinions by federal and state judges reflect the difficulty in reaching uniform or predictable results even when all judges agree on the applicable statement of the test, which in nearly every jurisdiction and for every employment law is some variation of the modern test described by the Supreme Court in *Nationwide Mutual*.<sup>278</sup>

The modernized version of the test is deficient for two other reasons. First, there is no guarantee that judges will strike any particular balance between “economic realities” and the traditional factors of direct, physical control or contractual right of control. The test does not, and could not, assign weight to any particular fact, and thus judges will continue to disagree about where the test should lead in any particular case. In *Nationwide Mutual*, for example, one might have argued that the employer’s coercive power to demand exclusive service, subject to discharge at will, when combined with a pension forfeiture upon any subsequent competitive service, might make a strong argument for employee status. Yet many of the judges who reviewed the case believed Darden’s status might be that of an independent contractor but for application of a now defunct statutory purpose test.<sup>279</sup>

Second, the economic realities test might still fail to provide protection to many workers who need it. Again, the *Nationwide Mutual* case is instructive. If a plaintiff such as Darden makes a strong case for deserving protection, he might still fail to obtain such protection if a judge determines that, even under the economic realities test, the plaintiff was really an

276. See Rev. Ruling 87-47, 1987-1 C.B. 296, 298-99.

277. A random search of state appellate cases in which at least one judge dissented on the issue of worker status yielded nine such cases in a nine month period (March through November, 2000). See *Cobb v. Union Camp*, No. 2981432, 2000 WL 640863 (Ala. Civ. App. May 19, 2000); *AFM Messenger Servs. Inc. v. Dep’t of Employment Sec.*, 733 N.E.2d 749 (Ill. App. 2000); *Carpetland U.S.A., Inc. v. Illinois Dep’t of Employment Sec.*, No. 1-99-1983, 2000 WL 1683044 (Ill. App. Nov 9, 2000); *Green v. Bobby A. Freeman Estate*, 759 So.2d 201 (La. App. 2000); *Marchetta v. CPC of Louisiana, Inc.*, 759 So.2d 151 (La. App. 2000); *Blanz v. Brigadier Gen. Contractors, Inc.*, 613 N.W.2d 391 (Mich. App. 2000); *Stamp v. Dep’t of Consumer and Bus. Servs.*, 9 P.3d 729 (Or. App. 2000); *McCown v. Hines*, 537 S.E.2d 242 (N.C. App. 2000); *Chandler v. Cash*, 20 S.W.3d 69 (Tex. App. 2000).

Dissents on the same issue in the federal courts of appeals are also common. For recent cases (during the last five years), see *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (5th Cir. 1998); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256 (4th Cir. 1997); *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093 (6th Cir. 1995).

278. See *supra* text accompanying notes 195-205.

279. See *supra* text accompanying notes 217-243.

independent contractor. And after *Nationwide Mutual*, a court cannot address this shortfall in the economic realities test by invoking statutory purpose.<sup>280</sup>

## 2. Do Other Traditional Factors Suggest Any Solution?

As noted earlier, courts have frequently looked to other factors beyond control to expand their search for evidence of employee status. Unfortunately, any of the additional factors courts have listed as evidence of employee status are, in reality, additional aspects of control, or they present the same problems as the control factor.

### a. Duration of the Relationship

A frequently cited factor, which has the appearance of simplicity and objectivity, is the duration of the relationship.<sup>281</sup> The theory is that a short-term relationship is indicative of an independent contractor, while a long term relationship that extends from one assignment to the next tends to show that the worker is an employee. But why should the duration of the employment matter for any purpose? The answer, most likely, is that it tends to highlight the economic realities of the relationship. A worker who has served the same employer for a significant period of time is more likely to be dependent on that employer. He is also more likely subject to the employer's control, either by virtue of familiarity or by virtue of his need for continued business or employment. If a worker has served the employer briefly, he is not so dependent and is more likely to have an independent calling that is legitimately viewed as his own business.<sup>282</sup>

However, even if application of this measure of the relationship were as simple as it first appears, it probably does not carry enough weight to lead to greater predictability for the ultimate question of status.<sup>283</sup> In fact, evaluating the duration of a relationship can be fraught with further complications. Some types of work lead quite naturally to long-term relationships regardless of the worker's status, especially if the employer

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280. See *supra* text accompanying notes 231-240.

281. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (listing "the duration of the relationship between the parties" as one of thirteen factors when determining whether a hired party is an employee); RESTATEMENT (SECOND) OF AGENCY § 220(2)(f) (1958) (listing "the length of time for which the person is employed" as one of ten factors when determining whether an individual is an employee or independent contractor); Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (Factor six of twenty sets forth that "[a] continuing relationship... indicates that an employer-employee relationship exists.").

282. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j (1958).

283. See, e.g., *Duncan v. Powers Imps.*, 884 P.2d 854, 856 (Okla. 1994) (finding worker to be independent contractor despite six month term of the relationship).

requires the work in question continuously or regularly. There are many cases of independent contractors who serve a hiring party for long or indefinite periods.<sup>284</sup> Employees, similarly, can serve an employer only temporarily. Thus, the duration of the relationship, while certainly relevant to the nature of the relationship, is not a fact that clearly distinguishes one group from the other.

### *b. Termination Right*

Closely connected to the duration of the relationship is the right of either party to terminate the relationship. Sometimes, this factor is stated as two separate factors: the employer's right to discharge (the more important factor, because it provides greater potential for employer control), and the employee's right to quit.<sup>285</sup> In general, an employer's unrestricted right to discharge is inconsistent with the worker's status as an independent contractor, because an independent contractor has a contract creating a duty to complete a job and a right to receive the whole compensation for it. In contrast, the typical employee is hired for an indefinite period and is not committed to remain in the position or entitled to the position for any particular length of time—he can quit or be discharged.<sup>286</sup>

Generalizations regarding the parties' right to terminate the work relationship break down upon closer scrutiny. Some employees work for a definite term of employment and are protected from discharge until the term is complete. A contractor and employer, on the other hand, might agree that the relationship is subject to termination at any time. The right of termination factor loses even more of its force in any case in which the parties have enjoyed a lengthy relationship based on successive renewals of business. Sometimes, an employer's freedom not to solicit further work from a formerly regular contractor has basically the same effect as a right to terminate at will. Consider a sales agent like Darden in *Nationwide Mutual*.<sup>287</sup> The employer's decision not to renew the agent's authorization to sell the employer's product might leave the agent without his usual, and

284. See, e.g., *Livingston v. Ireland Bank*, 910 P.2d 738, 742 (Idaho 1996) (finding person who conducted a series of appraisals and repossessions for bank over extended period of time to be an independent contractor); *Ross v. Texas One P'ship*, 796 S.W.2d 206, 215 (Tex. App. 1990) (finding security guard serving employer over extended period of time to be independent contractor).

285. See, e.g., Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (Factor nineteen sets forth that the employer's "right to discharge a worker" indicates an employer/employee relationship, while factor twenty sets forth that the worker's right to terminate services indicates an employer/employee relationship.).

286. See, e.g., *id.*; *Harger v. Structural Servs., Inc.*, 915 P.2d 1324, 1336 (N.M. 1996); *In re BKU Enters., Inc.*, 513 N.W.2d 382, 387 (N.D. 1994) (ABKU's power to terminate the contracts with dealers without cause is an especially strong indication of employee status.).

287. See *supra* text accompanying notes 217-227.

possibly exclusive, source of income. Even worse, it might leave him restricted in his ability to sell the same type of products for any other client, as a result of a forfeiture clause.<sup>288</sup> In this case, not only would the agent be terminated from his relationship with the employer, he would be terminated from his profession.

### c. *Work Scheduling*

Another seemingly simple and objective factor relates to the scheduling of the work to be done by the "employee". Courts frequently consider that if the employer controls the time of work and the number of hours worked, the relationship is more likely to be one of employment, but as the worker gains more control over his hours he is more likely to be an independent contractor.<sup>289</sup> Control over working hours is certainly some evidence of true independence. However, some employees (e.g. law professors) enjoy considerable discretion over their hours of work. Indeed, federal wage and hour law distinguishes salaried "white collar" employees from hourly-rated employees, on the basis that white collar employees receive the same salary regardless of the number of hours they work.<sup>290</sup> Also, there are some independent contractors, such as security guards, who provide a type of service that by nature must be scheduled by the hiring party.<sup>291</sup> Moreover, an employer frequently must coordinate the schedules of several different independent contractors whose work is interrelated.<sup>292</sup>

### d. *Method of Compensation*

A factor nearly as old as the control test itself is based on the method of compensation. As noted in Section I(B), early wage legislation based coverage on the distinction between wages and other forms of compensation, such as salary. Even today, courts frequently state that an independent contractor is usually paid by the task, in the form of a fixed fee or commission, while an employee is paid according to a unit of time, such

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288. *See id.*

289. *Compare* EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983) (finding sales agents to be independent contractors in part because they were not required to account to the company for their daily activities), *with* Golden v. A.P. Orleans, Inc., 681 F. Supp. 1100, 1103 (E.D. Pa. 1988) (finding sales agent to be an employee in part because the company required her to work specified hours, attend weekly meetings, and submit daily activity reports). *See also* Lankford v. Gulf Lumber Co., 597 So.2d 1340, 1345 (Ala. 1992) (noting that employer did not control independent contractor's hours or days of work).

290. *See* 29 U.S.C. § 213(a)(1) (1994); 29 C.F.R. § 541.1 (1994).

291. *See, e.g.,* Ross v. Texas One P'ship, 796 S.W.2d 206, 215 (Tex. App. 1990).

292. *See, e.g.,* Harger v. Structural Servs., Inc., 915 P.2d 1324, 1335 (N.M. 1996).

as an hourly wage or yearly salary.<sup>293</sup>

In the modern world, however, the method of compensation is rarely important in distinguishing employees from independent contractors. Many workers who have their own trade or business, such as lawyers and psychiatrists, bill by the hour.<sup>294</sup> And employees frequently are paid for each task, “piece”, or sale. Sales employees, for example, are often paid on a commission basis just like independent sales agents.

*e. Location of Work*

In the view of some judges and lawmakers, the *place* where the work is performed is so important to the question of status that, depending on other circumstances, a worker cannot be an independent contractor unless he passes a test of “place.”<sup>295</sup> The place of the work is important, according to this view, because the fact that the worker performs his work on property owned or controlled by the employer suggests a greater degree of employer control than if the worker performed his work elsewhere, such as at the worker’s own shop, beyond the employer’s potential supervision.<sup>296</sup> The performance of work at the employer’s place of business may also tend to show the lack of a separate business by the worker. But there are clearly many situations in which the location of the work should count very little, if at all, in determining a worker’s status. A skilled plumber or electrician, who might indisputably be an independent contractor, can only perform his services on the client’s premises. A truck driver or outside sales person who might certainly be an employee by virtue of other factors must still perform his work away from the employer’s premises. With the growing

293. See *e.g.*, *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989); *Locations, Inc. v. Hawaii Dep’t. of Labor and Indus. Relations*, 900 P.2d 784, 789 (Haw. 1995); *Harger*, 121 N.M. at 667; *Sherard v. Smith*, 778 S.W.2d 546, 548 (Tex. App. 1989). See also RESTATEMENT (SECOND) OF AGENCY § 220(2)(g), cmt. j (1958); Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (Factor twelve sets forth that “[p]ayment by the hour, week, or month generally points to an employer-employee relationship . . .”).

294. See *e.g.*, *Potter v. Montana Dep’t of Labor and Indus.*, 853 P.2d 1207, 1212 (Mont. 1993) (noting that carpenters are traditionally paid on an hourly basis even when they work as independent contractors); *Ross*, 796 S.W.2d at 215 (Tex. App. 1990) (finding security guard service paid by the hour to be independent contractor).

295. See *e.g.*, *Clayton v. Alaska*, 598 P.2d 84, 86-87 (Alaska 1979); *Midwest Prop. Recovery, Inc. v. Job Service of North Dakota*, 475 N.W.2d 918, 924 (N.D. 1991); *Vermont Inst. of Cmty. Involvement, Inc. v. Dep’t of Employment Sec.*, 436 A.2d 765, 767 (Vt. 1981). The courts in each of these cases applied the so-called ABC test of employee status frequently included in state unemployment compensation laws. For a discussion of the “ABC” test, see *infra* note 327.

296. See *e.g.*, *Henry Broderick, Inc. v. Squire*, 163 F.2d 980, 981 (9th Cir. 1947) (finding sales agents who worked out of company’s offices to be independent contractors). See also Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (Factor nine sets forth that work performed on employer’s premises suggests an employer/employee relationship, but notes that “[t]he importance of this factor depends on the nature of the service involved.”); RESTATEMENT (SECOND) OF AGENCY § 220(2)(e), cmt. l (1958).

incidence of telecommuting,<sup>297</sup> and the possibility that many employees will perform much of their work from home, the importance of this factor may be further diminished.

*f. Integration*

A potentially important factor suggested by many descriptions of the economic realities test is whether the work is integrated into the employer's business.<sup>298</sup> In general, if the employer itself regularly performs the work in question, using at least some workers who are unquestionably employees, as well as those whose status is in question, the work is part of the employer's usual business. The work is also part of the ordinary course of the employer's business if it lies near the core of what the employer does. For example, real estate sales work is at the core of a real estate sales company's business, and therefore this factor points in favor of employee status for the company's sales agents.<sup>299</sup>

The importance of this factor may reflect the idea that an independent contractor should have a business that functions as a separate business rather than as a cog in the employer's machine. It might also stem from the fear that employers like Microsoft could shift some types of workers wholesale from "employee" to "independent contractor" status by exaggerating their skill and independence without changing the essential role and significance of the workers in the business organization. In the modern business world, however, important functions of all sorts are frequently contracted out—including manufacturing, maintenance, sales, and even human resources management.<sup>300</sup> Moreover, the integration test has its own ambiguities, as judges can and do differ over what is a regular or natural part of the employer's business versus an incidental service. Are sales and distribution necessarily part of the same business that manufactures the goods? If so, employment law would be forced to treat

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297. See *Telecommuting: Employers Cite Benefits, Cost Savings of Increased 'Teleworking' Arrangements*, Daily Lab. Rep. (BNA), at A-4 (Oct. 29, 1999).

298. See, e.g., Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (Factor three sets forth that "[i]ntegration of the worker's services into the business operations generally shows that the worker is subject to direction and control" and tending to demonstrate an employer/employee relationship); RESTATEMENT (SECOND) OF AGENCY § 220(2)(c), (h) (1958). See also *supra* text accompanying notes 137-148.

In the workers' compensation law of some states, there is also a "relative nature of the work test." See, e.g., *Ostrem v. Alaska Workmen's Comp. Bd.*, 511 P.2d 1061, 1063-64 (Alaska 1973) (outlining the test). This test depends in part on a comparison of the worker's business and the employer's business. See *id.* at 1063.

299. See, e.g., *Golden v. A.P. Orleans, Inc.*, 681 F. Supp. 1100, 1103 (E.D. Pa. 1988).

300. See, e.g., *Henry Broderick, Inc. v. Squire*, 163 F.2d 980, 981 (9th Cir. 1947) (finding sales agents who worked "out of the Real Estate Department" of a company licensed as a real estate broker not to be employees, where other factors demonstrated their independence).

any vertically integrated business as a single employer.<sup>301</sup> As the organization of business and work continues to change, the distinctions assumed by the integration test are likely to become more uncertain.

*g. Degree of Skill*

Still another traditional factor relevant to control or economic realities is the worker's degree of skill. It is frequently said that the more skilled a worker is, the more likely it is that he is an independent contractor.<sup>302</sup> However, the importance of this factor has declined greatly in the modern world. At one time, some courts took the position that a true professional was beyond supervision by virtue of his possession of a skill that his employer lacked, and thus a professional could not be an employee. Eighty years ago it was doubted whether it was even conceivable for a doctor to be an employee.<sup>303</sup> Today, the modern corporate organization depends on the

301. Consider the situation of newspaper carriers, for example. They work for newspapers on a daily basis, and newspapers depend on them for a large part of their distribution. In the *Hearst* case, for example, the U.S. Supreme Court noted the NLRB's finding that the newsboys were "integral" to the newspapers' circulation and distribution. *NLRB v. Hearst Publ'g*, 322 U.S. 111, 119 (1944). Congress found that the carriers owned sales and distribution businesses based on other factors, and that the carriers were "independent contractors." See *supra* text accompanying notes 98-101. The NLRB and courts have found that some carriers are employees and others are independent contractors. See, e.g., *Gonzalez v. Workers' Comp. Appeals Bd.*, 54 Cal. Rptr.2d 308 (Cal. App. 1996) (finding carrier to be an employee); *Kirksville Publ'g Co. v. Div. of Employment Sec.*, 950 S.W.2d 891 (Mo. App. 1997) (finding carriers to be independent contractors).

Courts frequently cite the integration factor as important, but with inconsistent results. In many cases, the combined weight of other factors offsets an otherwise compelling degree of integration of the parties' businesses. Compare *Stover Delivery Sys. v. Div. of Employment Sec.*, 11 S.W.3d 685 (Mo. App. 1999) (finding delivery drivers employees of courier service), and *Margoles v. Labor and Indus. Review Comm'n*, 585 N.W.2d 596 (Wis. App. 1998) (finding doctors employees of medical clinic), with *Fritts v. Div. of Employment Sec.*, 11 S.W.3d 721 (Mo. App. 2000) (finding plumbers not employees of plumbing business), and *Cilecek v. Inova Health Sys. Serv.*, 115 F.3d 256, 259 (4th Cir. 1997) (finding doctor independent contractor, not employee of medical facility).

For a good discussion of the sub-factors that may bear on the importance of the integration of a worker's activities in the employer's business, including the relative sizes of their respective businesses, the regularity with which the worker's services are needed, and the custom of the industry, see *Bradley v. Clark*, 804 P.2d 425, 428 (Okla. 1991).

302. See, e.g., *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (noting that sculpting is a skilled profession and therefore sculptors are more likely to be independent contractor). See also RESTATEMENT (SECOND) OF AGENCY § 220(2)(d) (1958).

303. See, e.g., *Schloendorff v. Soc'y of New York Hosp.*, 105 N.E. 92 (N.Y. 1914); *Virginia Iron, Coal & Coke Co. v. Odle's Administrator*, 105 S.E. 107, 109 (Va. 1920) (Doctor was employed by coal mining company "to render professional services requiring special education and training, and involving the exercise of skill and judgment, which could not, in the nature of things, be controlled by the will and direction of the company . . . . The position of the doctor was that of an independent contractor."). Of course, the medical profession has changed radically in the past decade. See *Health Care Employees: Independent Union Certified as Agent for Emergency Doctors at Austin Hospitals*, Daily Lab. Rep. (BNA), at A-1 (March 21, 2000). But see *AmeriHealth Inc./AmeriHealth HMO*, 329 NLRB No. 76 (1999) (finding that primary care and specialty physicians were independent contractors and not employees).

employment of an assortment of skilled and specialized professionals, including doctors and other medical professionals, who are clearly in a different relationship with the corporation than they would be as outside independent contractor professionals. Thus, the modern and prevailing view is that even a professional, no matter how highly skilled, can be an employee, although his skill level may diminish the employer's capacity for control over the details of his work.<sup>304</sup>

#### *h. Freedom to Serve Other Employers*

A more important factor for proving that the worker has a truly independent business, and thus does not need protection as an employee, is his freedom to serve other employers. An employee ordinarily works for only one employer at a time, either because it is impractical to hold substantial employment for more than one party at a time, or because his employer prohibits other engagements. An independent contractor, if truly analogous to an independent businessperson or professional, works not only for other clients but sometimes even for competitors of the alleged employer. Therefore, if the worker is free to work for other clients, this fact supports independent contractor status.<sup>305</sup> Even if a worker is in theory free to serve others, he may be engaged in the equivalent of full time work for one employer, and courts have sometimes placed the de facto exclusivity of the relationship among the many other factors showing employee status.<sup>306</sup> Still, employees sometimes "moonlight," and putative independent contractors (as in the *Nationwide Mutual* case) sometimes agree not to serve others, especially competitors, in order to protect trade secrets and confidences or to prevent conflicts of interests. An independent contractor who is happy with an ongoing relationship that provides plenty of work and income might simply choose not to solicit other work.

#### *i. Investment in Business*

A related factor, which may show the existence of a separate business,

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304. See, e.g., *Golden v. A.P. Orleans, Inc.*, 681 F. Supp. 1100, 1103 (E.D. Pa. 1988); *Medi-Stat, Inc. v. Kusturin*, 792 S.W.2d 869 (Ark. 1990); *Rice v. California Lutheran Hosp.*, 163 P.2d 860 (Cal. 1945); *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957); *McDonald v. Hampton Training Sch. for Nurses*, 486 S.E.2d 299 (Va. 1997).

305. See, e.g., *Martin by & Through Martin v. Goodies Distrib.*, 695 So.2d 1175, 1176-77 (Ala. 1997). See also Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (asserting, in factor seventeen, that working for more than one firm at a time indicates that the worker is an independent contractor, and factor eighteen asserts that making one's services available to the general public indicates that the worker is an independent contractor.).

306. See, e.g., *Glenn v. Stoneload Delivery Co.*, 894 S.W.2d 713, 716 (Mo. App. 1995). See also Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (treating full-time work as a separate factor in its own right, indicative of an employer/employee relationship.).



is the value of a worker's investment in his business. An independent business usually has business assets apart from its ability to provide personal services, and it uses these assets in the performance of its services for its client. If the worker supplies more of the tools and materials for the work, for instance, the worker's investment increases, she is exposed to greater risk of loss or opportunity for profit, and it becomes more likely that she is an independent contractor.<sup>307</sup> An employee, by contrast, brings only his personal services to the relationship, and the employer provides all the supplies and equipment. If the employer supplies most of what the worker needs, it is the employer who bears more of the business risk, and his interest in the productive use and proper maintenance of his own resources is likely to result in substantial control over the details of the work. It is then more likely the worker is an employee.<sup>308</sup>

Although the extent of a worker's investment in equipment, supplies and facilities is certainly relevant to whether he is legitimately and independently in business, it is rare that a worker in a disputed case is without at least some investment in his occupation, and there is no particular scale or formula for measuring or comparing the significance of a worker's investment. Some courts have suggested that the investment must be viewed in comparison with the value of the work.<sup>309</sup> Other courts discount the significance of this factor for occupations in which the cost of equipment is comparatively small.<sup>310</sup> The importance of investment in physical assets is less and less important all the time, as more and more professions depend on intellectual capital instead of tools and facilities.

On the other hand, some workers make very substantial investments in physical assets, and yet there may be good reason to treat them as employees. Transportation workers who purchase their own vehicles present a special problem, because the amount of their investment (sometimes obtained with the financial assistance of the employer) may

307. *See, e.g.*, *Lankford v. Gulf Lumber Co.*, 597 So.2d 1340, 1345 (Ala. 1992) (finding worker to be independent contractor despite employer's purchase of tires for his use, because worker normally purchased and maintained his own trucks and other equipment).

308. *See, e.g.*, *Hickey v. Arkla*, 699 F.2d 748 (5th Cir. 1983); *Trs. of Sabine Area Carpenters' Health and Welfare Fund v. Don Lightfoot Home Builder*, 704 F.2d 822 (5th Cir. 1983); *Golden v. A.P. Orleans, Inc.*, 681 F. Supp. 1100, 1104 (E.D. Pa. 1988); *Potter v. Montana Department of Labor and Indus.*, 853 P.2d 1207, 1212 (Mont. 1993) ("When an employer furnishes valuable equipment, an employment relationship almost invariably exists."); *Walling v. Hardy Constr. Co.*, 807 P.2d 1335, 1340 (Mont. 1991).

309. *See, e.g.*, *South Dakota Dept. of Labor v. Tri State Insulation*, 315 N.W.2d 315, 316 (S.D. 1982) (Real estate agents' slight investments, including use of personal automobile and very modest office supplies, did not count against (this seems a little counter-intuitive—shouldn't these factors count for independent contractor status?) independent contractor status in view of the little that was needed to do the job.); *Tasters Ltd., Inc. v. Dep't of Employment Sec.*, 863 P.2d 12, 25 (Utah 1993) (Investment of \$250 to perform work earning less than \$600 per year evidenced independent contractor status.).

310. *See, e.g.*, *Krijn v. Pogue Simone Real Estate Co.*, 752 F. Supp. 102, 104 (S.D.N.Y. 1990).

seem especially large, and yet a driver may be nearly as dependent on an employer as an employee, and his work for the employer nearly as routine as any employee's work.<sup>311</sup> Of course, a driver's dependence on the employer will likely be compounded if the employer is important in providing financing for the vehicle and its maintenance. Naturally, there are ambiguous situations in which this factor could point either, or neither, way, because the investment by either party is not decisive under the circumstances.

*j. The Worker Has Employees*

Perhaps the most likely sign that a worker is not an employee is that he is in fact an *employer*. An employer ordinarily hires an employee to perform his work personally, and the employee lacks the freedom to hire his own substitute not selected by the employer.<sup>312</sup> A person who is free to hire others and to delegate all or part of his duties, and who does not thereby breach his contract with the employer, looks much more like an independent business person. In this situation, the employer exercises much less control over the work (he cannot even determine who performs the work) and the contractor bears more of the risk in the form of labor costs. The contractor also has the opportunity to expand his business and profits by hiring others so that he can perform more than one job at a time. Such a person is more likely, though not necessarily, an independent contractor.<sup>313</sup>

The hiring of assistants is not, however, always decisive evidence of independent contractor status. Even in the earliest cases, courts recognized that a worker's ability to hire assistants did not preclude his status as an employee if the employer exercised sufficient control over the whole workforce. In *Lehigh Valley Coal*, Judge Hand believed that the miners' "employment" of assistants was a subterfuge by the employer to avoid the law.<sup>314</sup> Undue reliance on this factor might result in a court denying protection to many agricultural workers and day laborers who are organized

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311. See, e.g., *AFM Messenger Serv., Inc. v. Dep't of Employment Sec.*, 733 N.E.2d 749 (Ill. 2000), *appeal granted*, 738 N.E.2d 924 (Ill. 2000).

312. See, e.g., *In re Guajardo*, 809 P.2d 500, 502 (Idaho 1991) (finding the fact that employer hired worker's assistants to evidence employment relationship).

313. See, e.g., *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (finding salespersons not employees, in part because they were free to hire their own assistants); *Shaw v. C.B.&E. Inc.*, 630 So.2d 401, 403 (Ala. 1993) (finding office cleaner who hired and paid her own helpers when needed to be independent contractor); *Keith v. New & Sun Sentinel Co.*, 667 So.2d 167, 173 (Fla. 1995); *Mississippi Employment Sec. Comm'n v. PDN, Inc.*, 586 So.2d 834, 841 (Miss. 1991) (finding the fact that nurse was required to provide her own replacement if she was unable to complete assignment to evidence independent contractor status).

314. See *supra* text accompanying notes 74-95.

in a variety of ways, including one worker acting as a captain or paymaster for the others, giving the appearance but not the reality of separate employer status.<sup>315</sup>

Still, of all the frequently listed factors of status, the actual hiring of one's own employees may be the best proof that one owns an independent business, especially if it is combined with other factors showing a true enterprise. Why not a simple and objective test based on this factor? Some courts may have already moved in this direction, but without much benefit.<sup>316</sup> In most cases in which independent contractor or employee status is questioned, the workers in question have no employees of their own.<sup>317</sup> Many workers whose status is ambiguous, especially those whose work is essentially creative, are unable to delegate as a practical matter even if there is good reason to treat them as true contractors.<sup>318</sup> Other contractors may simply choose to avoid the trouble of employer status. As a result, even if the importance of the hiring factor is elevated, it will not resolve the majority of cases in which the worker in question has hired no one.

### C. *Would a Return to Statutory Purpose Rule Make Employee Status Any Clearer?*

As discussed earlier, some courts have proposed that the statutory purpose rule be adopted to solve the difficulties of determining worker status. Under this rule, if the worker is the sort that the lawmakers intended to protect under a particular statute, the law should be extended for the worker's benefit.<sup>319</sup> In *Nationwide Mutual*, however, the Supreme Court rejected this approach, and restricted the federal courts to consideration of the usual factors of the modernized common law test, which centers on employer control.<sup>320</sup> Regardless of this prohibition, it is doubtful whether statutory purpose as a separately stated factor ever affected the outcome of a

315. See, e.g., *Cobb v. Union Camp Corp.*, CV-96-139, 2000 WL 640863 (Ala. App. May 19, 2000), *reh'g denied*, 2000 Ala. Civ. App. LEXIS 486 (Ala. App. July 28, 2000) (per curiam); *Larson v. Hometown Communications, Inc.*, 540 N.W.2d 339, 352-53 (Neb. 1995).

316. See, e.g., *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) ("Having the authority to hire assistants . . . might have great probative value where the individual claiming to be an independent contractor does exercise authority to enlist assistants without prior approval of the party that hired him . . . . [T]his show of authority would be highly indicative that the hired party was acting as an independent contractor."); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (finding that drivers were independent contractors after emphasizing entrepreneurial opportunities drivers enjoyed by virtue of their right to hire employees and delegate work).

317. If a worker has no employees, most courts are not inclined to treat this fact as significant in evidencing employee status. See, e.g., *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1099 (6th Cir. 1995) ("[I]t would seem that a hired party's failure to hire her own assistants is rarely, if ever, significant in determining whether a party is an independent contractor.").

318. See, e.g., *Aymes*, 980 F.2d 857 at 861.

319. See *supra* text accompanying notes 94, 122-137, 217-243.

320. See *supra* text accompanying notes 217-243.

significant number of cases. At best, it provided an additional rationale for judges who were already likely to find employee status.

As noted earlier, statutory purpose nearly always leads in the same direction: broad statutory coverage of economically dependent workers.<sup>321</sup> But the economic realities test already leads down that path, because it bases status on the degree of a worker's economic dependence. *Nationwide Mutual*<sup>322</sup> notwithstanding, a judge or jury is likely to be mindful of the statutory rights that will be denied an economically dependent individual worker if he is deemed to be an independent contractor. If there is a real issue whether a worker is the economic equivalent of an employee, a factfinder's knowledge of what is at stake will probably carry the same weight as any express factor. On the other hand, courts applying the statutory purpose rule have still denied coverage to workers who appeared to be independent contractors based on the strength of other factors. Indeed, during the interval between *Hearst*<sup>323</sup> and the Taft-Hartley Act,<sup>324</sup> the Supreme Court was quite clear in demonstrating that there was still a difference between employees and independent contractors.<sup>325</sup>

Assigning any new or additional weight to statutory purpose also compounds a different problem; it reinforces the fear that a worker's status may differ between individual states and between state and federal courts.<sup>326</sup> It is now the case, particularly in state law, that a worker may be an employee for one purpose and an independent contractor for another, especially in any state that has adopted the so-called "ABC test"<sup>327</sup> of employee status in unemployment compensation law, the "relative nature of

321. An important exception is in the case of copyright and intellectual property disputes, in which it is the worker who asserts independent contractor status in order to strengthen his ownership claim to the product of his work. See *supra* text accompanying notes 211-216, 248.

322. See *supra* text accompanying notes 217-243.

323. 322 U.S. 111 (1944).

324. Pub. L. No. 101, 61 Stat. 137 (1947).

325. See *supra* text accompanying notes 137-148.

326. This problem already exists with respect to employee status under different federal laws, because of the suggestion in *Nationwide Mutual* that the Fair Employment Labor Standards Act is a special case for which the statutory purpose doctrine is still properly relevant. See, e.g., *McGuigan v. CPC Int'l, Inc.*, 84 F.Supp.2d 470, 476-77 (S.D.N.Y. 2000).

327. For a good discussion of the "ABC" test and its development in state unemployment compensation law, see *Carpet Remnant Warehouse v. New Jersey Dept. of Labor*, 593 A.2d 1177 (N.J. 1991). The typical ABC test begins with a presumption that every payment for services is a payment of wages to an employee. The employer can overcome this presumption by proving (A) the worker has been and will continue to be free from control or direction over the performance of services, (B) the services are outside the regular course of the employer's business or are performed outside all of the employer's places of business; and (C) the worker has an independently established trade, occupation, profession or business that includes the services in question. See, e.g., N.J. STAT. ANN. § 43:21-19(i)(6) (1998). Part (B) may result in the classification of many common law independent contractors as employees because their work is part of regular course of the employer's business.

the work” test in workers’ compensation law,<sup>328</sup> or any other specialized statutory rule for status.<sup>329</sup> But if a determination of statutory purpose and its effect on worker status depends on judicial interpretation, an employer and worker may continue to be uncertain about status even when one court or agency has made very clear findings of status with regard to one particular law. The possibility remains that a court or agency determining status for another purpose will reach a different conclusion.

Finally, the statutory purpose rule substitutes a court’s judgment of the proper coverage of a law for the lawmaker’s judgment. While Congress or a state legislature might be criticized for failing to extend coverage to some workers, shortcomings in statutory coverage are common in the product of a representative government. Moreover, the Supreme Court’s observation in *Nationwide Mutual* that Congress had not seen fit, after half a century, to abandon the usual test of employee status was apropos.<sup>330</sup> It would better if Congress and the states were to invent new ways of delineating the coverage of their laws that do not depend on status at all, or that depend on some other type of status.

## V.

### ALTERNATIVES TO EMPLOYEE STATUS AS A BASIS FOR STATUTORY COVERAGE

Employee status is important because it is the basis for imputing a worker’s liability to the employer under the doctrine of *respondet superior*, and for purposes of determining the applicability of laws that use employee status as the basis for statutory coverage. The underlying

328. The “relative nature of the work” test first requires an examination of the claimant’s work or business, considering (1) the degree of skill involved, (2) the degree to which the work or business constitutes a separate calling or business; (3) the extent to which the claimant’s alleged business can be expected to bear its own risks of accident. Second, the test requires an examination of the relationship between the claimant’s business and the employer’s business, considering (1) the extent to which the claimant’s work is a regular part of the employer’s business; (2) whether the claimant’s work for the employer is continuous or intermittent; and (3) whether the claimant’s work for the employer is of such duration as to constitute an employee-employer relationship instead of a hiring for a particular job. See *Ostrem v. Alaska Workmen’s Comp. Bd.*, 511 P.2d 1061, 1063 (Alaska 1973). See also *Sandy v. Salter*, 541 S.W.2d 929 (Ark. 1976); *Stamp v. Dep’t of Business and Consumer Servs.*, 9 P.3d 729 (Or. Ct. App. 2000).

The main differences between the “relative nature of the work” test and the common law test are the former’s de-emphasis in the importance of supervision of the details of the work and the inclusion of a new factor: the extent to which the worker/claimant can be expected bear the risks of industrial accident. The significance of these differences may be illusory. Proof of the employer’s supervisory control, or lack thereof, is still relevant to whether the worker/claimant is skilled or maintains a truly separate business; and the worker/claimant’s ability to bear the risks of industrial accident is likely to be proven by the same evidence that would show the economic realities of the relationship between the parties. See *supra* text accompanying notes 74-95.

329. See *infra* text accompanying notes 340-341.

330. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

assumption of statutory coverage based on employee status is that there is some important difference between employees and non-employees, such as independent contractors. For example, lawmakers may assume that employees are a class of persons who suffer problems targeted by employment law and who need the protection of these laws, while independent contractors are not. Additionally, unlike independent businesses that negotiate with each other, employees may lack the bargaining power to obtain reasonable terms of compensation. Employees may also be less able to deal with certain burdens better allocated to an employer, like calculating withholding taxes and remitting taxes. Employee coverage also serves as an important limit against regulatory meddling in affairs between independent businesses. Lawmakers may assume that however strong the argument for enhancing the bargaining power of employees, there is no valid argument for interfering with bargaining between independent businesses, even if one of the businesses is an individual who performs the same work as an employee.

The usual response to the difficulties of applying any test of employee status is to recognize new factors or vary the description of the test in a way that shifts emphasis from one set of factors to another,<sup>331</sup> but none of these solutions avoids the ultimate uncertainty of a conceptual border that is inherently vague. For most if not all “employment” laws, a better solution is to rethink the necessity of using employee status as the basis for coverage, and to ask whether there are other entirely different ways of determining the reach of the law. For nearly every so-called employment law, an alternative rule of coverage, not dependent on status, would fulfill the lawmakers’ goals better and with much less uncertainty.

#### A. Payroll Tax and Withholding Laws

Of all the employment laws that affect employers on a day to day basis, perhaps none is as important as the obligation to pay certain payroll taxes and withhold income taxes on wages paid to “employees.” Indeed, a large proportion of lawsuits in which employee status is at issue involves the collection of payroll taxes or claims for unemployment benefits. The coverage rules for these tax and public benefits laws reflect the failure of employee status to serve as a practical basis for coverage. While such laws begin with a general rule of coverage based on employee status, they end with a long list of exceptions for workers who are covered regardless of

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331. State legislatures have tinkered with the test in a number of ways. For example, an Oregon law provides that for some purposes, non-employee/independent contractor status must be based on evidence of a separate and independent business, such as separate registration and licensing of the business, separate office and telephone numbers, or business cards. See ORE. REV. STAT. § 670.600 (1999); Cliff E. Spencer, *Oregon's Independent Contractor Statute: A Legislative Placebo for Employers*, 31 WILLAMETTE L. REV. 647 (1995). See also *supra* note 327.

employee status, and others who are not covered regardless of employee status.<sup>332</sup> The special exemptions and rules of coverage reflect, at least in part, a belief that the burden of calculating and paying taxes should not be borne by some types of employers with respect to some types of employees—or that the burden of self-payment of taxes should not be borne by some types of independent contractors.

However, there may be other and more efficient ways of determining who should bear these burdens. Employers are generally presumed better able to deal with withholding and paying taxes because of their administrative resources, and because the periodic payment of wages permits the installation of an efficient system for collecting and delivering taxes and accounting for their payment. Household employers are frequently relieved of this burden not because domestic servants are efficient at paying their own taxes but because a household employer is no better at this task.<sup>333</sup>

A simpler rule of coverage would be based not on the status of the persons earning compensation but on the amount and regularity of the payment of compensation to an individual in return for services. In other words, any payment not to a corporation, partnership or other special legal entity in return for services might be subject to tax requirements if the payment was periodic in the fashion of a payroll.

A household employer paying relatively small amounts for compensation would be exempt under this scheme, or the worker that employer pays might be exempt if payment is a one-time event or very small amount. An analogous rule already applies for so-called “casual workers,” for whom taxes must be paid only if compensation reaches a certain level.<sup>334</sup> A rule of coverage based on the regularity of payment

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332. Under federal tax law, some workers, such as corporate officers, certain “homeworkers,” and certain sales and delivery persons, are “statutory employees,” regardless of their status under the common law. See 26 U.S.C. §§ 3121(d), 3306(i), 3401(c) (1994). Some are excluded from treatment as employees, regardless of their status under the common law. These include, for example, certain real estate agents (and of course newspaper sales and delivery persons!). See *id.* §§ 3121(b), 3306(c), 3401(a), 3506, 3508. Still others are treated as employees only if they satisfy the common law test and the employer has paid them a minimum amount of money. These include domestic service workers, casual workers who perform services not in the ordinary course of the employer’s business, and certain agricultural laborers and home workers. See *id.* §§ 3121(a)(7)-(10), 3306(c), 3401(a).

333. See 140 CONG. REC. S14392-02 (Oct. 6, 1994) (statements of Sen. McConnell) (proposing to extend similar relief to other small employers, such as farmers); *Social Security: House Lawmakers Back Nanny Tax Bill; Recorded Vote Set for May*, Daily Tax Rep. No. 89, at D-8 (1994) (discussing need to reduce burden of payroll tax reporting, withholding for household employers); *Employment Taxes: ABA Urges Improved Compliance with Domestic-Worker Reporting Rules*, Daily Tax Rep. No. 153, at D-5 (1994) (noting that before amendments reducing coverage and simplifying reporting requirements, only 25% of household employers were in compliance).

334. See 26 U.S.C. § 3401(a)(4) (1994) (Exemption for “service not in the course of the employer’s trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is

would exclude many contractors whose services are truly a one-time or limited-time event.<sup>335</sup> If payments continued in a manner analogous to a payroll, however, the employer would be required to treat the worker as an employee.

The coverage of unemployment compensation tax laws is important not only for purposes of determining when an employer must pay the tax but also for determining which workers should benefit from the security of public unemployment compensation benefits, and whether the job from which a worker has been discharged was a termination of employment qualifying for an award of benefits.<sup>336</sup> Thus a new rule of coverage must also serve the goal of providing income security to those who need it. In this regard the amount and regularity of payments to individuals for services would still provide a better basis for coverage than employee status. If payments to an individual worker are in a regular form analogous to a payroll, the worker is likely to be dependent on that stream of income in the same manner that any employee is dependent on wages.

### B. Employee Benefits Law

ERISA,<sup>337</sup> the law at issue in *Nationwide Mutual*, is another important element of employment law. ERISA not only provides for federal court jurisdiction over employee benefits disputes,<sup>338</sup> it also requires periodic reporting by plans, and provides rules and standards for the administration of plans, and the vesting of benefits. Presently, ERISA applies only to benefits plans created for "employees."<sup>339</sup> The special rules of regulation and administration that ERISA provides are based on the special characteristics of plans, which are offered on a completely standardized basis to many participants and provide benefits long after they are promised and earned. The anti-forfeiture provisions, for example, prevent an employee from the loss of a potentially substantial part of his compensation and retirement security on the basis of events occurring long after the compensation was earned. In *Nationwide Mutual*, the employer terminated

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regularly employed by such employer to perform such service.").

335. It is possible, but doubtful, that employers would seek to avoid coverage by making delayed lump sum payments to workers. The complications in timing payments, the cost of antagonizing workers, and the possible violation of other state laws regulating the timing of payments of compensation would likely exceed any gain achieved by such a strategy.

336. As noted earlier, many states use the "ABC" variation of the common law test to determine status for these purposes. See *supra* note 327. The "ABC" test undoubtedly results in the inclusion of many workers who would otherwise be independent contractors, but still depends ultimately on factors such as control and the relationship of the employer's business to the employee's work or business. See *id.*

337. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

338. See *id.* § 1132.

339. *Id.* § 1002(1), (2), (7).



its contractual relationship with Darden, and Darden, whose years of work for the employer may have left him with a very narrow range of skills and opportunities, found the same work with a different insurance company.<sup>340</sup> If Darden had been an employee, there would be no question that the forfeiture provision was void. As an independent contractor, however, Darden lacked ERISA protection.<sup>341</sup>

What policy reasons support the denial of protection to independent contractors who are included in group plans analogous to those provided to employees? In each case, the risks and problems for participants are the same. Admittedly, ERISA is not designed to reach many types of insurance and other financial products that individuals might buy for their long-term protection. Perhaps the limits of ERISA coverage are based on the notion that individuals are in a better position to control the selection of benefits they purchase on their own. Perhaps it is simply a choice not to meddle in affairs outside the core concern—employment benefits that are the chief form of retirement and medical security for most individuals. Yet it is difficult, if not altogether impossible to distinguish the plan in *Nationwide Mutual* from the typical employee benefit plan meriting federal statutory protection.

Congress's choice of an employee basis for ERISA coverage appears to be a product of habit rather than necessity. Alternative measures would have served Congress' purposes much better. The chief characteristics of plans that require such regulation are not the employee status of the participants (after all, protection is also extended to non-employee family members), but the group basis on which the plans are offered and their importance as a form of compensation for work. Thus, ERISA might have been drafted with a greater and more precise reach if it applied to all group plans provided as compensation for services.

While amending ERISA in this regard would undoubtedly expand the law's coverage and effect, it would not significantly increase the burden on employers providing such plans.<sup>342</sup> Employers are not required to provide

340. See *Nationwide Mut. Ins. Corp. v. Darden*, 503 U.S. 318, 320 (1992). See also *supra* text accompanying notes 217-243.

341. See *supra* text accompanying notes 220-227.

342. ERISA imposes certain reporting and disclosure burdens, see 29 U.S.C. §§ 1021-1030, and requirements as to the content, terms and funding of covered plans, see *id.* §§ 1051-86, 1102, 1103, 1161-1185b. However, these requirements are not necessarily any more onerous than pre-existing state laws, and ERISA rewards employers by preempting state regulation of covered plans. See *id.* § 1144. More importantly, ERISA provides tax benefits for qualified plans. See PETER J. WIEDENBECK & RUSSELL K. OSGOOD, *CASES AND MATERIALS ON EMPLOYEE BENEFITS* 65-70 (1996). Until the mid-1980's, the benefits of ERISA appear to have encouraged a substantial growth in the percentage of employees covered by private employer-funded plans. Since the 1980s, coverage appears to have leveled off in recent years, and for some demographic groups it has declined, for a variety of economic reasons. See *id.* at 110-132.

benefit plans to any group of employees or non-employees. Benefits are strictly a matter of employer choice. Employers may actually benefit in many ways by the extension of ERISA to their non-employee plans, because ERISA preempts many state laws and common law claims that might be even more burdensome.<sup>343</sup> Extension of ERISA in the manner proposed would also eliminate the difficulty of determining the nature of the rights of non-employee participants who an employer has purposely or inadvertently included in an employee plan.

The chief difficulty for employers in an extension of benefits laws to non-employees would be the impact of such an extension on nondiscrimination rules, which require an employer to provide some benefits, especially retirement benefits, on a nondiscriminatory basis to all or most employees if it provides benefits at all.<sup>344</sup> If an employer provided benefits to employees but not independent contractors under an expanded version of ERISA, the employer might violate the nondiscrimination rules.<sup>345</sup> In this regard, benefits costs for some employers might increase significantly. However, if there is a purpose for nondiscrimination rules, it is not served by allowing employers to avoid their impact by creating two classes of workers based on the sometimes slight differences between employees and independent contractors.

Moreover, as the *Microsoft* case illustrates, an employer that attempts to reduce benefits costs under present law by shifting work to a large and regular force of independent contractors is spending its savings on a game of chance.<sup>346</sup> Any contractor who works for longer than the usual minimum term of service required for participation in a pension plan probably has a fair chance of proving that he is actually an employee.<sup>347</sup> If he succeeds, the employer may face all of Microsoft's complications in calculating unpaid benefits, dealing with a violation of the rule against nondiscrimination, and suffering a possible loss of special tax treatment.

### C. Wage and Hour Laws

A variety of federal and state employment laws regulate the amount, manner and timing for payment of compensation. The most important of

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343. See 29 U.S.C. § 1144.

344. See, e.g., 26 U.S.C. § 401(a)(5) (1994) (pension, profit sharing and stock bonus plans); *id.* § 410 (minimum participation standards); *id.* § 79(d) (life insurance benefits); *id.* § 105(h) (accident and health plans); *id.* § 120(c) (prepaid legal service plans); *id.* § 125(b) ("cafeteria" plans); *id.* § 129(d)(2) (dependent care assistance). See also 26 C.F.R. §§ 1.401-0 to -13 (IRS summarizing and interpreting nondiscrimination rules). See generally WIEDENBECK *supra* note 342, at 273-294.

345. See *supra* note 342. See also *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011 (9th Cir. 1997) (en banc) (*Vizcaino II*).

346. See *Vizcaino II*, 120 F.3d at 1011.

347. See *supra* text accompanying notes 281-284.

these is the Fair Labor Standards Act (FLSA),<sup>348</sup> which prescribes a minimum wage and requires the payment of an overtime premium (except for certain exempt salaried workers). Some federal courts continue to regard the FLSA as one law that provides for coverage of a broader range of workers outside the common law notion of "employee,"<sup>349</sup> but in practice they have applied the same economic realities test that courts use for many other purposes. As in the case of the payroll tax and withholding laws, however, a more suitable rule of coverage might be based on payments to individuals in return for services. After all, if the law provides that every employee's time is worth no less than some statutory minimum, why should the law permit a lower valuation for an independent contractor's time? Indeed, a worker who earns less than the minimum wage for his time is not likely to have the skill, entrepreneurial investment or economic independence one would expect of a true independent contractor. Nevertheless, courts continue to deny minimum wage claims by workers deemed to be independent contractors despite their regular or continuous service for an employer in return for periodic payments.<sup>350</sup>

There are two plausible explanations for FLSA coverage of employees and exclusion of independent contractors. The first is that an employer should bear the responsibility of monitoring working time, assuring payment of the minimum wage, and compensating for overtime hours only when the employer has control over a worker's time and productivity. The common law test of worker status satisfies this theory of responsibility if it identifies employees who are subject to employer control and independent contractors who are not.<sup>351</sup> However, the control test sometimes leads to uncertain results, because an employer's control over one aspect of the employment relationship may be offset by a lack of control over some other aspect. For example, employer control sufficient to create an employer-employee relationship might be accompanied by comparatively little control over hours of work or productive use of time. Many employees are professionals or persons of special skill or responsibility whose work cannot easily be measured in units of time, or they work independently or outside the employer's place of business—sometimes at home, on the road or at a customer's place of business. Others work primarily for tips or commissions under circumstances that make a simple application of minimum wage and overtime law inappropriate. For many of these employees the FLSA provides special rules or partial exemptions. Among

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348. 29 U.S.C. §§ 201-219 (1994).

349. See *supra* text accompanying notes 184-190.

350. See, e.g., *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (5th Cir. 1998) (finding couriers independent contractors for delivery service and therefore not entitled to minimum wage).

351. See *supra* text accompanying notes 264-277.

these are piece rate workers,<sup>352</sup> commissioned sales employees of retail or service establishments,<sup>353</sup> industrial homeworkers,<sup>354</sup> professionals,<sup>355</sup> administrative employees,<sup>356</sup> executive employees,<sup>357</sup> outside salespersons,<sup>358</sup> computer systems analysts and programmers,<sup>359</sup> software engineers,<sup>360</sup> salespersons for auto, truck or boat dealers,<sup>361</sup> trip-rated local delivery drivers,<sup>362</sup> and taxi drivers.<sup>363</sup> These exemptions are not enough to relieve employers of the full burden of compliance with respect to many other employees who work without direct employer supervision or oversight, such as a repairman who works primarily away from the employer's place of business, or a craftsman whose skills are unknown to the employer. On the other hand, lack of employer control over the details of the work sometimes leads to a finding of independent contractor status even though the employer exercises considerable control over the quantity of work available to a worker and the amount and method of his compensation. Thus, independent contractors are categorically denied the protection of the FLSA, even if the employer controls their earnings by dictating a standard rate of compensation for work that could be measured in units of time.<sup>364</sup>

A second possible reason for denying FLSA protection to independent contractors is that independent contractors are entrepreneurs who accept the chance of profit or loss in every undertaking. By working efficiently, an independent contractor can earn more than a wage-earning employee can, and he might also increase his profits by hiring assistants and increasing the volume of his business. Conversely, he accepts that unexpected conditions or his own inefficiency might reduce his earnings to less than he would have received as an employee. The idea that independent contractors are entrepreneurs is represented in the economic realities factor that is now part of the common law test.<sup>365</sup> But this is only one part of the common law test,

352. 29 U.S.C. § 207(g).

353. *See id.* § 207(i).

354. *See id.* § 211(d).

355. *See id.* § 213(a)(1).

356. *See id.* § 213(a)(1).

357. 29 U.S.C. § 213(a)(1).

358. *See id.* § 213(a)(1).

359. *See id.* § 213(a)(17).

360. *See id.* § 213(a)(17).

361. *See id.* § 213(b)(10), (11).

362. 29 U.S.C. § 213(b)(11).

363. *See id.* § 213(b)(17).

364. *See, e.g.,* *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 301-02 (5th Cir. 1998) (Employer paid "independent contractor" couriers on a commission basis (based on a percentage of the price the employer charged to the customer), but also employed a small group of employee couriers who performed the same work for an hourly wage.).

365. *See supra* text accompanying notes 305-315.

and other factors—such as the worker’s freedom to determine his starting and quitting time, to accept or reject assignments or to work for another employer—may distract the factfinder from recognizing the lack of entrepreneurial potential.<sup>366</sup>

To supplement employee coverage, an additional basis for coverage under the FLSA would focus more clearly on facts that are important in identifying workers who are the equivalent of wage earners rather than entrepreneurs; in other words, those who receive regular, standardized payments in return for their time and personal services. For individuals not already subject to coverage as employees, the rule would begin with an objective threshold similar to that proposed for payroll taxes, in order to exclude incorporated business entities and those workers whose services and compensation are truly irregular. The second part of the test would require consideration of whether the employer’s method of compensation is based on a measurement of working time or a standardized piece or task rate. If so, this fact would support the conclusion that the worker is a wage earner entitled to the protection of the Act. Some workers who qualified for coverage under this test might be the sort who would be exempt or partially exempt if they were employees under the usual rules of FLSA coverage. Thus, a third part of the test would exempt workers to the same extent that they would be exempt as employees. Workers still covered under this three-part test would be mainly low-skilled, individual workers performing routine, unitized work for regular payments of compensation—namely, those workers whose economic situation is nearly indistinguishable from that of employees already protected under the FLSA.

#### *D. Laws Prohibiting Discrimination and Retaliation*

Employment laws prohibiting discrimination or retaliation against “employees” are one example of the legislative habit of using employee status to determine statutory coverage without much thought of the actual necessity of such a limitation on coverage. Laws prohibiting discrimination on the basis of race, sex, age, disability and other protected characteristics typically protect “employees” but not independent contractors, and they apply only to employers who employ a certain number of employees.<sup>367</sup> In other words, employee status is the basis for defining the enterprises and

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366. See, e.g., *Herman*, 161 F.3d at 304, 307-310 (Majority found, but dissent rejected, that couriers had “opportunity for profit and loss” because they could decide how many delivery assignments to accept from the employer, and “experienced” drivers knew to reject assignments that did not pay well in comparison to the time and effort required to make the delivery.).

367. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1994) (defining “employer” as “a person . . . who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”); Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1994); Americans with Disabilities Act, 42 U.S.C. § 1211(5)(a) (1994).

institutions subject to the law, and for defining the individuals who enjoy the protection of the law. An employer who employs ten employees and fifteen independent contractors is not subject to the law and is free to discriminate. An employer who is subject to the law can also discriminate, provided it only discriminates against its independent contractors.

It is doubtful that these jurisdictional rules are based on some notion that discrimination is somehow more acceptable when practiced by small employers against independent contractors. A more likely explanation is that restricting an employer's hiring and workforce management, and subjecting the employer's decisions to inspection by judges and juries, is burdensome. We expect that large employers with vast resources can reasonably bear these costs as the price of equal employment opportunity. Small employers, on the other hand, might be suffocated by the burdens of acquiring expertise to comply with the law, defending against claims, and paying for the errors of supervisors and foremen. As a result, employers who employ fewer than fifteen employees are exempt from a wide range of employment discrimination laws that apply to nearly all employers with fifteen or more employees.

The more difficult question is why an employer of any size should be permitted to discriminate on the basis of race, sex, age or disability against an independent contractor when it would be illegal to discriminate against an employee or applicant for employment. Some possible explanations are: 1) that lawmakers believe discrimination is less prevalent against independent enterprises, because price and quality competition is likely to overcome irrational prejudice; 2) that independent contractors will suffer less from the prejudice of a single client; 3) that the costs and complications of remedying any actual discrimination in the selection of contractors may be too great; and 4) that some business decisions should not be exposed to inspection and second-guessing by judges and juries. Thus, even if the "business" that suffers discrimination is an individual, whose work might also be performed by an employee, the law does not interfere.

Would the absence of jurisdictional limits based on employee status have grave consequences for large or small employers? Experience under laws that lack such limits suggests that there is little to fear. One of the earliest anti-discrimination laws, the Civil Rights Act of 1866 (also known as Section 1981)<sup>368</sup> prohibits race discrimination in making contracts. Plaintiffs in employment discrimination lawsuits routinely allege Section 1981 as a supplement to their rights under the more modern Title VII,<sup>369</sup>

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368. 42 U.S.C. § 1981 (1994).

369. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e -17 (1994)).

because employment is one kind of contract covered by Section 1981.<sup>370</sup>

By its terms, Section 1981 applies to other forms of contracts as well. Unlike Title VII, it is not limited to the employment context. Nevertheless, there is little evidence that substantial businesses—those without any reasonable claim to employee status—have invoked Section 1981 against their customers or potential customers.<sup>371</sup> A sampling of the few Section 1981 cases filed by non-employees shows that nearly all such cases involved contractors whose status was ambiguous; they worked as individuals under circumstances in which a claim of employee status would not have been far-fetched.<sup>372</sup> Even the exceedingly rare claim by an incorporated business with more than a one-person workforce involved a business so small that a claim of employee status might have been plausible.<sup>373</sup>

The paucity of Section 1981 claims by legitimately independent businesses suggests that the elimination of the employee status test of coverage might lead to significant numbers of new lawsuits only by those individuals in the zone of ambiguity. In other words, eliminating this test would extend protection to those who probably deserve it as much as clear-cut employees. These individuals already sometimes assert race discrimination claims under Section 1981. Elimination of the employee status test of coverage would permit similar claims for sex, age, disability and other forms of discrimination.<sup>374</sup> Claims might also be filed by substantial businesses, but such claims are likely to be rare. Substantial businesses do not succeed over time by suing customers to compel their business, which is probably one reason why businesses rarely invoke Section 1981 against other businesses.

Much of the preceding discussion regarding discrimination on the basis of protected characteristics, such as race or sex, also applies to legislative or judicial rules prohibiting retaliation. Many courts that have considered the

370. See BARBARA LINDEMANN, ET. AL., *EMPLOYMENT DISCRIMINATION LAW* 921 (3d ed. 1996).

371. See, e.g., *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799 (7th Cir. 1999) (involving individual medical professional, alleging employee status for purposes of some employment laws, but found to be independent contractor); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168 (7th Cir. 1996); *Fitzgerald v. L&L Truck Brokers, Inc.*, 32 F. Supp. 2d 1080 (E.D. Ark. 1999) (involving individual truck driver suing as independent contractor); *Wright v. State Farm Mutual Auto Ins. Co.*, 911 F. Supp. 1364 (Kan. 1995) (involving insurance agent trainee who accepted conversions to independent contractor status); *Beverly v. Douglas*, 591 F. Supp. 1321 (S.D.N.Y. 1984) (finding physician to be independent contractor).

372. See *supra* cases cited at note 371.

373. See, e.g., *Danco, Inc. v. Wal-Mart, Inc.*, 178 F.3d 8 (1st Cir. 1999) (involving incorporated parking lot maintenance business, owned by sole shareholder who performed the work with help of son and with occasional hiring of assistants).

374. The State of Washington appears to have taken this step already. See *Marquis v. Spokane*, 130 Wash.2d 97, 922 P.2d 43 (1996) (holding that independent contractor may sue for sex discrimination).

question have concluded that various public policy rules against retaliatory discharge of whistleblowers or others engaged in protected conduct apply only for the protection of employees and not for independent contractors.<sup>375</sup> But if public policy requires the protection of employees who engage in whistleblowing, there is no clear reason why the same protection should not be extended to other individuals who suffer termination or non-renewal of their contracts.

Employee counts should also be eliminated as a basis for determining employer status under laws that prohibit discrimination or retaliation. The notion that small businesses need relief from the burdens of regulation may be sound, but a jurisdictional threshold based on the number of employees is not, because the small size of an employee workforce may conceal a relatively large and sophisticated business. A successful law firm, for example, with several partners and independent contractors but with only fourteen employees, is exempt from many discrimination laws although it may have vastly greater resources than a restaurant with fifteen part time waiters and waitresses. Substantial businesses near the threshold might even purposely avoid regulation simply by relying as much as possible on independent contractors.

A better predictor of the size and capacity of a business is its gross revenue, which has been the basis for jurisdiction under the Fair Labor Standards Act for most of the past century.<sup>376</sup> A rule of coverage based on gross revenue is not only a more accurate predictor of the actual size of a business; it is also clearly more objective. Admittedly, such a rule would raise a new set of difficulties, especially if a business concealed some of its receipts to avoid taxes or other financial obligations, but such problems tend to be simple factual issues as compared with those raised under the highly subjective definition of status that is the present basis for jurisdiction.

### *E. Other Employment Laws*

The employment laws and proposals described above are representative and not exhaustive of the whole range of possibilities for statutory reform. Nearly any law commonly designated as an "employment" law depends on some test of employee status as a basis for determining coverage. In retrospect, it is questionable whether employee status is the best measure of coverage under any such law. As the Supreme Court reasoned in *Hearst*, for example, the fact that newsboys organize for

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375. See, e.g., *New Horizons Elec. Mktg., Inc. v. Clarion Corp.*, 561 N.E.2d 283 (Ill. App. 1990); *MacDougall v. Weichert*, 677 A.2d 162 (N.J. 1996).

376. See 29 U.S.C. § 203(s)(1)(A)(ii) (1994) (creating an exemption for businesses with less than \$500,000 in gross sales or business done).



the purpose of bargaining collectively, and that collective bargaining may be an appropriate way of establishing standardized terms of employment, should be more important to questions of coverage than common law notions of status designed for tort law.<sup>377</sup> Laws that protect employees against polygraph examinations,<sup>378</sup> background checks,<sup>379</sup> or medical testing<sup>380</sup> are important because they protect individuals from invasions of personal privacy and invidious discrimination. Employment and employee selection is the most common context but not the exclusive domain for such problems. Individual non-employee workers have an equal right to personal privacy. Indeed, whatever problem a law seeks to address may be a problem commonly experienced by “employees,” but it may also be a problem commonly experienced by other individuals not currently considered employees.

In some laws reliance on a distinction between employees and other individual workers may be based on the assumption that an independent contractor can more appropriately bear the costs of buying insurance, bearing an administrative burden, or managing or avoiding certain risks. Thus, protecting employees but not independent contractors under workers’ compensation laws<sup>381</sup> and workplace safety laws<sup>382</sup> arguably leaves the party most in “control” with responsibility for insurance, safety and security. Rudimentary notions about control, skill and method of payment, however, are unlikely to lead to the best allocation of these burdens.

Naturally, the details of new rules of coverage or jurisdiction are particularly suited to legislative and not judicial crafting. No court could properly apply Title VII or other employment laws to aid an individual working as an independent contractor, because these laws say quite clearly that they protect only “employees.” A court can apply the term “employee”

377. See *supra* text accompanying notes 122-129.

378. See, e.g., Employee Polygraph Protection Act of 1988, Pub. L. 100-347, 102 Stat. 646 (codified as amended at 29 U.S.C. at §§ 2001-2009 (1994)).

379. See, e.g., Consumer Credit Protection Act, 15 U.S.C. § 1681(a) (1994) (regulating certain background checks for the purpose of evaluating a “consumer for employment, promotion, reassignment or retention as an employee”) (emphasis added).

380. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12112(d) (1994) (providing “medical examinations and inquiries” provision).

381. While many state workers’ compensation laws appear to define “employee” broadly for purposes of coverage, the practice of many state courts has been to restrict coverage to a common law “control” definition of employee. See, e.g., *Hunter v. Crawford Door Sales*, 501 N.W.2d 623 (Minn. 1993). At least one state has attempted to move away from traditional employee/contractor distinctions to a so-called “relative nature of the work” test that looks to other factors bearing on the question which party should provide insurance. See, e.g., *Ostrem v. Alaska Workmen’s Comp. Bd.*, 511 P.2d 1061 (Alaska 1973).

382. See, e.g., Occupational Safety and Health Act, 29 U.S.C. § 654 (1994) (imposing certain duties on “employers” and “employees”). Cf. Mine Safety and Health Act, 30 U.S.C. § 802(g) (1994) (protecting the safety of “any individual working in a coal or other mine”) (emphasis added).

restrictively or expansively, but in the end it must apply some form of the term Congress or a state legislature has written. Moreover, the specification of an alternative rule of coverage, such as an objective measure of amounts, frequency or patterns of payments is properly the job of lawmakers. So too is the decision whether small employers below some particular size should be exempt. In this respect, *Hearst*<sup>383</sup> and *Nationwide Mutual*<sup>384</sup> each provide correct answers to different questions. Employment laws should not be only for “employees” only. On the other hand, rules of coverage should be drafted by legislatures, not courts.

## VI.

### CONCLUSION

Employee status matters mainly because our employment laws make it matter. As a device for defining the coverage of all sorts of protective and social welfare legislation, the idea of an employee provides an appealingly simple answer to the question of who is entitled. Most people for whom such laws are designed will satisfy the test, but the borders of any test of employee status are destined to remain forever vague. The more we increase the stakes of employee status, the more likely it is that employers will drive greater numbers of workers into the zone of ambiguity. Why should non-employee workers be excluded at all? For many of our “employment” laws, the ultimate answer appears to depend much more on legislative habit than careful consideration. Clear rules and equitable coverage demand more than outdated nineteenth century notions of status.

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383. See *supra* text accompanying notes 98-136.

384. See *supra* text accompanying notes 217-243.