The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose

John Bruntz
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I. INTRODUCTION

Defining the nature of a working relationship between suppliers of services and the parties to whom these services are rendered is one of the most troublesome and important issues facing businesses today. The determination of whether workers are considered employees or independent contractors has grave implications for the parties involved, and the issue highlights some fundamental realities facing the post-industrial United States.

As the Internal Revenue Service moves more aggressively to enforce compliance, and as changes in the makeup of the work force emerge, the characterization of workers as employees or independent contractors grows increasingly critical. The issue involves workers at every strata of society, from farm laborers to physicians, from newspaper delivery persons to attorneys, and from actors and musicians to engineers. Farms and small businesses are impacted acutely because they face potentially fatal retroactive tax reclassification and unfair labor charges if nominal independent contrac-

* President and Chief Operating Officer of the Wittern Group, Inc. Special thanks to Colleen Casady and Paul Kittredge, Jr. in their help of this Article.
1. See infra notes 53-59 and accompanying text.
2. STAFF OF THE JOINT COMMITTEE ON TAXATION, General Explanation of the Tax Reform Act of 1986, at 1343-44 [hereinafter JOINT COMMITTEE]. See also infra note 63 and accompanying text.
3. See infra notes 30-33 and accompanying text.
4. See infra notes 285-314 and accompanying text.
5. See infra notes 190-92 and accompanying text.
6. See infra notes 104-12 and accompanying text.
7. See Perritt, Should Some Independent Contractors Be Redefined As "Employees" Under Labor Law?, 33 VILL. L. REV. 989, 993 n.19 (1989) (suggesting that all lawyers who do not have their own library are employees of a particular client).
8. Id. at 1029-32.
9. See infra notes 50-52 and accompanying text.
10. See infra notes 61-63 and accompanying text.
tors are found to be employees. Commercial realities, however, provide equally compelling reasons for continuing to treat workers as independent contractors. Little guidance is available for an absolute determination because the various common law and statutory distinctions are widely divergent and subject to broad ranges of interpretation.

The purpose of this discussion will be to highlight the various analyses used to determine whether a worker is an employee or an independent contractor and to focus on the tax consequences, the implications on labor and employment issues and on state workers compensation legislation of such a determination. Three diverse occupational fields will be illustratively employed to apply the abstract factors to workplace realities. Finally, the discussion will focus on threads of commonality used in making the determination and suggest means of minimizing exposure and avenues to proceed with a reasonable level of certainty.

II. HISTORICAL PERSPECTIVE

The distinction between an employee and an independent contractor has evolved from the common law concept of master and servant and the law of agency. It was, however, in determining the scope of vicarious liability under the doctrine of respondeat superior that the degree of the master's control over his servant became the

12. See infra notes 96-98 and accompanying text.
16. See infra notes 27-32 and accompanying text.
17. See infra notes 40-93 and accompanying text.
18. See infra notes 94-215 and accompanying text.
19. See infra notes 216-48 and accompanying text.
20. See infra notes 249-332 and accompanying text.
21. See infra notes 333-42 and accompanying text.
23. RESTATEMENT (SECOND) OF AGENCY 220 (1933) is often referred to as the source of the common law on the independent contractor versus employee issue. The RESTATEMENT uses the term "master" for employer and "servant" for employee. Id. at (2).
paramount consideration. If the master controlled the economic activity of another person, the other person was a servant.

The right-to-control test was first developed in the mid-nineteenth century by English courts and was soon adopted by American courts. American courts embraced Blackstone's control rationale of respondeat superior as the logical test of the master-servant relationship. The seminal case was *Boswell v. Laird*, decided by the California Supreme Court in 1857. In this case a dam under construction by a contractor burst, damaging the plaintiff's property, and suit was brought against the landowner who was having the dam built. Justice Field engaged in an extensive analysis of English law in his opinion and ultimately determined:

"Something more than the mere selection, on the part of the principal, is essential to [the relation of master and servant]. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case, that power was wanting, and of course, the relation to which it was essential did not exist."

The common law definition of independent contractor developed with the control test being the threshold inquiry. This definition was outlined by the Restatement of Agency as, "[A] person who undertakes to execute certain work or to accomplish a stipulated result for another, under such circumstances that the right of control of the doing of the work, and of the faces and agencies employed in doing it, is the contractor." The evolution of the distinction between master/employer and servant/employee and independent contractor parallels the changes in economic activity as industrial development and production became more sophisticated.

Prior to the Industrial Revolution, work was performed largely by entrepreneurial craftsmen and a relatively small number of servants. The forces that compelled turning independent contractors

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26. "A master is, lastley, chargeable, if any of his family layeth or costeth anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance . . . for the master hath the superintendance and charge of all his household." 1 W. BLACKSTONE, COMMENTARIES 43 (1765).
27. See supra note 25 and accompanying text.
28. Boswell, 8 Cal. at 489.
29. Id.
30. RESTATEMENT (SECOND) OF AGENCY 220 (1933).
into employees were based in the Industrial Revolution and the development of mass manufacturing. Production efficiency was created by replacing decentralized “home” output with an integrated system where each production stage was located as close as possible to the preceding stage. The integrated enterprise demanded a large number of employees and the larger enterprise needed a high degree of control and predictability which they could get with employees but which was not possible in commercial relationships with individual entrepreneurs. This approach fragmented the type of task performed by the individual and made it more difficult for a servant to leave a particular master and find alternate employment, while at the same time it created situations where work was defined in ways that made employees fungible and easily replaceable. The integrated system further increased the master’s control, and consequently made the distinction between employee and independent contractor easy to draw.

It appears the previous benefits of greater control over the activities of the employees has diminished, either because of changes in technology or because of changes in managerial philosophy. Today patterns of economic activity are moving away from integration and toward reducing managerial overhead and bureaucratic inflexibility. Decentralization redistributes work from groups of employees to persons not subject to the same level of control. In addition demographic factors put pressure on employers to organize work to accommodate the needs of parents and the elderly who will not be in the labor force unless they can have flexible schedules and flexible places to work. Changes that have taken place in the United States over the past four decades have dramatically transformed the composition of the American work force and have irrevocably changed its economy. The post World War II economic prosperity, fueled by a strong manufacturing base and structured around a male worker and an at-home spouse, is not part of today’s economic or

32. Id.
33. Id.
35. See id; see also Riddle, Service-Led Growth: The Role of the Service Sector in World Development, 82 A.J.I.L. 224 (1988) (reviewing a variety of sources which discuss the growth of service economies).
36. See Riddle, supra note 35, at 224.
37. Id.
38. Id.
The shift away from manufacturing and towards a service-based economy, which began in the early to mid-1970's, is expected to continue as manufacturing jobs decline and jobs in the service sector grow. In 1955, manufacturing produced 30% of all goods and services, but by 1985, the percentage dropped to 21%. By the year 2000, manufacturing is expected to account for only 17% of all goods and services produced. Between 1979 and 1985, the United States economy generated nearly eight million new jobs, but actually lost more than 1.7 million jobs in manufacturing.

Employers are turning away from full-time employees because of an inability to adapt their schedules to consumer patterns. Thus, contracted services and part-time workers are becoming an increasingly predominant part of the working relationship. The line between characterizing these workers as employees or independent contractors has grown less distinct. The tests which evolved from the Industrial Revolution must be evaluated in light of post-Industrial realities.

III. LEGAL CONSIDERATIONS

The term “employee” is used in many federal statutes, but its legal meaning changes depending upon its context. Consequently, a person classified as an “employee” under one statute may not qualify as an “employee” under another. The United States Supreme Court has also provided guidance in the interpretation of the meaning of employee under various federal statutes, but other than proffering general tests the issue is far from settled.

The compounding difficulty is that the legislative intent of the statutes has sent courts in diametrically opposite directions. The history of the Fair Labor Standards Act indicates that Congress in-

39. *Id.*
40. *Id.*
41. *Id.*
44. *Id.*
47. *See infra* notes 107-12, and 139-41 and accompanying text.
tended the term "employee" in that Act to be given a particularly broad interpretation. This same broad construction is also evident in other social welfare legislation which is remedial in nature. On the other hand, the legislative history of Section 530 of the Revenue Act of 1978 specifies that there is broad latitude to consider an individual an independent contractor for employment tax purposes.

A. Tax Analysis

The term "employee" is not given a comprehensive definition in the Internal Revenue Code. A different definition is used for income tax withholding, Federal Insurance Contribution Act (FICA) tax purposes, and for Federal Unemployment Tax Act (FUTA) purposes. Specific code and regulatory provisions apply to certain occupations, but most workers are classified on the basis of common law. The common law test determines whether a worker is an employee if the employer has the right to direct and control when, where and how the worker performs his tasks. The employer need not exercise control; it is sufficient if the employer has the right to do so. The IRS has developed twenty common law factors to determine whether sufficient control exists to establish an employer-employee relationship.

From a tax perspective, a piecemeal statutory approach to defining an employee has developed to respond to the competitive implications of making employees into independent contractors. For example, under Section 530 of the Revenue Act of 1978, certain persons not treated as employees were exempted from coverage even


49. See, e.g., Doe v. St. Joseph's Hosp., 788 F.2d 411, 422-23 (7th Cir. 1986).


52. I.R.C. §3102.


55. Marvel v. United States, 719 F.2d 1507, 1514 (10th Cir. 1983).

56. Id.


though they might meet the common law definitions. Section 530 liberated the employer from the burden of proving that a purported independent contractor is in fact an independent contractor. If an employer has any "reasonable basis," he may treat a worker as a non-employee if other statutory considerations are met. The Tax Equity and Fiscal Responsibility Act of 1982 extended the provisions of Section 530 indefinitely.

What Congress provided on one hand, however, it took away by the 1986 Tax Reform Act which added a subsection (d) to Section 530 and effectively removed the exemption for certain technical fields. Section 530(d) contradicts the original intent of Section 530, i.e., to prevent the IRS from making case-by-case retroactive employee versus independent contractor determinations. Now, individuals such as engineers and computer technicians must deal with all of the previous uncertainties of IRS determinations and the common law tests from which they had enjoyed a measure of freedom. Section 530(d) was enacted to eliminate the competitive inequities held by firms who treated technical service specialists as independent contractors, thereby avoiding withholding obligations, while firms that considered the same class of individuals as employees were responsible for employment taxes and benefits.

If the Internal Revenue Service reclassifies a worker from independent contractor to employee status for tax purposes, several negative consequences inure to an employer. The employer becomes liable for some or all of the income and Social Security taxes that should have been withheld, and for matching FICA and FUTA taxes. The employer may also lose the qualified status of employee benefit and pension plans and, therefore, the associated expense deductions for these plans.

Section 3509 of the Internal Revenue Code specifies an employer's tax liability for employment taxes when the IRS reclassifies a worker from independent contractor to employee. This statute is applicable if the employer is found not to have intentionally disre-

60. See supra note 58 for legislative history of Section 530.
62. Id. at 52.
63. Id.
64. Id. at 54.
66. See Solomon & Schlesinger, supra note 61, at 55.
arded the requirements to deduct and pay employment taxes. If the employer intentionally disregards requirements to deduct and pay employment taxes, the IRS may retroactively impose a variety of taxes. Under Section 3403, the employer is liable for the payment of withholding tax—whether or not the tax was actually withheld. The employer can be assessed for both halves of the Social Security taxes and the employer is liable for payment of federal unemployment taxes. Under Section 6672, a penalty of one hundred percent of the tax may also be assessed against the employer.

Independent contractors are required to pay their own taxes and the self-employment tax is roughly equal to the combined employer-employee Social Security payments. In theory, the IRS should receive roughly the same revenue regardless of how a worker is classified, but in practice it is much harder to police independent contractors than to monitor employers withholding taxes from regular employees. The IRS has estimated that misclassification of workers costs $1.56 billion a year in lost revenue. In an effort to recover this revenue, the IRS has aggressively sought to close this perceived loophole. In the fiscal year ending September 30, 1989, the agency examined 16,600 small business returns. It reclassified some 76,000 workers as employees and proposed assessments of $93.8 million.

Chief Judge Michael J. Melloy of the United States Bankruptcy Court for the Northern District of Iowa stepped to the forefront of this issue with his ruling on a priority claim of the IRS against the bankruptcy estate of the owner of a trucking company. Although the decision was subsequently reversed and remanded, his decision is important as the initial judicial interpretation of Section 530. The case involved the question of whether truck drivers should be considered employees and thus subject the debtor (company owner) to retroactive employment tax liability. Judge Melloy recognized the dif-

68. I.R.C. §3509(c).
71. Id.
72. I.R.C. §§1401, 1402(b) (providing that the 1990 tax rate for self-employed individuals will increase to 15.3%).
73. Green, IRS Campaign on Payroll Taxes Sparks Clashes, WALL ST. J., Feb. 28, 1990 at 13, col. 1. IRS will audit 3500 business tax returns.
74. See supra note 2 and accompanying text.
75. Id.
76. See Green supra note 61, at 1.
difficulty in making the determination when he stated, "Whether the drivers were employees of independent contractors presents the Court with a very close and different issue upon which reasonable people might differ." The case is illustrative of the conflicting factors which arise in determining the status of individuals and of the application of Section 530 of the Revenue Act of 1979. The debtor provided fringe benefits for the drivers such as medical insurance, worker's compensation insurance and vacation time. Also subsequent to the period in question, the debtor changed the characterization of his drivers from independent contractors to employees to gain some control over them. On the other hand, it appeared from the record that both the debtor and the drivers intended the relationship to be regarded as independent because of the Contract Labor Agreement between the parties and because the drivers paid their own taxes. Judge Melloy determined that he did not have to decide the common law status of the drivers because of the protection afforded by Section 530. He added that the threshold inquiry is the applicability of Section 530(a)(3) which requires consistency by the taxpayer in the way individuals are treated for tax purposes. In addition, Judge Melloy focused on the "safe havens" of Section 530(a)(2) in determining whether a taxpayer had a "reasonable basis" for not treating an individual as an employee. He considered the debtor's educational and employment background, the long-standing recognized practice of a significant segment of the trucking industry to consider drivers independent contractors, and the debtor's reliance on the advice of his accountant in determining that the debtor qualified for the relief under the safe harbor provisions of Section 530. The decision was appealed by the Internal Revenue Service and Judge Hansen, of the United States District Court for the Northern District of Iowa, agreed with Judge Melloy's decision that Section 530 would allow the debtor to escape liability, regardless of whether the employer's workers would be considered employees under the

80. Id.
81. Id. at 4-5.
82. Id.
83. Id.
84. Id.
85. Id. at 5.
86. Id.
87. Id.
90. Id.
common law, if certain conditions were met. Hansen stated, “Generally those conditions are whether the taxpayer consistently treated his workers as independent contractors and had a reasonable basis for so treating them.” The court found that for an employer to meet its burden of establishing that it has consistently treated its workers as independent contractors throughout their employment, two conditions must be met. First, the employer must prove that the employer has not treated an individual, whom it claims to be an independent contractor, or any individual in a substantially similar position (as defined in Section 530(a) (3)), for any period up and to, including, the period in contention, as an employee. Secondly, the employer must show that the relevant period commences after December 31, 1978 and that all Federal tax returns required to be filed with respect to such individual are consistent in that the individual is not considered an employee during “such period.” Finally, the court found “[i]f these two conditions are met . . . the individual will be deemed to not be an employee unless ‘the taxpayer had no reasonable basis for not treating such individual as an employee.’”

As to the reasonableness of the debtor claiming a worker as an independent contractor rather than an employee, the court in citing *General Inventory Corporation v. United States*, adhered to the debtor’s showing that his views were in conformity with a “significant segment of industry” test. The court found that something more than the “personal observations of the debtor” are necessary and left it to the trial court to “define the relevant ‘significant segment of the industry’ and to determine what proof is necessary to show the practices of the chosen segment.”

Judge Hansen found that as a matter of law, the court erred in finding that the debtor had a reasonable basis for relying on his accountant. He explained that even though the debtor might have had a limited educational background, the accountant’s education and experience in employment taxation and the applicable industry

92. *Id.*
93. *Id.* at 182.
94. *Id.*
95. *Id.* at 183.
96. *Id.*
97. 823 F.2d at 340.
98. 115 B.R. at 184.
99. *Id.*
100. *Id.* at 185.
must be established before reasonable reliance may be asserted.\textsuperscript{101}

The decisions in \textit{McAtee}, are the first judicial attempts to interpret Section 530, and they clearly place a heavy burden upon an employer to prove it is entitled to Section 530 protection.\textsuperscript{102} Congress unequivocally intended to protect employers who exercised good faith in determining the status of workers\textsuperscript{108} and the legislative history specifies that there should be liberal construction in favor of taxpayers.\textsuperscript{104} In practice, however, this Congressional directive seems to have been ignored. In the past three years, tax assessments have been issued in 90% of returns examined for employment tax issues and in May 1989, the IRS expressed to Congress its concern about the growing problem of employment tax abuse.\textsuperscript{105} The request was made to modify Section 530 as a means of regaining revenue lost through the misclassification of workers.\textsuperscript{108} The IRS approach has the additional consequence of increasing competitive inequities because only selected companies in an industry are audited. Thus, some businesses must count workers as employees while their unaudited competitors can treat similar workers as independent contractors.\textsuperscript{107} Companies that may have a borderline case should pay particular attention to reporting requirements and should file all necessary reports for every contractor earning $600 or more annually.\textsuperscript{108} If it is clear that a nominal independent contractor will be considered an employee upon IRS examination, the business would be well advised to change the status prospectively. While assessments for previous years may result, a good faith, voluntary action to correct the situation could encourage IRS leniency.\textsuperscript{109} The minimum assessment is likely to be the normal three years open under the general IRS statute of limitations.\textsuperscript{110} If, however, payroll returns have not been filed, the IRS may take the position that there is no statute of limitations because the statute only begins with the actual filing of an applicable tax return.\textsuperscript{111}

\begin{thebibliography}{11}
\bibitem{101} Id. at 184-85.
\bibitem{102} Id. at 185.
\bibitem{105} See Kenny & Hulen, \textit{Determining Employee or Independent Contractor Status}, 20 \textit{TAX ADVISER} 661, 669 n.40 (1989).
\bibitem{106} Id.
\bibitem{107} Id. at 668.
\bibitem{109} Id.
\bibitem{110} Id.
\bibitem{111} Id. at 34.
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B. Labor and Employment Standards

Whether an individual performing services for another is an employee or an independent contractor determines whether the individual is or is not covered by various labor statutes. Employees are covered by and afforded the protections of the minimum wage and overtime provisions of the Fair Labor Standards Act — independent contractors are not. Employees are covered by and entitled to the protections of the National Labor Relations Act — independent contractors are not. Employees are covered by and entitled to the protections of federal and state equal employment opportunity statutes — independent contractors are not. The statutory restrictions, coupled with the changing complexion of the workforce, force employers to clearly prefer independent contractor relations. They do not need to extend benefits, such as health insurance and pensions, to independent contractors. In addition, the possibility of union organization is eliminated, and the employer avoids state and federal labor standards legislation. Indeed from an employer's perspective, having services performed by independent contractors avoids virtually all the restrictions and obligations which arise when an employer-employee relationship exists.

The right-to-control test which stood as the seminal benchmark for determining employment status came under fire in the 1940's when the United States Supreme Court was called upon to interpret the social welfare legislation enacted in the 1930's. An approach, now known as the "economic realities" test, emerged from this series

116. See supra notes 30-33 and accompanying text.
117. Id.
118. See Bioff & Paul, Employees and Independent Contractors: Legal Implications of Conversion from One to the Other, 4 COMM. & ENT. 649 (1982) (principal motive for employers to prefer independent contractors is to avoid labor laws).
119. See, e.g., Horn v. C.L. Osborn Cont. Co., 591 F.2d 318 (5th Cir.) reh'g denied, 595 F.2d 1221 (1979) (declaring independent contractors are not entitled to have purchasers of their services comply with occupational safety and health standards under the Occupational Safety and Health Act.) See also 29 U.S.C. §654 (1988).
of cases.\textsuperscript{121} Deciding whether to follow the common law right-to-control test or the broader economic realities test has been a source of divergence as various labor and employment statutes are examined.\textsuperscript{122} A review of prominent employment statutes will illustrate the range of interpretation.

1. \textit{National Labor Relations Act (NLRA).}—Competing interests between unions which recognized that “employee” status was necessary to provide workers with the full measure of protections granted by Congress and state legislatures, and businesses who sought to have services performed by independent contractors to avoid the restrictions and obligations which were imposed by labor legislation, have led to many difficult and controversial decisions by the National Labor Relations Board\textsuperscript{123} and by federal courts reviewing its decisions.\textsuperscript{124} The Board has generally emphasized that it is the right to control which is of paramount importance, not whether control is actually exercised.\textsuperscript{125}

The applicability of common law distinctions between employees and independent contractors surfaced in a dispute involving whether newsboys selling a variety of Los Angeles papers were entitled to be represented for purposes of collective bargaining.\textsuperscript{126} The Board applied common law criteria in a manner that permitted classifying the newsboys as employees.\textsuperscript{127} The Ninth Circuit Court of Appeals found that the Board had ventured too far from common law standards, which the Court believed the NLRA obligated the Board to follow.\textsuperscript{128}

The United States Supreme Court in \textit{NLRB v. Hearst Publications, Incorporated}, reversed the Ninth Circuit and broadly expanded the Labor Board’s decision.\textsuperscript{129} The Court found the common law right to control test inherently unsuitable for defining the meaning of employee under the National Labor Relations Act.\textsuperscript{130} It held that the common law classification should be replaced by the broad

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\textsuperscript{121} See, e.g. Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974).
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\textsuperscript{123} See NLRB v. United Ins. Co., 390 U.S. 254 (1968); Local 777, Seafares Int'l v. NLRB, 603 F.2d 862, reh'g denied, 603 F.2d 891 (D.C. Cir. 1979).
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\textsuperscript{124} See Bloff and Paul, supra note 118, at 663.
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\textsuperscript{126} \textit{In re Stockholders Publishing Co. \& Newspapers Local 75}, 28 N.L.R.B. 1006 (1941).
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\textsuperscript{127} \textit{Hearst Publications, Inc. v. NLRB}, 136 F.2d 608, 612 (9th Cir. 1943).
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\textsuperscript{128} 322 U.S. at 129.
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\textsuperscript{129} Id.
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\textsuperscript{130} Id.
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interpretations set forth by the NLRA under which economic factors have become the vital criteria for defining employee. The Court added that inconsistency in applying the common law test was widespread, and that the policies served by the common law test were not the same as the policies promoted by the National Labor Relations Act. The Court concluded that when the common law distinctions would operate to deny protections of the NLRA to a large group of workers who were subject to the evils that the statute was designed to remedy, the applicability of the NLRA should be interpreted broadly, upon an examination of the "underlying economic facts."

This decision met with considerable resistance, however, and Congress overturned Hearst in the 1947 Taft-Hartley amendments to the NLRA. Subsequent to these amendments, the test which has been consistently applied has been the common law right to control test. Control has been construed to mean control of both the result and the "manner and means" by which the purported employee brings about the result. Clearly, "the more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of an employer-employee relationship."

The current NLRA definition was articulated in NLRB v. H & H Pretzel Company In this case the sixth circuit recognized that an employer who had ten successive collective bargaining agreements with the union representing its drivers/salesmen could not unilaterally abrogate the collective bargaining process by leasing vehicles to the drivers and declaring them independent contractors. The court upheld a finding by the NLRB that the company had committed an unfair labor practice by replacing drivers who did not sign a putative

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131. Id.
132. Id. at 125-28.
133. Id. at 129.
134. "It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished." H.R. REP. No. 245, 80th Cong., 1st Sess., at 18 (1947).
135. See NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968); Hilton Int'l Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982); Air Transit, Inc. v. NLRB, 679 F.2d 1095 (4th Cir. 1982); Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C. Cir. 1978).
137. Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 451 (6th Cir. 1975).
138. 831 F.2d 650 (6th Cir. 1987).
139. Id. at 652.
140. Id. at 654.
independent contractor agreement. To reach this decision the sixth circuit said the standard was the “right-to-control” test. In determining control the court suggested looking at the intent of the parties, the industry norm, the relation of the work to the employer’s regular business, and other criteria pertaining to supervision, duration and tools of the trade. Other cases have held that it is necessary to relinquish a sufficient degree of control over the means and methods of accomplishing the primary business function if a bona fide independent contractor relationship is to be maintained.

The protections afforded employees under the National Labor Relations Act do not extend to allow a group of independent contractors to seek certification as a unit for collective bargaining purposes. Nor does it protect an independent contractor from being terminated because of an attempt to organize with other independent contractors or from attempting to fix prices charged for services or to restrict output in order to bargain more effectively with the purchaser of services. The relative inequity is especially harsh in situations where independent contractors compete directly with traditional employees for wages and desirable working conditions. The inherent disparity led Professor H.W. Arthurs to advocate a new classification, “dependent contractors” to include self-employed truck drivers, peddlers, taxi drivers and service station lessees. These dependent contractors, Arthurs asserted, should be eligible for unionization.

141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
147. See Production Worker Union, Local 707 v. NLRB, 793 F.2d 323, 325 (D.C. Cir. 1986).
148. Employees are protected from termination for these reasons, but independent contractors are not. 29 U.S.C. §158 (a)(1)(3) (1988).
152. Id. at 89.
153. Id. at 84-90.
The approach of Arthurs was adopted by Canadian courts in permitting some classifications of independent contractors to engage in collective bargaining. Some Canadian courts have endorsed an "organization test" which focuses on whether the services performed are "integrated" with the activities of the principal. While at least one United States commentator has advocated that the American labor system abandon the common law tort concepts for defining the boundaries of labor law, the traditional analysis has remained intact. The interpretation of the meaning of employee under the NLRA has one overriding benchmark, i.e. Congress in enacting the Taft Hartley Amendment has expressly overruled a broader test and has unequivocally reinforced the control test. The current state of the law is best summed up by Former Chief Judge Bazelon of the D.C. Court of Appeals:

On consideration of that issue[whether parties are employees or independent], I find myself in a maze of precedents with few standards for decision discernable. I, of course, note that Congress has quite clearly commanded that the common law definition of independent contractor be the basic guide for distinguishing between employees and independent contractors. This does not mean that considerations of labor policy are irrelevant but that they be considered in light of the common law test of control.

2. Fair Labor Standards Act (FLSA).—The principles articulated in Hearst have continued to govern application of the employee definition of the Fair Labor Standards Act. In the case of Rutherford Food Corporation v. McComb, the parties disputed whether a group of skilled specialists, paid for results only, were employees or independent contractors under the FLSA. This case was decided the same day the Court interpreted the meaning of employee under the Social Security Act. In both cases the Court did

of Canadian law in this area.

157. Id.
160. See, e.g., Gemsco, Inc. v. Walling, 324 U.S. 244 (1945); Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 754 (9th Cir. 1979).
163. Id. at 706; Rutherford 331 U.S. at 730.
not view the common law factors in isolation, but instead looked at the practical exigencies of the workers' circumstances. While neither case explicitly referred to the "economic realities" test introduced in *Hearst*, there was a strong inference that the worker's particular situation must be assessed.

The "economic realities" test was used expressly in *Bartels v. Birmingham*. The Court outlined that while control is a factor in the employer-employee relationship for the purposes of social legislation, employees are "those who as a matter of economic reality are dependent upon the business to which they render service." This test has continued to stand as the definition of employee as defined in the Civil Rights Act of 1964.

In the fifth circuit case of *Mednick v. Albert Enterprises, Incorporated*, the court of appeals revealed that the term "employee" was not to be construed in its common law sense when used in any federal social welfare legislation. The court examined the purpose of the FLSA and asked whether the individual was the type of person intended to be protected by the FLSA and whether he was in business for himself or dependent upon the business of another for his living. The *Mednick* court said the purpose of the FLSA was to protect workers whose livelihood depended upon finding employment in the business of others and looked at the skill level and sophistication of the worker, the intent of the employer to avoid wages and benefits, and the difference in legal knowledge between the employer and the worker in expanding the definition of employee.

The application of the economic realities test has been characterized by broad ranging rulings. Alien prisoners of war, undocumented aliens, and professional nurses who worked simultaneously with several different parties have all been considered covered by the FLSA. The standard is whether, as a matter of economic fact, the party is in business for himself, and control is only significant

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165. 332 U.S. 126, 130 (1947).
166. *Id*.
168. 508 F.2d 297, 299 (5th Cir. 1975).
169. *Id*.
170. *Id*.
171. *Id*.
175. *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1980).
when it shows an individual exerts such a control over a meaningful part of the business that it stands as a separate entity.\textsuperscript{176} It is not relevant whether an employer may have had the intention to create an employment relationship,\textsuperscript{177} and the employer's self-serving labels are not controlling.\textsuperscript{178} It has, however, been recognized that an employer's admission that workers were employees covered by the FLSA was highly probative evidence of an ultimate finding of an employment relationship.\textsuperscript{179}

The test also rests on what the "agent" actually did do and not on what he could do.\textsuperscript{180} In \textit{Donovan v. Sureway Cleaners},\textsuperscript{181} the fact that Sureway's operators of dry cleaning establishments possessed, in theory, the power to set prices, determine their own hours, and independently advertise was not controlling when the court found that in reality the operators worked the same hours, charged the same prices and primarily relied on Sureway for advertising.\textsuperscript{182}

In applying the economic reality test all relevant information must be considered.\textsuperscript{183} The Second Circuit Court of Appeals in \textit{Brock v. Superior Care, Incorporated},\textsuperscript{184} looked at the issue of whether professional nurses were employees protected by the overtime pay provisions of the FLSA. The court acknowledged that upon review the skill level of the nurses, the degree of independent initiative exercised, and the level of permanence of the work relationship all militated toward a finding of independent contractor status.\textsuperscript{185} The court found an employment relationship to exist even though the nurses were free to decline referrals at any time.\textsuperscript{186} In so finding, Judge Newman found that an employee may work for more than one employer without losing coverage under the FLSA\textsuperscript{187} and the person does not have to rely on any employer for the primary source of income.\textsuperscript{188}

In \textit{Patel v. Quality Inn South},\textsuperscript{189} Judge Vance observed that,

\begin{footnotes}
\item 176. Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974)
\item 177. \textit{Usery}, 527 F.2d at 1312.
\item 178. \textit{Id.} at 1315.
\item 179. 656 F.2d 1368 (9th Cir. 1981).
\item 180. \textit{Id.}
\item 181. \textit{Id.} at 1371.
\item 182. 642 F.2d at 143
\item 183. 840 F.2d at 1054.
\item 184. \textit{Id.} at 1060.
\item 185. \textit{Id.}
\item 186. \textit{Id.}
\item 187. \textit{Id.}
\item 188. 846 F.2d at 700.
\item 189. \textit{Id.} at 702.
\end{footnotes}
"Given the unequivocal language of the FLSA and its legislative history, it is not surprising that the Supreme Court has adopted an expansive definition of the term employee in its decisions under the act."\textsuperscript{190} The \textit{Patel} Court found that an undocumented alien could bring an action under the FLSA for unpaid wages and liquidated damages even though the United States Supreme Court in \textit{Sure-Tan} precluded undocumented aliens from recovering an award of back pay under the National Labor Relations Act.\textsuperscript{191}

The United States Supreme Court has provided that, "[b]readth of coverage was vital to [the FLSA's] mission."\textsuperscript{192} The FLSA was adopted in 1938 to eliminate substandard working conditions and it was considered "the most momentous and far-reaching measure that [Congress has] considered for many years."\textsuperscript{193} The Fair Labor Standards Act definition of employee is characterized as the broadest among labor statutes\textsuperscript{194} and from an employer standpoint its reach poses the greatest risk for nominal independent contractors to be considered employees and fall within its coverage.

\textbf{3. Title VII of the Civil Rights Act of 1964 (Title VII).}\textsuperscript{195} Under Title VII of the Civil Rights Act of 1964 there is no requirement that there be an ongoing employment relationship at the time of the alleged discrimination.\textsuperscript{196} However, in order for an adverse action to be prohibited by Title VII, it must occur in an employment setting. Thus the issue of whether a worker is an employee is often the focal point of an employer's defense in Title VII cases.\textsuperscript{197}

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees."\textsuperscript{198} "Employee" is broadly defined as "an individual employed by an employer."\textsuperscript{199} There is no elaboration in the statute, nor any evidence in the legislative history regarding how expansively the definition of "employee" is to be read.\textsuperscript{200} In \textit{Hishon v. King & Spaulding},\textsuperscript{201} the

\textsuperscript{190} 467 U.S. at 892.
\textsuperscript{192} 83 CONG. REC. 9262 (1938).
\textsuperscript{196} See, e.g., Cobb v. Sun Papers, Inc., 673 F.2d at 339-41 (11th Cir.), cert. denied, 459 U.S. 874 (1982); Lutcher v. Musician Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).
\textsuperscript{199} See, e.g. Cobb, 673 F.2d at 339; Spirides v. Reinhardt, 613 F.2d 826, 830 (D.C. Cir. 1979).
\textsuperscript{200} 678 F.2d 1022 (11th Cir. 1982).
\textsuperscript{201} Id. at 1027.
Court found that neither the Act nor its legislative history gives any guidance in defining “employee.”

It appears that the only comment made in Congress was that the term “employer” was intended to have its common dictionary meaning, except as qualified by the Act. Thus, who is entitled to the protections afforded those individuals within the jurisdictional scope of the statute is subject to judicial construction. Courts interpreting Title VII have turned to two other sources for guidance in distinguishing between employees and independent contractors: the common law and judicially developed tests under other statutes.

The United States Supreme Court has not spoken on this issue with regard to Title VII, but lower court decisions have placed the interpretation somewhere between the broad economic realities test of the FLSA and the control test of the NLRA decisions. In *EEOC v. Zippo Manufacturing Company* the court stated that while the economic realities test was appropriate for FLSA cases, it was not the correct test for Title VII cases because Congress intended a more limited objective in the enactment of Title VII. In *Spirides v. Reinhardt*, the D.C. Circuit Court of Appeals provided that because Title VII was remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party. The court looked at both the economic realities of the work relationship and the extent of the employer’s right to control the “means and manner” of the worker’s performance, and suggested that both elements need to be incorporated into the analysis. The factors the court deemed important were: (1) the right to control; (2) the kind of occupation; (3) the skill required; (4) who furnishes the equipment used and the work place; (5) length of time individual has worked; (6) method of payment; (7) how the work was terminated; (8) whether annual leave was given; (9) whether the work is an integral part of the business of the employer; (10) whether the worker accumulates retirement benefits; (11) whether the “employer” pays Social Security taxes; and (12) the intention of

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202. 110 CONG. REC. 203. See *Spirides*, 613 F.2d 826; *Lutcher*, 633 F.2d 883.

203. See *Spirides*, 613 F.2d 826; *Lutcher*, 633 F.2d 883.

204. *Spirides*, 613 F.2d at 826; *Lutcher*, 633 F.2d at 883.

205. 713 F.2d at 37.

206. 613 F.2d at 831.

207. Id.

208. Id.

209. Id.

210. Id.
the parties.\textsuperscript{211}

This list is similar to the \textit{Restatement} but it adds factors involving employee benefits.\textsuperscript{212} Thus the components of the \textit{Spirides} hybrid test are common law principles and considerations of employee benefits and taxes, together with a general instruction to consider the purpose of the legislation.\textsuperscript{213} This approach has been followed in a long line of cases that have viewed the hybrid test as a balancing test involving a substantial degree of discretion.\textsuperscript{214} In applying the hybrid approach the courts look at the economic realities of the situation but focus on the employer's right to control the employee as the most important factor in determining employee status.\textsuperscript{215} The approach was challenged by the Sixth Circuit in \textit{Armbruster v. Quinn}.\textsuperscript{216} The court rejected the \textit{Spirides} reasoning and said that the term employee should be construed as broadly under Title VII as it is under the FLSA.\textsuperscript{217} The court emphasized the broad remedial goals of Title VII\textsuperscript{218} and held that the statute "must be read in light of the mischief to be corrected and the ends to be attained."\textsuperscript{219} The \textit{Armbruster} court extended "coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded."\textsuperscript{220}

The opportunity for discrimination in the work place certainly exists anytime someone performs services for another. As soon as any selection or payment occurs, the chance of discriminatory treatment arises. The \textit{Armbruster} court said the aim of the Title VII was "to rid from the world of work the evil of discrimination."\textsuperscript{221} By its express language, however, Title VII exempts many workers and employers from its provisions. This dichotomy has resulted in a divergence of decisions on similar fact situations. In \textit{Nanavati v. Burdette Tomlin Memorial Hospital}\textsuperscript{222} a physician with staff privileges at a hospital was found to be an independent contractor under Title VII so that discrimination charges could not be pursued, while in \textit{Doe v.}

\footnotesize{211. Id. at 831-32.}
\footnotesize{212. Id.}
\footnotesize{213. See, e.g., Cobb, 673 F.2d at 341; Lutcher, 633 F.2d at 883.}
\footnotesize{214. See, e.g., Cobb, 673 F.2d at 341; Lutcher, 633 F.2d at 833.}
\footnotesize{215. 711 F.2d 1332, 1341 n.7 (6th Cir. 1983).}
\footnotesize{216. Id. at 1340.}
\footnotesize{217. Id. at 1339.}
\footnotesize{218. Id. at 1340 (quoting Dunlop & Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977)).}
\footnotesize{219. Id. at 1341.}
\footnotesize{220. Id. at 1340.}
\footnotesize{221. 857 F.2d 96, 102 (3d Cir. 1988).}
\footnotesize{222. 788 F.2d 411 (7th Cir. 1986).}
St. Joseph's Hospital, it was decided that Title VII may afford a remedy to a non-employee physician for discrimination by the hospital.

Clearly Congress did not intend all employers to be subject to Title VII in their relationships with all suppliers of services. Conversely a rigid application of the common law would allow employers to evade their legal responsibilities. The hybrid right of control/economic realities test appears to effectively reconcile the conflicting pressures and represents a workable guideline for determining the application of Title VII and its progeny of anti-discrimination legislation to work place situations.

4. Americans With Disabilities Act of 1990.—On July 26, 1990, President Bush signed into law the Americans With Disabilities Act of 1990 (hereinafter “ADA”). The purpose of the ADA was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The ADA initially will cover employers who have 25 or more employees who work at least 20 or more calendar weeks in a year and will become effective in July, 1992.

The ADA prohibits discrimination against a “qualified individual with a disability” concerning job applications, hiring, advancement, discharge, compensation, training or other terms, and conditions or privileges of employment. According to the administrative guidelines, there are three basic provisions to assure a match between employment selection criteria and an applicant's actual ability to do the job. These criteria are: (1) the disabled individual should not be disqualified because of his or her inability to perform non-essential or marginal job functions; (2) screening and selection criteria should be job-related and consistent with business necessity; and (3) reasonable accommodation should be provided to assist the disable in meeting job criteria.

223. Id. at 424.
227. ADA §12101(b)(1).
228. ADA §12111(5)(A).
229. ADA §12112(a).
231. Id.
232. See ADA §§12111-12117.
While most states currently prohibit employers from discriminating against individuals with disabilities, the ADA will impose greater burdens on employers.\textsuperscript{233} The cost associated with compliance and providing reasonable accommodation unless the accommodation would impose an “undue hardship”\textsuperscript{234} on the employer will place a considerable burden on an employer. This standard is considerably higher than treating all employees equal and it is expressly higher than the “de minimus” standard\textsuperscript{235} which limits accommodation only to that which would require no more than a small cost to the employer. It will also likely push employers to seek ways to circumvent the application of the ADA and to gain a competitive advantage over businesses burdened with the added cost of compliance. Because the ADA applies only to the employment relationship a further benefit of expanded use of independent contractors may result.\textsuperscript{236} This will be particularly true for smaller companies who want to have less bona fide employees than the minimum required for falling within coverage under the ADA.\textsuperscript{237}

Unlike statutes which prohibit discrimination based upon race, gender or age, where an employer can readily identify a covered individual, it may be difficult for a manager to determine whether an individual is disabled, for whom reasonable accommodations must be made. The term employee is defined under Section 12111 of the ADA as “an individual employed by an employer.”\textsuperscript{238} This is the same definition of employee as that found in the Fair Labor Standards Act.\textsuperscript{239} Judge Vance of the Eleventh Circuit Court of Appeals opined that, “It would be difficult to draft a more expansive definition.”\textsuperscript{240} As has been previously noted, the legislative history of the FLSA suggests that such a broad definition is appropriate.\textsuperscript{241} The ADA defines “employer” in the same manner as Title VII except that for the first years after the date of enactment, it only includes employers who employ 25 or more employees.\textsuperscript{242}

The Americans with Disabilities Act incorporates the enforce-
ment provisions under Title VII of the Civil Rights Act of 1964.\textsuperscript{243} The Equal Employment Opportunity Commission is responsible for investigation charges of discrimination. The EEOC is also required, as part of its enforcement responsibilities, to provide technical assistance to employers and interested individuals and organizations regarding their rights and obligations under the Act.\textsuperscript{244}

While it will be many years before appellate courts will interpret these definitions, the legislative history of the ADA\textsuperscript{245} and its remedial purpose clearly demonstrate that a very broad reading of “employee” will arise from review. The ADA provides one further trap for the unwary in the event nominal independent contractors are engaged to perform traditional employment functions.\textsuperscript{246}

There is certainly an incentive, however, to legitimately engage independent contractors to perform services to avoid falling under the purview of the ADA. Language in the ADA cautions against using any type of contractual or other arrangement to circumvent the ADA, including the use of employment agencies or labor unions, if the effect is to screen out qualified individuals with a disability.\textsuperscript{247} Any attempt to alter the characterization of existing employees to avoid compliance will be a clear violation. If, however, an election is made to have services performed by independent parties or businesses who are not dependent upon the business, and all control is relinquished over the manner and means over how these services are performed, the reach of the ADA may be able to be avoided.\textsuperscript{248} Because of the dire consequences of noncompliance, it may be well advised to seek technical assistance from the EEOC before proceeding.

A review of the labor and employment decisions reveals that courts look at unequal bargaining power and superimpose protective construction when the circumstances most acutely demand it. In cases where the economic realities test is employed, the degree of dependence on the business with which the “employees” are connected determines employee status.\textsuperscript{249} When the relative bargaining power is less disparate, the “hybrid analysis”\textsuperscript{250} is utilized which views the economic realities of the relationship in light of common law principles of agency, and the right of the employer to control the

\textsuperscript{243} ADA §12206(a).
\textsuperscript{245} ADA §12112.
\textsuperscript{246} ADA §12112.
\textsuperscript{247} ADA §12111(5).
\textsuperscript{248} Usery, 527 F.2d at 1311-12.
\textsuperscript{249} Cobb, 673 F.2d at 341.
\textsuperscript{250} Id.
worker is the most important factor. Where collective bargaining significantly equalizes the power of employers and workers, the more narrow common law control test is employed.

C. Workers' Compensation Impact

Prior to the enactment of workers' compensation statutes society was governed by the assumption that wages bargained for by the employee were presumably proportioned to the risk involved in the work. This attitude was guided by the broad nineteenth century political, economic and social objective of "progress." The rights of property developed by the founding fathers to safeguard a society of landowners and small tradesmen militated toward an insulation of entrepreneurs from liability. In Farwell v. Boston & Worcesters Railroad, Justice Shaw, in articulating the "fellow servant" doctrine was motivated by the desire to free railroads and businesses generally from responsibility for injuries to employees. The storm of expansion prevalent at that time and courts imbued with the ideas of rugged individualism, made law that enabled businesses to thrive. The question of how far entrepreneurs should be allowed to insulate themselves from liability in order to stimulate enterprise was begged by the necessity of caring somehow for persons injured in the course of enterprise. It was also recognized that more could be done than was currently being done by employers to avoid injuries.

The question of who bore the risk for employees' injuries was essentially part of the general question of how the risks and costs of injuries should be borne. The administration of risk is conducted in pursuit of three discernible goals: (1) stimulation toward reducing costs by preventing injuries; (2) minimizing the administrative expense of shifting and distributing that cost; and, (3) securing persons against catastrophic loss from serious injuries.

251. Id.
253. See, e.g., Downey, WORKMEN'S COMPENSATION 15 (1924); Bradbury, WORKMEN'S COMPENSATION (2d ed. 1914).
256. See Farwell, supra note 254.
257. Id.
258. See Steffen, supra note 255, at 511.
259. Id.
260. Id. at 509-10.
Workmen’s compensation statutes were promoted on the principle that the risks of injury should be borne by industry. This principle related the belief that the person who has the most knowledge and control of an employee’s activities is in the best position to introduce and enforce safety measures and thus prevent injuries. The general purpose of the various state workmen’s compensation statutes which developed in the 1930’s was to remove the burden of industrial and commercial accidents from the victim and to allocate the cost of these accidents over the consumers of the product or the customers of the business. The acts would guarantee prompt, limited compensation for an employee’s work injuries, regardless of fault, as an inevitable cost of production.

Workmen’s compensation acts were “intended to apply to workers whose services form a regular and continuing part of the business or cost of the product.” They were not intended, however, to impose potential liability on a businessman for every worker who performs work on the business premises. Twentieth century legislation for the protection of employees has adopted the independent contractor distinction as an express or implied limitation of coverage. The statutes limit liability to injuries suffered by an employee which arise out of and in the course of his employment. This definition has resulted in many close and unusual findings, including situations where a party was found to be an employer in one case and an independent contractor in another.

As discussed above the traditional test of whether a workman is an employee or an independent contractor for the purpose of tort liability was the right to control, which was adopted from the com-

261. See 81 Am. Jur. 2d Workmen’s Compensation §2 (1976); see also Kirkwood v. Indus. Comm’n, 416 N.E. 2d 1078, 1081 (Ill. 1981) (stating that “workmen’s compensation law is concerned not with injuries by the employee, but injuries to the employee. . . .” (emphasis supplied)).


263. *Id.*


265. *Id.*


268. For instance, the Illinois Industrial Commission and the Illinois Supreme Court found Herman Kirkwood to be an employer of individuals applying siding in *Kirkwood Bros. Constr. v. Industrial Comm’n*, 381 N.E.2d 697 (Ill. 1978), and less than three years later, he was denied workers’ compensation as a claimant when working with another company in applying siding in *Kirkwood v. Industrial Comm’n*, 416 N.E.2d 1078, 1081 (Ill. 1981).
mon law master-servant concept. This test considered the degree of control that can be exercised over a workman and the performance of his work as significant factors in determining whether the master is to be held vicariously liable for the acts of his servant. Professor Larson in his seminal treatise on workmen's compensation suggested that this test is not appropriate in determining whether a worker is an employee for purposes of workmen's compensation acts. Larson maintained that workmen's compensation law is concerned not with injuries by the employee, but injuries to the employee, and the right to control his activities does not have the same significance as it has in determining whether the employer should be responsible for the acts of his servants. He found it more important to consider the nature of the claimant's work in relation to the regular business of the employer. This consideration is stressed in two distinct parts: the nature of the claimant's work, and its relation to the employer's work.

Some courts have expressly adopted the "relative nature of the work test" enunciated by Larson. Other courts have approved remedial construction in principle, but cited the need to maintain business reliance on the traditional "control" rule. The underlying theme throughout the cases is whether the services constitute an integral part of the putative employer's regular business; that is, whether the services were substantial, essential and recurring. If the duration of the effort is sufficient to amount to the hiring of continuing services, courts will find an employment relationship to exist. Another prominent factor is the amount of supervision and control exercised. This control is beyond merely the right to engage or discharge the person and extends to having sufficient knowledge of the operation to provide direction and minimize risk.

269. See supra Part C and accompanying text.
270. Id.
271. 1 C.A. LARSON, WORKMEN'S COMPENSATION (1980).
272. Id. at §43.42, 43.50.
273. Id.
274. Id. at § 43.52.
275. Id.
276. See, e.g., Grothe, 659 P.2d at 605; Barton v. Crawford & Co., 553 P.2d 716, 719 (N.M. 1976); Sandy, 541 S.W.2d at 931; Evans, 326 So. 2d at 604.
277. See, e.g., Kirkwood, 416 N.E.2d at 1082.
278. See LARSON, supra note 271, at 43.52.
279. Id.
280. Id.
281. Id.
282. Id.
It is particularly important for an employer to properly determine whether it is responsible for workers' compensation coverage, because an injured employee may elect to maintain a tort action for damages rather than claim more limited compensation under workers' compensation if workers' compensation insurance is not properly obtained. Thus an employer still faces all obligations under the workers' compensation acts and has not limited its liability against broader tort claims. At least one court has also said that if an employer fails to secure workers' compensation insurance, and the employee elects to maintain an action at law, the employer may not plead the employee's comparative negligence as a defense.

A number of state courts have recognized that in workers' compensation cases, the employee-independent contractor issue cannot be decided without consideration of the remedial statutory purpose. This is consistent with federal courts that have recognized that the distinction between tort policy and social legislation policy justifies departures from common law principles when claims are that one is excluded as an independent contractor from a statute protecting "employees.

While the remedial purposes of workers' compensation legislation militate toward a broad finding of employee status, the express exclusion of "independent contractors" is purposeful, and will continue to be recognized. There are situations where the goals of workers' compensation legislation are best served by imposing the risk of "no-fault" work injuries directly on the provider, rather than the recipient, of a compensated service. This goal is certainly clear when the provider of service has the primary control over work safety, is best equipped to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment. No significant deviation from present construction is likely, because as articulated in Kirkwood v. Industrial Commission, "business relations have been structured in consideration of them, and insurance protection against compensation claims have been tailored with these tests in mind. It could be unnecessarily disruptive, and expose employers to risks against which..."

283. Grothe, 659 P.2d at 604.
284. Id. at 605.
they have had no opportunity to insure. 288

It has been consistently decided that parties who engage individuals on a regular and recurring basis to perform services for their trade or business will be considered to have employees for purposes of workers' compensation coverage. 289 Courts will likely interpret close questions in favor of finding employee status pursuant to the remedial purposes of workers' compensation coverage. 290

IV. ILLUSTRATIVE OCCUPATIONS

Courts have frequently held that in applying the Silk factors, allowances must be made for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ. 291 Regardless of what test is applied, the weight courts give to various factors is dependent upon the relationship of the provider of the services to the recipient and the perception of the norms of this vocational or occupational field. Three diverse areas have been selected to illustrate the dynamics of applying the test of whether an individual is characterized as an employee or as an independent contractor. 292 These fields were not chosen because they represent areas of focus by any government agency or because they are the most acute areas of abuse, 293 but instead were selected because the fields represent a cross section of the issues presented. 294 Agricultural workers are typically lower paid, highly controlled and operate strictly on the landlord's premises. 295 Sales professionals are often highly compensated individuals with much more latitude as to hours of work, methods and means employed, and where the work is to be performed. 296 The service sector broadly covers all economic strata and because of its growing importance in the United States economy, a discussion is warranted. 297 Yet the

288. Id.
289. See, e.g., Grothe, 659 P.2d at 605; Barton, 553 P.2d at 719.
290. See supra Part III and accompanying text.
292. Id.
293. Id.
294. See Bioff & Paul, supra note 118 (discussing in detail the independent contractor/employee dichotomy in the newspaper distribution industry); see also Harter, Are They Employees or Independent Contractors?, 29 LAB. L.J. 779 (1982) (discussing the trucking industry).
295. See Harter, supra note 294, at 779.
296. Id.
297. Id.
characterization of individuals as employees or independent contractors in each of these endeavors is a complex and inexact science. By reviewing how tests are applied to these fields, analogous determinations may be made when confronted with the same issue in other fields.

A. Sales Professionals

The issue of whether a sales representative is an employee has arisen most frequently in the context of discrimination allegations.\(^{298}\) Because being an employee is the threshold inquiry for coverage under Title VII and related anti-discrimination statutes,\(^{299}\) this characterization is critical. In *Hickey v. Arkla Industries, Incorporated*,\(^{300}\) the Fifth Circuit examined the circumstances of a former district sales representative who voluntarily left the employ of Arkla.\(^{301}\) The facts revealed that Mr. Hickey was subsequently given an exclusive territory, was not allowed to sell products directly competitive with the Arkla products he sold, was required to attend Arkla sales meetings and was provided with office space and secretarial service by Arkla.\(^{302}\) In addition, Arkla set the prices at which Hickey could sell its products and placed credit limits on Hickey's customers.\(^{303}\)

Despite these substantial measures of control exercised by Arkla over Mr. Hickey, the court found that Hickey was an independent contractor and thus not entitled to coverage under the ADEA.\(^{304}\) It reached this conclusion by employing the hybrid test enunciated in *Spirides* and by focusing in particular on whether the individual was economically dependent for his livelihood on the business to which he renders service.\(^{305}\) While the court cited five factors to consider in reaching this conclusion,\(^{306}\) it focused specifically on the opportunities for profit and loss,\(^{307}\) the permanency of the relationship and whether the success of the enterprise depended upon the individual's


\(^{300}\) Hickey, 699 F.2d 748.

\(^{301}\) Id.

\(^{302}\) Id. at 750-51.

\(^{303}\) Id.

\(^{304}\) Id. at 752.

\(^{305}\) Id.

\(^{306}\) The court listed: (1) degree of control; (2) opportunities for profit or loss; (3) investment in facilities; (4) permanency of relationship; and (5) skill required. Id. at 752 (citing Usery v. Pilgrim Equip. Co., 527 F.2d at 1311).

\(^{307}\) Id. at 752.
“initiative, judgment and foresight.” The court distinguished “economic dependence” from Hickey’s close ties to Arkla by saying that any business is dependent upon a major supplier and while serious economic adjustments may result from the loss of such a supplier this “will not necessarily serve to establish ‘economic dependence’” however great the loss.

It is important to note that the court looked at the existence of an agreement which was cancellable by either party upon thirty days’ notice and the fact that Hickey had established a corporate vehicle for his sales of Arkla products. The court also focused on the fact that Arkla did not control the manner Hickey employed in marketing its product nor which customers he could contact within the territory.

The hybrid test was also applied by the Third Circuit in *E.E.O.C. v. Zippo Manufacturing Company* in finding that the company’s district managers with defined territories were independent contractors. The court examined factors such as the lack of control Zippo exercised over the means and manner of sales practices of the district managers. The individuals were free to establish their own business organizations, were not required to account to Zippo for their daily activities and had the right to terminate the relationship on thirty days’ notice. The court also considered the fact that the district managers received a commission as a percent of sales, rather than a salary, and the potential for this profit was the result of their own initiative and within their control. The militating factors noted in the finding of independent contractor status, however, were the length of time the district managers were with Zippo and the level of economic dependence because they were required to sell only Zippo products. In balancing the conflicting issues, the court determined that the district managers “were independent contractors even under the more liberal ‘economic realities’ standards as applied in FLSA cases.”

308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. 713 F.2d 32 (1983).
314. *Id.* at 33.
315. *Id.*
316. *Id.* at 34.
317. *Id.* at 38.
318. *Id.*
319. *Id.*
The issue of the employment status of manufacturer representatives was also addressed in Armbruster v. Quinn and Unger v. Consolidated Food Corporation but different results were obtained. The Sixth Circuit Court of Appeals focused on evidence of the possibility of advancement within the company as well as whether the representatives handled products other than those of the defendant in finding employment status. It also considered the hiring and termination process and the payment of company-paid benefits and advances. In Unger, sales representatives deemed employees were required to file regular sales reports and to exclusively represent its product. They were paid business expenses, were provided a regular draw against commissions, and taxes were withheld.

Section 3508 of the Internal Revenue Code was added in the Tax Equity and Fiscal Responsibility Act of 1982. This section provides non-employment treatment of direct sellers if three tests are met. Two of the tests are consistent with the recent decisions addressing sales professionals. Section 3508(2)(B) provides that the direct seller must receive all remuneration directly related to sales rather than from hours worked. Section 3508(2)(C) requires that the services performed by the person must be pursuant to a written contract which specifies that the person will not be treated as an employee for federal tax purposes.

Section 3121(d) of the Insurance Contributions Act defines “employee” to mean any full-time life insurance salesman or a traveling salesman personally engaged full time in the solicitation of orders on behalf of a principal. This Act also exempts from coverage, however, individuals with a substantial investment in facilities and individuals performing sales services in the nature of a single transaction.

320. 711 F.2d at 1332 (6th Cir. 1983).
322. See 711 F.2d at 1342 n.9.
323. Id.
324. See Unger, 657 F.2d at 909.
325. See id. at 916 n.8.
When these disparate sources are examined, the universal qualities which seem to consistently influence the outcome are: (1) the presence of a written, freely terminable agreement; \(^3\) (2) compensation solely on results; (3) an investment in facilities; and (4) the individual being exclusively responsible for taxes. These factors appear to override substantial control exercised by exclusive territories, requirements not to market competing products and potential losses resulting from losing the product line.\(^3\) 

Any organization which distributes its product or service by independent sales professionals faces increased scrutiny from the Internal Revenue Service because the Internal Revenue Service Audit Manual has noted that sales organizations are suspect and subject to major abuses.\(^3\) Under "known or probable areas of noncompliance" the manual lists sales organizations and specifically identifies, inter alia independent contractors as a source of selection of returns for examination.\(^3\)

**B. Agricultural Workers**

The minimum wage, overtime, record keeping and child labor provisions of the FLSA most often bring the issue of employment status of agricultural workers before appellate courts. In a number of agricultural cases, courts have applied six criteria to find employment, rather than a contractual relationship.\(^3\) The first factor is once again control, and courts have held that even if supervision does not include the details of harvesting or setting the hours of work, the workers may still be employees if the employer has a right to control the farm operation as a whole.\(^3\) The opportunity for profit and loss is important. However, opportunity for profit does not mean merely an opportunity for increased remuneration through greater effort. In *Donovan v. Gillmore*, the court held that a reduction in money earned by workers is not a loss sufficient to satisfy the criteria for independent contractor status.\(^3\) The *Gillmore* court also examined the capital investment involved and said large expenditures of risk capital and non-negligible items such as work gloves or pails consti-

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333. *But see infra* note 338 and accompanying text.
334. *Id.*
336. *Id.* at Exhibit 4640-1.
337. *See, e.g.* United States Dept. of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987); Beliz v. W.H. McLead & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985); Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748 (9th Cir. 1979).
338. 835 F.2d at 1536.
tute a capital investment.\textsuperscript{340} Moreover, the district court found the farm workers' disproportionately small stake in the operation to be an indication that their work was not independent.\textsuperscript{341}

While the degree of skill required is a consideration, it is noted that the development of occupational skills is also required of good employees in any line of work.\textsuperscript{342} An individual's qualities which make him a more effective worker do not change the nature of the employment relationship.\textsuperscript{343} The permanency and duration of the relationship is important although many agriculture related jobs are seasonal by nature. The \textit{Gillmore} court found that however temporary a seasonal job may be, if it is permanent and exclusive for the harvest season, it is sufficient to suggest an employment relationship.\textsuperscript{344} The remaining factor is whether the activity of the employee is an integral part of the farmer's business.\textsuperscript{345}

While these factors are frequently discussed, the central focus appears to be the economic dependence of the workers on the farmer. In \textit{Usery v. Pilgrim Equipment Company},\textsuperscript{346} the Fifth Circuit advised that, "[i]t is \textit{dependence} that indicates employment status . . . [and] [e]ach test must be applied with that ultimate notion in mind."\textsuperscript{347}

The decision in \textit{S.G. Borello & Sons, Incorporated v. Department of Industrial Relations},\textsuperscript{348} provides an in-depth and well reasoned discussion of the issues associated with whether agriculture workers should properly be considered employees or independent contractors.\textsuperscript{349} In \textit{Borello}, the California Supreme Court held that agricultural workers who were hired to harvest cucumbers under a written sharefarmer agreement were "employees" for the purposes of the state worker's compensation statute.\textsuperscript{350} Under the California Worker's Compensation Act, "independent contractors" are defined as those who render service for a specified recompense, for a specified result, under the control of the principal as to the result of his work only and not as to the means by which such result is

\begin{flushleft}
340. \textit{Id.} at 162.
341. \textit{Id.}
342. 835 F.2d at 1537.
343. \textit{Id.}
345. 603 F.2d at 754-55.
347. \textit{Id.} at 1311-12 (emphasis in original).
348. 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 399 (1989).
349. \textit{Id.}
350. 48 Cal. 3d at ----, 769 P.2d at 406-408, 256 Cal. Rptr. at ----.
\end{flushleft}
Despite the existence of a detailed sharefarmer's agreement, the terms of which were explained to the sharefarmers, the California Supreme Court determined that the employer did not show that the harvesters were independent contractors. This conclusion was based upon a finding that the growers exercised pervasive control over the whole operation on land they owned and cultivated for their own account. The harvesting was simple manual labor, that was learned quickly and involved no particular skill, and the workers had a seasonal, but permanent relationship with the growers and did not hold themselves out in business.

The Borello court gave weight to the fact that the sharefarmers expressly agreed that they were not employees and that they consciously accepted the attendant risks and benefits. Justice Eagleson reasoned that "[T]he protections conferred by the Act have a public purpose beyond the private interests of the workers themselves." He looked at the purpose of the worker's compensation legislation and determined that the statute was enacted because of society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury.

The court did, however, indicate that a worker's express or implied agreement to forego coverage as an independent contractor was "significant." It added that where there were compelling indicia of employment present, an individual waiver of the protections derived from employment would not be assumed. There was no evidence of any meaningful bargaining as to the terms of the agreement or as to any "voluntary" election of an independent and unprotected status in the Borello case. It appears reasonable to speculate that in situations where an equality of bargaining does exist and a more free waiver of rights is undertaken, a different result may inure.

Because of the relatively low wage of most agricultural workers

351. CAL. LABOR CODE §§3351, 3353 (West 1982).
352. 48 Cal. 3d at ___, 769 D.2d at 409, 269 Cal. Rptr. at ___.
353. Id.
354. 48 Cal. 3d at ___, 769 P.2d at 407, 269 Cal. Rptr. at ___.
355. 48 Cal. 3d at ___, 769 P.2d at 409, 269 Cal. Rptr. at ___.
356. Id.
357. Id.
358. Id.
359. Id.
360. Id.
361. 48 Cal. 3d at ___, 769 P.2d at 410, 269 Cal. Rptr. at ___.
and the lack of identifiable training or skills required, any review of this type of worker will be inherently suspect, and the likelihood of finding economic dependence is extremely high. Courts have found an employment relationship to exist even in circumstances where the putative employees could hire and control their own helpers.\footnote{362} Even where the contractor is found to have employees, the farmer may be determined to be a "joint employer" if reasonable steps have not been taken to ensure that the contractor has complied with all required employment filings.\footnote{363}

The retroactive charges and record keeping requirements imposed by the FLSA\footnote{364} and the fact that the nonpayment of employment taxes is not dischargeable in bankruptcy\footnote{365} make the employment status of laborers a serious area of concern for all farmers who retain workers from time-to-time to assist them in the farming operation. The fact that devastating economic hardship on the farm could result, however, was considered in United States Department of Labor v. Lauritzen but did not alter the finding of an employment status.\footnote{366} In an effort to provide some certainty and control, Wisconsin enacted a statute which restricted efforts to remove farm workers from state labor standards by making them independent contractors.\footnote{367}

C. Service Sector

Today, the service sector employs three out of four American workers.\footnote{368} The rise of the service sector has altered, and will continue to alter, the dynamics of the workplace, affecting everything from wages and the length of the work week to the size of the typical business establishment. The average manufacturing enterprise employs approximately sixty people, compared with only eleven for the typical service establishment.\footnote{369} Between 1978 and 1982, more than half of all new jobs were created by firms with fewer than one hundred employees.\footnote{370} The smallest firms, those with fewer than twenty employees, now employ one out of every five workers but are creat-

\footnotesize{362. See supra note 159 and accompanying text; Mednick v. Albert Enters., 508 F.2d 301 (5th Cir. 1975).}
\footnotesize{363. Howard v. Malcom, 852 F.2d 101 (4th Cir. 1988).}
\footnotesize{364. 603 F.2d at 748.}
\footnotesize{365. See United States v. Sotelo, 436 U.S. 268 (1978).}
\footnotesize{366. 835 F.2d at 1535.}
\footnotesize{368. See Riddle, supra note 35 and accompanying text.}
\footnotesize{369. Id.}
\footnotesize{370. See BERLIN & SUM, supra note 43 and accompanying text.}
ing two-fifths of all new jobs. 371

By their very nature, service industries must be located when and where consumers need them, and their hours of operation must be flexible enough to accommodate consumer schedules. 372 Employers have turned to part-time workers and independent contractors as a way to adapt their services to consumers' patterns, and they are expected to continue to do so. 373 The issue of whether a provider of services is considered an employee or an independent contractor often arises in a service context when an injury arises in the furtherance of the services. It can also arise when the relationship is severed and the service provider seeks unemployment insurance. 374 These situations create severe hardship in some cases because the parties engaging the providers of services have no expectancy that they will be responsible for employment-related charges. 375

The fundamental distinction which controls the discussion appears to be whether the provider of services is, in fact, engaged in an independent trade or business. 376 This distinction does not mean that one must examine only whether the endeavor is the type that would customarily be considered an independently established trade, occupation, profession or business. 377 Instead one must look at whether the facts dictate that an independent concern was in fact formed and engaged. The case of McGuire v. Department of Employment Security 378 highlights the importance of this distinction. McGuire was a quadriplegic who contracted with licensed practical nurses to provide constant care. 379 The nurses, who had to be licensed, were paid a set hourly wage and entered into agreements which acknowledged that they were independent contractors. 380 The Utah Industrial Commission determined that these nurses were not exempt from unemployment coverage 381 and the Court of Appeals confirmed the decision and determined that even though a worker might possess a business or professional license which would allow an independent trade, it is necessary that such a person have engaged in "such an

372. Id.
373. Id.
374. Id.
375. SMALL BUSINESS REPORTS, April 1990, at 32-35.
376. 840 F.2d at 1059.
377. Id.
379. Id. at 986.
380. Id.
381. Id. at 988.
independent business, occupation or profession, not whether he or she could have [been engaged in an independent business]."882 This same result occurred in other diverse fields such as jockeys883 and television writers,884 both of which clearly are specialized occupational areas.

The service sector considered for this discussion is confined to situations such as McGuire where an individual or business seeks to obtain services and inadvertently enters into an employment relationship. In Evans v. Naihaus885 a furniture salesman who had several rental properties was found responsible for worker's compensation claims by an individual who he periodically retained to perform periodic maintenance and repair services on his rental property.886 However in Sandy v. Salter887 the Arkansas Supreme Court found that a carpenter who sustained injuries in remodeling a house could not collect worker's compensation against the owners of the house.888 In both cases the defendants had no personal skill or knowledge in construction or repair and did not supervise or direct any work performed by the respective claimants.889 Each claimant used his own tools and each received an hourly compensation.890 While factual distinctions between the two cases are hard to draw it appears significant that the defendant in Evans v. Naihaus was found to be in the business of managing rental property.891 The court provided that, "the nature of the claimant's work in relation to the regular business of the employer has taken precedence over other relevant factors."892

Another significant factor courts have considered in finding an employment relationship is the level of inherent risk or danger associated with the under taking. As early as the 1920's courts have held that if the work being done by the contractor is of an inherently dangerous character, then regardless of how independent the contractor may be, immunity will be denied to the employer.893 The

384. 326 So. 2d 601.
385. Id. at 604.
386. 541 S.W.2d 929.
387. Id. at 931.
388. Id.; Evans, 326 So.2d at 603.
389. Sandy, 541 S.W.2d 929, 930; Evans, 326 So.2d at 603.
390. 326 So.2d at 603.
391. Id.
392. For discussion, see Blount v. Tow Fong, 48 R.I. 453, 138 A. 52 (1937). The subject is further annotated in 23 A.L.R. 984 (1913), and 21 A.L.R. 1229, 1243, 1265 (1922).
393. Grothe, 659 P. 2d 602.
Alaska Supreme Court said that because the inherent danger of working with dynamite made it unreasonable for a licensed professional to be self-insured, it weighed in favor of considering the person an employee.\(^{394}\) This is an area of particular concern because some state worker's compensation statutes prevent employers in certain occupations of a hazardous nature from engaging independent contractors without liability when otherwise they would be liable to pay compensation if their own employees performed the work.\(^{395}\)

Unless parties are engaged with distinct business or professional organizations that invoice for services rendered and service a broad clientele, significant risk is involved in engaging independent contractors to perform services. This risk is compounded if the services to be performed are in furtherance of a regular business or if they are of a dangerous nature.

V. GUIDANCE

Taxwise, the safest way to retain a provider of services is to consider the person an employee, though this is also clearly the most expensive.\(^{396}\) A business may compromise its ability to be competitive in its industry by adding to the cost of its product or service the costs associated with additional employees.

The best time to settle the uncertainty of worker classification is before the relationship commences. Courts have been very consistent in finding an employment relationship to exist where an employer has sought to change the nature of the relationship with the same parties involved.\(^{397}\) The employer or the worker may request a determination letter from the Internal Revenue Service District Director's Office by submitting Form SS-8.\(^{398}\) The instructions require an employer to complete the form for one worker who is representative of the class of workers whose status is in question.\(^{399}\) This is also the time to define the level of control to be exercised over the project or task. If the directions extend beyond explaining the result to be ob-

\(^{394}\) Iowa-Illinois Gas & Elec. Co. v. Industrial Comm'n, 95 N.E. 2d 482 (Ill. 1950).
\(^{395}\) Employee benefits cost approximately 40% of straight wage costs. R. Henderson, Compensation Management: Rewarding Performance 334 (3d ed. 1982).
\(^{396}\) See Joint Committee, supra note 2.
\(^{398}\) Id.
\(^{399}\) See, e.g., Merchants Home Delivery Service, Inc. v. NLRB, 580 F.2d 966, 974 (9th Cir. 1978) (providing that "there is a difference between directing the means and manner of performance of work and exercising an ex post facto right to reprimand when the end result is unsatisfactory."). Id.
tained, a designation of employee status will likely follow. It is helpful in reaching independent status if the method of compensation is also predicated on reaching the defined result.

A finding of independent contractor may be enhanced by the existence of a written agreement which details the worker's duties and the terms and conditions of the service arrangement. The document should incorporate the common law factors and recite the parties' intent to create an independent contractor relationship. IRS regulations require that a written contract must be in place to cover real estate agents and door to door sales people, and that the contracts must contain language that the agent is responsible for payroll, income and other taxes. This consideration should be extended to every contract covering independent contractors regardless of the type of service being provided. The agreement should also identify the services to be performed, the payment of expenses and the requirement that a business license be obtained by the independent contractors. An agreement will never supersede the objective facts of the relationship, however, and there is substantial authority that the existence of an agreement will not be considered.

It is also well advised to engage contractors who are incorporated, who have their own capital equipment and business premises, and who have other similarly situated customers. While none of these factors individually will be controlling, they are all very persuasive in tipping the balance toward an independent contractor status. The prevailing guideline is that to be safe the provider of services must be engaged as a separate company, performing distinct tasks not central to the nature of the primary business, and for

400. But see United States v. Rosenwasser, 323 U.S. 36 (1945). The method of payment is legally irrelevant to a finding of control, or to any other finding relating to employee status. Id.


402. See supra note 278 and accompanying text.

403. See McComb, 331 U.S. at 729. Economic realities, not contractual labels, determine employment status for the remedial purpose of the FLSA. Usery, 527 F.2d 1308, 1315. Recitations in contract are not important for tax liability. Silk, 331 U.S. 708. It is not significant how one could have acted under the contract terms, because the controlling realities are reflected by the way one actually acts. Usery, 527 F.2d 1308. These courts implicitly rejected or minimized the RESTATEMENT factor of "intent of the parties."

404. See supra note 150 and accompanying text. But see I.R.C. §530(d). The incorporation or partner status of a technical specialist will not remove the Section 1706/Section 530(d) finding of employee.

405. The United States Supreme Court emphasized that in determining whether a worker is an employee, the circumstances of the whole activity should be examined rather than any one particular factor. McComb, 331 U.S. at 730.

406. Id.
which the allocation of employees would be a virtual impossibility.

An employer is particularly vulnerable to a finding of employment status if the workers are lower paid, lower skilled individuals. Courts have extended broad latitude to bring this class of individuals under the protection of the respective statute being reviewed. The relative lack of bargaining power and the high degree of dependence of the workers compels a finding of employment status. While economic reality may not be the test being applied, it is always the underlying theme.

If the provider of services is on more equal footing with the putative employer, the RESTATEMENT principles of agency should govern the consideration. Employer control can be quite substantial under this analysis if other factors point toward an independent relationship.

CONCLUSION

Independent contractors and employees perform identical services for employers, but they may be identified differently depending upon the decision of the employer, the application of certain statutes, or by judicial interpretation. The ultimate classification has grave implications for both the worker and the employer. The risk of retroactive reclassification and the resulting imposition of penalties are concerns which may confront anyone who engages another to mow a lawn or clean a carpet, as well as large commercial businesses or agricultural concerns.

The classification of employment status is not immutable and the ultimate determination is a finding of law subject to de novo consideration by appellate courts. An understanding of the range of interpretation and the methods used in making classification decisions will serve as a guide to developing a strategy for considering workers, employees, or independent contractors. In light of the IRS' aggressive pursuit of employment taxes from employers with nominal independent contractors, and pervasive new legislation imposing new restrictions on the employment relationship, how a class of

407. See supra note 23.
408. See supra notes 251-274 and accompanying text.
409. See supra notes 60-386 and accompanying text.
410. Id.
412. Belliz, 765 F.2d at 1327.
413. See supra notes 60-386 and accompanying text.
414. The Americans with Disabilities Act has been termed the most sweeping civil rights legislation passed in Congress in twenty-five years. Ray and Brown, "Federal Legislative
workers is characterized is a fundamental decision from which serious consequences may flow.

Facile labels and subjective factors are only relevant to the extent they mirror the economic control and reality of the situation. One must look to the essence of the relationship and determine what level of control and dependence is necessary to achieve the desired result. Once the control level is assessed, the tests and considerations outlined herein should be cautiously applied in a detailed, fact specific, individualized inquiry.