CHAPTER 2
THE EMPLOYMENT RELATIONSHIP

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NARAYAN v. EGL, INC.
616 F.3d 895 (9th Cir. 2010)

Three truck drivers who resided in California performed freight pick-up and delivery services for EGL in California. All three Drivers signed "Leased Equipment and Independent Contractor Services" agreements. The agreements stated that it was the intention of the parties to create a vendor/vendee relationship and acknowledged that Contractors were not considered to be employees of EGL. The agreements also contained a "choice of law" provision stating that Texas law would be controlling in any disputes between the company and the Contractors. Alleging that they were in fact employees, the drivers filed claims under California state law for unpaid overtime wages, business expenses, meal compensation and unlawful deductions from wages. The district court held that the law of Texas applied, and that declarations in the Agreements that the Drivers were independent contractors rather than employees, compelled the holding that they were independent contractors as a matter of law. Thus, the district court granted EGL's motion for summary judgment and the drivers appealed.

1. *What issues did the court consider in this case? What was its decision?*

The appeals court dealt with two main issues. First, should the case be decided under Texas or California law? The court decided that California law should be applied because the dispute was about statutory rather than contractual rights. Second, under California law, was the district court correct in determining that the drivers were independent contractors rather than employees? The appeals court decided that the district court had not considered the appropriate factors in deciding the employment status of the drivers. The district court's grant of summary judgment was reversed and the case was remanded.

2. *What factors did the appeals court consider to determine the employment status of the drivers? How do these compare to the economic realities test? Common law test?*

The court mentions numerous factors, although many are duplicative. Factors corresponding to the economic realities test included the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the principal; the alleged employee's opportunity for profit or loss depending on his managerial skill; the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; whether the service rendered requires a special skill; the degree of permanence of the working relationship; whether the service rendered is an integral part of the alleged employer's business; and whether the one performing services is engaged in a distinct occupation or business.

Common law test criteria, as set out by the Supreme Court, are also found among the factors cited by this court. Regarding right of control, the court points to the relevance

of considering the kind of occupation and whether such work is usually done under supervision. The court also says that the "right to discharge at will, without cause" is the most important single indicator of employment status. Furthermore, the court points to the California Labor Code (Sec. 2750.5) itself as another source of criteria. Criteria listed in the labor code and not already mentioned above include that the individual has the right to control the manner of performance of the contract for services; the result of the work and not the means by which it is accomplished is the primary factor bargained for; and the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. Bona fide independent contractor status is evidenced by holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, hiring employees, holding a license pursuant to the Business and Professions Code, and the intent by the parties that the work relationship is of an independent contractor status.

3. *How did the appeals court apply these factors to the facts of this case?*

The court pointed to a numerous case facts that could support the conclusion that the drivers were really employees. Relevant facts included that the delivery services provided by the EGL drivers were an essential part of the regular business of EGL (an instructional video told drivers that they "have the key role in the shipping process"); the EGL Safety and Compliance Manual and Drivers' Handbook instructed drivers on numerous aspects of their work including receiving assignments and packages, responding to customer complaints and handling damaged freight. The drivers used EGL-supplied forms, received company memoranda and attended meetings on company policies. The Handbook also provided guidelines on how to communicate with EGL's dispatch, instructing drivers to notify the dispatcher before leaving EGL's facility dock, to contact the dispatcher after each delivery stop to report that the delivery was completed, and to immediately report any traffic delays. Indeed, the EGL drivers were told that communicating with dispatch was the single most important aspect of their services. Drivers were ordered to report to the EGL station at a set time each morning--whether or not packages were available to be delivered. One of the plaintiffs had been disciplined for showing up late. Drivers also had to submit advance notice of vacation days. While the drivers' contracts purportedly gave them the right to pick and choose assignments, in practice, EGL presented them with batches of deliveries that they generally had to accept as an all-or-nothing proposition. In some circumstances, standard operating procedure agreements between EGL and many of its customers determined the manner in which drivers made deliveries. Moreover, the drivers drove exclusively for EGL during their period of employment. Their ability to drive for other companies was compromised by the fact that EGL required them to affix EGL logos to their trucks. EGL regulated their drivers' appearance--requiring them to wear EGL-branded shirts, safety boots and an EGL identification card.

Drivers supplied some of the equipment used to deliver packages (*e.g.*, hand trucks, lift gates, etc.), but EGL provided other supplies such as EGL-branded boxes and packing tape to their drivers for package pick-ups. While EGL's drivers retained the right to

employ others to assist in performing their contractual obligations, EGL required all helpers to be approved by it. The same rule applied to passengers. None of the plaintiff drivers hired helpers to perform their duties for EGL. Consistent with an at-will employment relationship, the contracts could be terminated by either party upon thirty-days' notice or upon breach of the agreement. The occupation that the drivers were engaged in did not require a high level of skill. Drivers were not required to possess any special license beyond a normal driver's license, and no skills beyond the ability to drive. Drivers worked at EGL for several years, and their Agreements were automatically renewed. There was no contemplated end to the service relationship at the time that the plaintiff Drivers began working for EGL.

4. *Why had the district court ruled for the employer? Why does the agreement that the drivers signed not matter?*

The lower court had not engaged in a detailed examination of the relevant criteria. It confined itself to an examination of a related case involving drivers in which an employment relationship was found, distinguishing it from the present case because there was no contractor's agreement in that case and the drivers worked regular schedules, drove regular routes, and were paid on scheduled pay days. The appeals court said that there were disputed questions of fact about whether the EGL drivers were really free to choose their own schedules and routes. But most importantly, the lower court's heavy reliance on the existence of an independent contractor agreement (consistent with its erroneous decision to apply Texas law) was misplaced: "[t]hat the Drivers here had contracts "expressly acknowledging that they were independent contractors" is simply not dispositive under California's test of employment." Even though California courts consider "whether or not the parties believe they are creating the relationship of employer-employee" to be a relevant factor, employment status is mainly determined by examining the nature of the working relationship.

5. *Does the business model of this logistics firm, including an emphasis on teamwork, customer service, and real time tracking of parcels, fit with the use of independent contractors? Why or why not?*

This is an interesting case to consider in light of the on-going litigation against Federal Express over its designation of drivers as independent contractors. Certainly, this type of business model entails considerably more than just driving and implies a desire to monitor and control how the work gets done. The essential problem in misclassification cases is that employers desire the legal and tax advantages of using independent contractors, while they still want to retain the prerogatives of an employer.

GLATT V. FOX SEARCHLIGHT PICTURES

2013 U.S. Dist. LEXIS 82079 (S.C.N.Y.)

This case involved a class of unpaid interns who worked for Fox Searchlight Pictures and Fox Entertainment group, asserting violations of the federal Fair Labor Standards Act

(FLSA) and state laws because they were classified as unpaid interns and not as paid employees. Plaintiffs moved for summary judgment alleging they should have been classified as employees entitled to pay.

1. *What issues did the court consider in this case? What did the court decide?*

The court considered the classification of these workers based on the FLSA. Plaintiffs argued they were employees. Defendant employer argued they were akin to "trainees" not entitled to pay. The court decided that the workers should have been classified as employees, and were entitled to be paid for their work.

2. What "factors" does the Department of Labor use to decide whether an intern is an employee covered by the Fair Labor Standards Act? How did the court apply these factors in this case?

The Department of Labor fact sheet lists 6 criteria for determining whether an internship at a for-profit business may be unpaid. These criteria are: 1) Is the training similar to training which would be given in an educational institution? 2) Is the internship experience for the benefit of the intern? 3) Did the intern displace regular employees, or work under close supervision of existing staff? 4) Did the employer derive any immediate advantage from the activities of the interns, or on occasion were its operations actually impeded? 5) Was the intern entitled to a job at the end of the internship? 6) Was there a mutual understanding by employer and intern that the intern was not entitled to wages for time spent in the internship? The court addressed each of the 6 criteria in turn, noting that no one criteria controlled, and that the test required consideration of all of the circumstances. It concluded that the interns were in fact employees entitled to pay.

3. *Do these factors – derived from an early Supreme Court decision that did not deal with interns per se – make sense in light of contemporary circumstances? Why or why not? Do they require employers to be entirely selfless and altruistic in establishing internships? Are there other factors that should be considered when drawing a line between interns who can be unpaid and employees who must be paid, including the primary beneficiary test dismissed by this court? What other factors?*

It may seem that in today's employment climate, where internships have become quite common, that the use of the *Walling* case was not appropriate. But the court began with the fact that the FLSA established the criteria used in *Walling*, and that they were a reasonable application of the agency's authority. Also, the court noted that the FLSA has an expansive definition of "employee," and unless an exception has been carved out, the worker is an employee entitled to pay. The *Walling* case carved out an exception for trainees, but they are not the equivalent of interns.

Employers have perhaps looked on unpaid interns as free labor, and no doubt would prefer to continue to do so. But they need not be entirely selfless and altruistic with regard to internships. If an internship was created to address the 6 criteria, and benefit the intern as well as the firm, that internship might qualify as unpaid.

One other factor that might be considered is whether the intern is a student seeking to further her education with practical skills. In that case, it might make more sense to permit those positions to be unpaid, as the skills the intern learns would benefit her in eventually seeking a job. The primary benefit test dismissed by the court might be helpful in determining the parameters of this exception, designed to meet the "trainee" exception to the coverage of FLSA.

4. *Have you ever had an unpaid internship? If so, did you get what you wanted from the experience or did you feel exploited? Why do you say that?*

Students experiences will differ, and their answers may provide a lively discussion.

ZHENG v. LIBERTY APPAREL CO.

355 F.3d 61 (2d Cir. 2003)

Twenty-six garment workers who worked in a factory in New York City's Chinatown sued six contractors that used the factory and an apparel manufacturer for violations of the Fair Labor Standards Act and state law. Because the contractors could not be located or had ceased doing business, the plaintiffs sought damages only from the manufacturer ("Liberty Apparel"). The manufacturer sub-contracted the last phase of the production process to the contract firms, relying on them to do the assembly work of stitching, sewing, cuffing, and hemming the garments. The garment workers were paid a piece rate for their labor.

1.) *What is the legal issue in this case? What did the appeals court decide?*

The issue is whether the apparel manufacturer is a joint employer of garment workers who performed assembly work for the manufacturer, but who had been hired and paid by contract firms. The appeals court concluded that the lower court did not consider all of the necessary factors when it determined that the manufacturer was not a joint employer of the garment workers. The judgment in favor of the manufacturer was vacated and the case was remanded for the lower court to apply the proper criteria.

2.) *What criteria had the district court applied to determine whether the manufacturer was an employer of the garment workers? What additional criteria does the appeals court say must be applied? How do these criteria help determine whether an employment relationship exists?*

The district court based its decision on the fact that the defendants did not hire and fire the garment workers; supervise the workers or control their work schedules and conditions of employment; determine the rate and method of payment; and maintain employment records. The appeals court says that these indicators of formal right of

control are insufficient to determine whether the manufacturer is a joint employer. On remand, the court also needs to consider whether work was performed on the manufacturer's premises; whether the contract firms had businesses that could shift as a unit from one putative joint employer to another; the extent to which the workers performed discrete line jobs integral to the manufacturer's production process; whether responsibility under the contracts could shift from one contract firm to another without material changes; the degree to which the manufacturer or its agents supervised the work; and whether the workers performed work exclusively or predominantly for the manufacturer.

Control over the work, and hence joint employer status, is more likely when the work is performed in the manufacturer's facility. Contract firms that serve a single client rather than seek business from a variety of firms are more likely to be part of joint employment relationships. When employees of contract firms perform work that is integral to the manufacturer's production process, the manufacturer is more likely to be a joint employer. However, since sub-contracting is common to many production processes, the court cautions that the extent of sub-contracting of integral tasks has to be judged against industry custom. If responsibility for contracts could pass from one contractor to another without material changes – such as by a new contractor continuing operations with the same set of employees – the manufacturer is likely to be deemed a joint employer. Extensive supervision also suggests joint employment, but only to the extent that such supervision demonstrates effective control over the employees' terms and conditions of employment - and not merely verification of contractual production standards. If the employees perform work exclusively or predominantly on behalf of the manufacturer, that is also evidence of a joint employment relationship. De facto control by the manufacturer over pay and work hours often accompanies such arrangements, as distinct from situations in which the subcontractor performs "merely a majority" of its work for a single customer.

In applying these criteria, the court takes considerable pains to distinguish legitimate, arms-length contracting relations between business partners based on economic considerations from relationships that look more like a "subterfuge to avoid complying with labor laws."

3.) *From the limited, disputed facts presented, how would you decide the case?*

Many important facts are in dispute. However, the trial court did find that the manufacturers did not hire or fire the garment workers, supervise and control their work schedules or conditions of employment, determine the rate and method of payment, and maintain employment records. The work appears to not have been carried out in Liberty's own facility, as Liberty delivered cut fabric to be sewn together by assemblers and sent its representatives out to check on how the work was being done. The amount of work being done for a single manufacturer is disputed, with the plaintiff's saying perhaps as much as 75% and Liberty's owner saying as little as 10%. The plaintiff's claims that the quality control inspectors from Liberty were in the factory numerous times each week for hours at a time and that they gave orders directly to employees (including general urgings to work harder) are potentially significant, although the owner suggests a much more limited role for company representatives. The assembly work is certainly integral to the

production process, although heavy use of sub-contractors is common in the industry. [Years after this appeals court decision, the case went to trial and a jury found for the plaintiffs – 2009 U.S. Dist. LEXIS 41624 (S.D.N.Y.)]

4.) *What are the practical implications of this case? For workers who are victims of unscrupulous contractors? For firms that subcontract or otherwise outsource parts of their operations?*

This decision signals a willingness on the part of the courts to look beyond formal, direct indicators of an employment relationship to the underlying economic realities when determining whether joint employer liability should be placed with companies that sub-contract aspects of their production process. Once again, employers are not safe assuming that the sub-contracting of work or procuring labor from staffing services ends any legal responsibilities to the persons performing that work. As contracting out becomes more widespread throughout the economy and corporate actors become more closely entwined within supply chains, these issues of legal (and social) responsibility for the actions of contractors should loom ever larger. For employees of small contract companies that might disappear overnight, establishing the joint employer status of client companies may be the only chance to recover damages for violations of the law.

JUST THE FACTS

Stan Freund installed home satellite and entertainment systems for a company that sold these systems. The company scheduled installations, although Mr. Freund could reschedule them. The installer worked on his own, but was required to wear a company shirt, follow certain minimum specifications for installations, not perform any additional services for customers without the company's approval, and call the company to confirm that installations had been made and to report any problems. Mr. Freund was paid a set amount per installation. He used his own vehicle and tools. Mr. Freund was free to perform installations for other companies and to hire others to do installations. However, while other installers did accept jobs from other companies, Mr. Freund worked six days a week for this company. Is Mr. Freund an employee with rights under the Fair Labor Standards Act? Freund v. Hi-Tech Satellite, 185 Fed. Appx. 782 (11th Cir. 2006).

The issue is whether Mr. Freund is an employee or an independent contractor. Since this case was brought under the Fair Labor Standards Act, the economic realities should be used to decide this question. The appeals court affirmed the trial court's ruling that the installer was an independent contractor. In doing so, both court's relied heavily on testimony from other installers who had set up their own companies, hired assistants, worked for other installation brokers, and did not work six days a week for one company. In the absence of compelling evidence that this installer's relationship with Hi-Tech was unique, evidence of how it treated its other installers was probative of the working relationship. In terms of right of control, the lower court had concluded that it favored contractor status because the installer was able to do the work as he saw fit, to re-schedule appointments, and to work for other companies. This conclusion is debatable, since there were also numerous indicia of employer control, including the initial scheduling of jobs, the required wearing of a company shirt, the prohibition against providing any other services to customers, and the requirement that installations be reported immediately. However, the court asserted that the control exercised over the installer was "the end result of customer satisfaction" rather than "day to day regulation" of his work – and that this distinction matters for purposes of assessing right of control. He was seen as able to realize a profit or loss based on payment per job, the number of jobs accepted, his efficiency, and his ability to hire assistants (even though he did not actually do so). He used his own vehicle, tools, and supplies. He had a special skill at installation, which included troubleshooting and dealing effectively with customers. The only factor that the lower court said was consistent with employment was that the installer's work was integral to the business.

A full-time safety and security assistant at a public school also coached the high school golf team. His coaching duties included supervising tryouts, coaching players during tournaments, conducting daily practices, transporting team members to matches, scheduling matches, communicating with parents, handling the team's finances, and fundraising. In all, the coach spent an estimated 300 to 450 hours per year on his

coaching activities, in addition to his full-time employment with the school district. For his services as coach, he received a "stipend" of a little over $2,000 per year, reimbursement for travel and other expenses, and paid administrative leave for coaching activities that occurred during school hours. He was paid separately and on an hourly basis for his work as a safety and security assistant. His continued employment was not predicated on his also agreeing to coach. He sought overtime pay for weeks in which the combination of his school duties and coaching required him to work more than 40 hours. The school contended that in his capacity as a golf coach, he was a volunteer with no entitlement to overtime pay. Was the coach an employee or volunteer with respect to his coaching activities? Purdham v. Fairfax County School Board, 2011 U.S. App. LEXIS 4644 (4th Cir.).

The court decided that the golf coach was a volunteer rather than an employee. Thus, he was not entitled to overtime pay under the FLSA. The court relied first on the fact that Congress explicitly exempted persons who do volunteer work for public agencies from the FLSA's requirements. Such individuals are exempt from FLSA coverage if: "(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency." The court determined that the coach's decision to coach had been made freely and without coercion. He accepted an offer to become coach, his employment as a security assistant was not dependent on his coaching, and he was free to stop coaching at any time without placing his job in jeopardy. The fact that the coach was motivated, in part, by the stipend he received did not render him a volunteer. Even though DOL regulations defining volunteers refer to performing "hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered," this does not mean that volunteers must be motivated solely by non-pecuniary considerations or that they cannot receive, as the coach did, nominal fees or reimbursement for their expenses. The court also asserted that "[i]t is the culture of high school athletics for the coaches to consider themselves volunteers."

Luann Lepkowski is one of about two hundred employees of Telatron Marketing, a company that provides "customer relationship management services" to corporate clients nationwide. Since early 2006, Ms. Lepkowski has been assigned to work exclusively on the Bank of America account. The computer, software programs, and databases that she uses in performing this work are owned and supplied by Bank of America. The operators identify themselves as representatives of the bank when dealing with customers. The bank provides training on bank products and procedures to Ms. Lepkowski and the other operators. The bank oversees day-to-day operations by monitoring phone calls to ensure that their procedures are being followed. Ms. Lepkowski works in a call center owned by Telatron. She was hired and is paid and scheduled by Telatron, which also maintains her personnel records. Ms. Lepkowski and the other operators brought a class action lawsuit against both Telatron and the Bank of America, alleging improper compensation. Is the Bank of America a joint employer of

these call center workers? Lepkowski v. Telatron Marketing Group and Bank of America Corp., 2011 U.S. Dist. LEXIS 9388 (W.D. Pa.).

The court dismissed the plaintiff's claim that the Bank of America was a joint employer who should also be a defendant in a class action wage and hour suit. The court pointed out that "[t]here is no unanimity of opinion … as to the appropriate factors to be considered in analyzing whether a joint employment relationship exists. The Second Circuit, as illustrated by *Zheng v. Liberty Apparel*, takes a relatively expansive view and looks at (1) whether the premises and equipment of the purported joint employer are used for the plaintiffs' work; (2) whether the contractors had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to the process of production for the purported joint employer; (4) whether responsibility under the contracts could pass from one subcontract to another without material changes; (5) the degree to which the purported joint employer or their agents supervised the plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the purported joint employer." In contrast, courts in the Ninth Circuit focus primarily on whether the proposed employer (1) had the power to hire and fire employees, (2) supervised or controlled employee work schedules or conditions of employment, (3) determined the rate or method of payment, and (4) maintained employment records. The Third Circuit, in which this case arose, has not set out explicit criteria for deciding when joint employment exists. The district court in this case chose to examine the totality of the circumstances and asserted that the same outcome would be obtained under either test.

Regarding the Ninth Circuit criteria, the court found that Bank of America did not have the power to terminate the plaintiffs' employment. It did not set work schedules, hours of work, or otherwise influence the day-to-day conditions of employment. The court dismissed the significance of the training provided by Bank of America and its' monitoring of calls because "these measures reflect precisely the type of quality control and customer service supervision that courts have consistently held to be 'qualitatively different' from the control exercised by an employer over an employee." On the other two factors, the plaintiffs did not contend that Bank of America determined their compensation or maintained their employment records. Applying the Second Circuit's test, the court focused on the questions of whether the premises and equipment of the putative joint employer were used, whether the contractors had a business that could shift as a unit from one putative joint employer to others, and whether there was any evidence that responsibility could pass from one subcontractor to another without any material changes. The court deemed the other criteria to be either duplicative with the Ninth Circuit's test or geared specifically to manufacturing contexts. The employees worked in call centers operated by the contractor and not Bank of America. They did use equipment and programs provided by the bank. The court deemed ownership of the premises on which work is performed to be a stronger indicator of supervisory control than ownership of equipment (There is some confusion in the decision, as the court states "On balance, therefore, I conclude that this factor weighs in favor of joint employment." However from the tenor of the discussion, and because the court subsequently states that "the Amended Complaint fails to plead sufficient factual allegations to satisfy *any* [italics

added for emphasis] of the seven joint employment factors analyzed above," I assume that this is an error.] The court also concluded that because the contractor had contracts with numerous other companies and there was no evidence that "Plaintiffs would continue to perform the same customer management services for BoA in the same manner, even if BoA terminated its relationship with Telatron and engaged another customer relationship company to handle their client accounts," evidence of joint employer status was lacking.

PRACTICAL CONSIDERATIONS

Try your hand at drafting an independent contractor agreement that a company that sells carpeting might use for its installers. Don't worry about making your agreement sound like legalese. Focus instead on what such an agreement should specify.

The point is to try to incorporate as many of the criteria for establishing independent contractor status as possible. The independent contractor agreement should specify what the person performing the work is expected to accomplish and any deadline for doing so, but should not specify hours of work, methods, requirements to attend meetings, supervisory relationships, or other provisions that indicate the contracting entity is substantially retaining its right of control. The agreement should make it clear that the contractor is in business for him or herself by placing responsibility for tools, materials, equipment, the hiring of assistants, and other expenses on the contractor. The agreement should generally leave the contractor free to perform services for others and should pertain only to the performance of some particular project or piece of work. The agreement should state that the contractor is responsible for payment of employment taxes and is not entitled to benefits. Payment should be related to completion of the agreed upon project and not be based on hours of work. The agreement should be for a limited period of time and not open-ended as to duration. A new agreement should be drawn up if additional projects are desired, and this should not be done on a continuous basis

How should companies that use temp workers supplied by temp agencies deal with those workers if performance problems emerge? If temp workers complain about inequitable treatment? If temp workers request leave under the Family and Medical Leave Act?

A tricky balance must be maintained if client companies do not wish to face potential liability as joint employers. That balance involves refraining from exercising employer-like control, while still taking steps to integrate temporary workers into the workplace. Performance problems sometimes have to be dealt with on the spot, but for the most part, unsatisfactory performance by temps should be brought to the attention of the temporary staffing firm and dealt with by them. The client company should refrain from any attempt to "discipline" individual temps or to request/require that particular temps not be assigned. Ultimately, if the quality of temps is not satisfactory, the client company should find another source for temporary workers. If inequitable treatment is complained of and relates to protected class characteristics, the client company has an obligation to do what is within its power to end any discriminatory treatment. Complaints about unequal treatment of temps in comparison to the client firm's "permanent" employees are not so much a legal problem as an issue of employee relations. Efforts should be made to treat temporary workers with dignity and to not needlessly reinforce the perception of second class status. However, it also has to be made clear to temps that the staffing firm is their employer and that they are working under different arrangements than the client company's own employees. If teamwork and close working relationships over a period of

time are important, those are indicators that a company would be much better off not staffing these positions with temps. Under the Family and Medical Leave Act, the temporary staffing firm is typically the "primary employer" – even when there is joint employment. Thus, staffing firms are typically responsible for responding to temps' requests for leave and providing required notices.

END OF CHAPTER QUESTIONS

1.) *A company sells health insurance policies. The company has a large sales force comprised of independent contractors. Some of its sales agents, usually after a significant period of service, are promoted to the position of "sales leader." Sales leaders agree to remain as independent contractors when they are promoted. Sales leaders do little selling of policies; instead, their main responsibilities are recruiting, training, and managing sales agents. The income of sales leaders is mainly derived from overwrite commissions on their subordinates' sales. The company retains control over the hiring, firing, assignment, and promotion of sales agents. The company determines sales leaders' territories and does not permit them to sell other insurance products or operate other businesses. Sales leads are distributed by the company and sales leaders are prohibited from purchasing leads from outside sources. Sales leaders set their own hours and conduct their day-to-day activities largely free from supervision. Attendance at company meetings and training sessions is generally considered optional for sales leaders. Sales leaders receive no benefits and the company does not withhold any of their pay for tax purposes. Several sales leaders sued for overtime pay under the Fair Labor Standards Act. Are the sales leaders employees or independent contractors?* (*Hopkins v. Cornerstone America*, 545 F.3d 338 [5th Cir. 2008], *cert. denied*, 2009 U.S. LEXIS 2005)

The trial court had found that the sales leaders were employees under the FLSA and the appeals court affirmed. The court set out the Fifth Circuit's version of the economic realities test: "we consider five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. No single factor is determinative.. Rather, each factor is a tool used to gauge the *economic dependence* of the alleged employee, and each must be applied with this ultimate concept in mind." Regarding the degree of control, the court observed that Cornerstone controlled the hiring, firing, assignment, and promotion of the Sales Leaders' subordinate agents, on whom the Sales Leaders relied for their primary source of income. Cornerstone at least partially controlled the advertising for new recruits by providing the Sales Leaders with approved ads and monitoring their placement. Cornerstone exclusively determined the type and price of insurance products that the Sales Leaders could sell. Cornerstone also controlled the number of sales leads received, prevented Sales Leaders from purchasing leads from other sources, and determined the geographic territories where the Sales Leaders and their subordinates could operate. Regarding investment in the business, the court found that Cornerstone's investment--including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products--outweighed the personal investments of Sales Leaders, even though . Sales Leaders made substantial investments in their individual offices. Regarding opportunity for profit or loss, the court dismissed found that the key drivers of Sales Leaders' compensation were all determined by Cornerstone. The likes of controlling office costs and motivating subordinates paled in comparison. Regarding skill, the court

found that while the Sales Leaders exhibited certain skills, they were primarily general management skills and the use of those skills was constrained by the high degree of control maintained by Cornerstone. Finally, regarding permanency, most of the Sales Leaders worked for a number of years and provided their services exclusively to Cornerstone.

2.) *An attorney and member of the New York Bar Association became actively involved with international environmental issues. She proposed, developed, and presented a program that was presented under the auspices of the association. She engaged in other efforts, including creating a new Bar Association committee on international environmental law, making presentations, and participating at the first United Nations Conference on Environment and Development. In return, the association provided her with workspace, clerical support, publicity, and reimbursement for out-of-pocket expenses. The attorney experienced harassment by a Bar Association official and sued. Was she a volunteer or an employee?* (*York v. Association of the Bar of the City of New York*, 286 F.3d 122 (2nd Cir. 2002)

When the issue is whether someone performing work is an employee or a volunteer, the nature of any payments received is usually a key fact. There must be wages or benefits, or a promise to provide these, beyond some minimum level of significance or substantiality. The court concluded that the benefits that the lawyer received, including clerical support, workspace, networking opportunities, and reimbursement for out-of-pocket expenses did not constitute significant reimbursement of the sort that would signal an employment relationship in the absence of any contractual agreement. The court opined that holding otherwise would transform a wide variety of efforts undertaken on behalf of voluntary member organizations into employment.

3) The exotic dancers at a nightclub sign independent contractor agreements at the beginning of their employment and are paid entirely by the tips they receive from appreciate customers. The club does not recruit dancers. Instead, women interested in working there come in for a dancing audition and "body check." If selected, dancers must obtain, at their own cost, an adult entertainment license ($350 per year). Dancers must remit a house fee to the club for each night of work (between $30 and $100 depending on the day of the week and time of arrival) and tip the DJ (at least $20) and "house mom" ($5-10). On slow nights, dancers can suffer a net loss for the evening. Dancers also spend thousands of dollars a year on costumes, shoes, cosmetics, and hair care. However, they are not investors in the club and do not pay any of the other expenses associated with operation of the club, including facilities, advertising, the sound system, and food and drink. Schedules are worked out between dancers and the club, although there is a strong expectation that dancers will work at least four nights a week. The club has a rule book for contractors and employees, and dancers have been disciplined for violations of these rules. There are elaborate procedures for checking in and out of work, including appearance inspections by the house mom and a breathalyzer test at the end of shifts. A number of the dancers have worked at the club for at least a year, but shorter periods of employment are also common. Are the dancers of the club

entitled to the protections of the Fair Labor Standards Act or are they independent contractors? Why? (Clincy v. Galardi South Enterprises, 808 F. Supp. 2d 1326 (N.D. Ga. 2011).

The court held that the dancers were employees because of the degree of control exerted by the Club over the work of the dancers, the dancers' opportunity for profit and loss, the dancers' relative investment, the lack of specialized skill required to be a dancer, and the integral nature of nude entertainment to the Club's business.

4.) *A surgeon worked as part of the medical staff at a hospital. The surgeon leased his own office space, scheduled his own operating room time, employed and paid his own office staff, billed patients directly, received no benefits, and did not receive tax documents (W-2 or 1099) from the hospital. The doctor performed all of his surgeries at this hospital and could use its nurses and other staff to assist in the treatment of patients. Medical staff membership required the doctor to follow medical staff bylaws, keep medical records, attend an orientation program, participate in continuing education programs, and agree to take calls from the emergency room. After the doctor was diagnosed with and treated for bi-polar disorder, he was reinstated with numerous conditions. These included submitting to close review of all of his surgical cases, meeting periodically with a monitoring physician, and providing extensive personal and medical information. When the surgeon subsequently had an acute manic episode while performing open-heart surgery, his medical staff privileges were rescinded. He sued for disability discrimination and the hospital argued that he was an independent contractor. What should the court decide? (Wojewski v. Rapid City Regional Hospital*, 450 F.3d 338 (8th Cir. 2006)

The appeals court affirmed the lower court's ruling that the doctor was an independent contractor. Therefore, he had no standing to sue under the employment provisions of the ADA. Both courts applied versions of the common law test. The court noted that the surgeon performed highly skilled work, leased his own office space, hired and paid his own staff, billed patients directly, and did not receive any benefits or tax documents from the hospital. Although the 2003 letter of agreement subjected the surgeon to an extensive set of controls and (in the words of the appellant) "perhaps rendered him the most controlled doctor in America," the court saw these stipulations as still falling within the normal tension that exists between hospital administrators and staff physicians. The hospital could "take reasonable steps to ensure patient safety and professional liability while not attempting to control the manner in which [the doctor] performed operations." Right of control is particularly difficult to assess for professionals. Not all cases involving staff physicians find them to be independent contractors (e.g., *Salamon v. Our Lady of Victory Hospital,* 514 F.3d 217 (2d Cir. 2008)).

5.) *A waitress at a diner sued for sexual harassment. The employer argued that it had fewer than 15 employees and was thus not subject to Title VII. Whether the diner had the requisite number of employees depended on whether the two managers in charge of the diner were "employees." The diner is owned by a woman who is the sole proprietor. However, she has delegated virtually all responsibility for the operation of the restaurant*

to these two managers. Without the owner's input, the managers decide who to hire and fire, work schedules, work rules, and all of the other operational decisions of the restaurant. The two managers do not have ownership interests in the restaurant (although one is married to the sole proprietor) or hold positions as board members (there is no board). Should the two managers be counted as employees? (*Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006).

The appeals court reversed the lower court's entry of summary judgment for the employer. The lower court erred in concluding that the managers were partners or principals in the firm, rather than employee agents. The appeals court expressed considerable doubt as to whether the criteria advanced by the EEOC and endorsed by the Supreme Court in its *Clackamas* decision (538 U.S. 440) for distinguishing partners from employees were relevant to a situation where the actors exercised control at the pleasure of an owner who delegated those responsibilities, rather than as a matter of right. The court held that if *Clackamas* is still applicable, it must be applied with consideration of the source of the authority exercised by the managers. The court concluded that "a small business owner like Gonzalez has the option of running the business herself … . In that way, she might keep the number of employees below Title VII's threshold. If instead, she chooses to engage another person to run the business on a day-to-day basis for her, without giving him a stake in the business that lets him share the power to control it, then she is taking on an additional employee that may put her workforce over the statutory threshold, just as if she had taken on an additional cook, server, cashier, or busboy."

6.) *A farm labor contractor recruited and hired workers to detassel and remove unwanted corn plants in the fields of the Remington Seed Company. Detasseling is necessary for the growing of hybrid plants and must be performed several times during a season. The workers were paid by the labor contractor. They took instructions from the labor contractor but also followed Remington's work rules. Remington had supervisors in the fields to inspect work and determine when jobs needed to be redone. The labor contractor had no clients other than Remington Seed. Remington advanced several payments to the contractor so that the workers could be paid and covered by workers' compensation insurance. Tools and portable toilets were supplied by Remington. The workers brought suit under the Fair Labor Standards Act against both the labor contractor and Remington Seed Company. Is Remington a joint employer liable for violations of these workers' rights?* (See *Reyes v. Remington Hybrid Seed Company*, 495 F.3d 403 [7th Cir. 2007]).

The district court had granted summary judgment to Remington. The appeals court vacated the decision on the grounds that Remington was a joint employer of the farm workers. Relevant facts included that the farm labor contractor had no business organization that shifted from one place to another. Instead, he put together crews for Remington alone. The workers took instructions from the farm labor contractor, but also followed work rules established by Remington. They started employment at company headquarters and received a briefing about pesticide safety. Remington supplied tools and outhouses. Remington had supervisors in the fields that inspected the work and decided if jobs needed to be re-done. However, any liability for Remington was limited to unpaid

wages and did not reach the farm labor contractor's unfulfilled promises of more work hours and better housing.

7). A logistics company used a subcontractor to deliver packages. The contract company owned the vehicles used by drivers to deliver packages, while the logistics firm owned the warehouse facilities and all other equipment. Drivers were hired and paid by the contract company. Every morning, the logistics company had packages delivered to one of its warehouses. Drivers could not begin work until the logistics company informed them that their packages had been received, coded, and were ready for pickup. After receiving the go-ahead, drivers sorted, scanned, and loaded the packages. The contract company leased the scanners from the logistics company. As drivers loaded their vehicles at the warehouse, a logistics company employee would often inspect the vehicles and drivers' uniforms to ensure that they conformed to the standards specified in the company's agreement with the contractor. The uniforms and the vehicles bore the names of both companies. Drivers spent the majority of their days making pickups and deliveries. Throughout the day, the logistics firm sent information regarding customer complaints, requests for re-deliveries, and other nonroutine matters to drivers. Using scanners, drivers logged the time at which each package was picked up or delivered. When drivers finished their delivery routes for the day, they unloaded any remaining packages at one of the warehouses and returned their scanners to be charged overnight. The information that the scanners had collected during the day about package locations was transmitted to a data server of the logistics company. The drivers allege that they were improperly denied overtime pay. Is the logistics company a joint employer potentially liable for wage and hour violations? Why or why not? (Layton v. DHL Express (USA), 686 F.3d 1172 (11th Cir. 2012).

No, the logistics company (DHL) was not a joint employer with the subcontractor (Sky Land). The court applied 8 criteria: 1) the degree of control of the workers; 2) the degree of supervision, direct or indirect, of the work; 3) the power to determine the pay rates or methods of payment of workers; 4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; 5) preparation of payroll and payment of wages; 6) ownership of the facilities where work occurred; 7) performance of a specialty job integral to the business, and 8) the relative investments of DHL and Sky Land in the enterprise.

Although DHL did engage in some small level of supervision of the drivers, most of the time the drivers were unsupervised. Further, DHL did not hire or fire, had no power to set pay rates, and did not pay the drivers. DHL did not control the method of performing daily tasks. In addition, Sky Land's contract with DHL was not exclusive, so that the drivers were not economically dependent on DHL.

8.) *Regardless of the eventual outcome of the Northwestern University case, should student-athletes be considered employees of the universities they attend? Why or why not?* (*See* Taylor Branch. "The Shame of College Sports." *Atlantic* (October 2011), 81-110)

Student-athletes are actively recruited and sign contracts to participate in activities that consume much of their time. They receive substantial payment in the form of scholarships and sometimes generate substantial revenues and publicity for their universities. Arguably, athletics is less central to what universities do than are the teaching and research performed by graduate assistants. Further, the mode of payment of athletes is less obviously a wage for services rendered. Nevertheless, the concept of the "student-athlete," devised by the NCAA to legitimize the amateur, non-employee status of athletes, is increasingly being challenged, as major school sports programs grow ever larger and top athletes treat college as brief internships on the path to professional careers.

9.) *What are the consequences of denying back pay and other individual remedies to undocumented workers? Justice Breyer, dissenting from the majority opinion in Hoffman Plastic Compounds, Inc. v. NLRB, writes that denying the NLRB the power to award back pay "… lowers the cost to the employer of an initial labor law violation … It thereby increases the employer's incentive to find and to hire illegal-alien employees." Does denying remedies to undocumented workers reinforce or undermine national immigration policies?*

At first blush, it appears entirely consistent with public policy on immigration to deny remedies under employment law to persons who do not have legal status to be employed and who are unlawfully in this country. However, doing so might actually increase the incidence of illegal immigration, because the potential cost to employers of employing these workers might be reduced. This decision appears to increase the vulnerability of undocumented workers. If they try to organize unions or otherwise assert their rights under the law (e.g., recover unpaid wages), they can be terminated with little consequence for the employer, beyond perhaps a court order to not engage in such behavior in the future. And given the lack of a meaningful remedy for the affected individuals, who would bring such a case in the first place?

10.) *Commenting on the increasingly widespread use of labor contractors by large companies, attorney Della Bahan claimed "These companies are pretending they're not the employer. The contractor is willing to work people seven days a week, not pay payroll taxes, not pay workers' comp taxes. The companies don't want to do that for themselves, but they're willing to look the other way when their contractors do it." Do you agree? To what extent should companies be held responsible for the employment practices of companies with which they contract?* (Steven Greenhouse. "Middlemen in the Low-Wage Economy." *New York Times* (December 28, 2003), Wk-10)

Companies that use their leverage to negotiate low-bid contracts with small contractors set in motion a process under which exploitation of workers is likely. Firms do not have to be privy to the details of their contractors' employment arrangements to know that it is low-wage workers who are going to bear the brunt of these arrangements. Yet, it is difficult to blame companies for seeking the best deal from contractors and to clearly

identify when a firm has sufficient knowledge of its contractor's employment practices and/or control to warrant holding the firm liable.

11.) *Legally, it makes a great deal of difference whether someone performing work is an employee or an independent contractor. But should it make a difference? What is the justification for excluding independent contractors from protection of antidiscrimination and other laws?* (Danielle Tarantolo, "From Employment to Contract: Section 1981 and Antidiscrimination law for the Independent Contractor Workforce," 116 *Yale Law Journal* 170, 202-04 (2006).

As a general matter, the argument is that the ability of independent contractors to sell their services to other users gives them greater bargaining power than that possessed by most employees and makes them less subject to mistreatment or exploitation. However, as the use of independent contractors to perform a wide range of tasks increases and distinguishing between independent contractors and employees becomes more difficult, there might be good reason to re-think the exclusion of independent contractors. This would seem particularly true for the likes of anti-discrimination laws which, in contrast to wage and hour laws, would reinforce basic societal values without unduly infringing on freedom of contract. Tarantolo notes that independent contractors already receive some protection from discrimination under 42 U.S.C § 1981 which prohibits discrimination in "making and enforcing contracts." However, this protection is limited to claims of disparate treatment based on race or national origin. She proposes to use this venerable, Reconstruction-era statute, "to modernize the workplace antidiscrimination regime."

FOR A CHANGE OF PACE

Students might critique an actual independent contractor agreement if one is available. If not, they might be presented with a hypothetical example like the following:

"I agree to provide services to the XYZ Company as an independent contractor. These services include writing software, "trouble shooting" computer network problems, and other tasks that might be assigned. I agree to respond to requests for my services in a timely fashion. I realize that I am free to consult for other companies and to use my own best professional judgment in determining how to provide these services to XYZ Co. I agree that I will be paid at the rate of $35/hr for all time spent performing services for the XYZ Corp."

What, if anything, is good about this agreement? What, if anything is problematic about this agreement? Should it say other things?

This can be used as another way to get students to think about the criteria for distinguishing between employees and independent contractors and how contractor relationships must be structured in order to retain contractor status.

The sample IC agreement is inadequate from the standpoint of ensuring that the person doing the work will not be deemed an employee. On the plus side, it explicitly states that the individual is free to offer her services to other users and refers generally to her right of control over how the work is done. However, the wording that allows the company to "assign" unspecified other tasks without additional negotiation and agreement reads like the "and any other tasks assigned" language typically found on an employee job description. The language about responding in a "timely fashion" also suggests right of control, and hence employee status, particularly considering that the task is writing software. Independent contractor status does not preclude payment on an hourly basis if other aspects of the relationship are clearly more contractor-like, but it seems possible to arrange payment on a project or per call basis that would be more consistent with IC status. Without loading the agreement with excess verbiage, it would be useful to elaborate further on the contractor's right of control, to specify that any training, manuals, supplies, or other materials are the responsibility of the IC, to specify that the payment cited is the sole payment for work performed and that the IC is responsible for any benefits as well as payment of all employment taxes, and to make the contract less open-ended in terms of duration.