Who Is an Employer and Who Is an Employee?

National Employment Lawyers Association
2016 Annual Convention
June 22-25
Westin Bonaventure Hotel & Suites, Los Angeles, California

Rachel Bien, Outten & Golden LLP, (212) 245-1000, rmb@outtengolden.com
James Kan, Goldstein, Borgen, Dardarian & Ho, (510) 763-9800, jkan@gbdhlegal.com
Peter Sung Ohr, National Labor Relations Board, (312) 353-7574, Peter.Ohr@nlrb.org
Douglas M. Werman, Werman Salas P.C., (312) 419-1008, dwerman@flsalaw.com

I. Employees or Independent Contractors?

While the issue is not new, over the past decade, there has been a surge in cases brought by workers claiming that their employers misclassified them as "independent contractors" instead of employees with the full benefits and protections of the Fair Labor Standards Act ("FLSA"). Courts generally agree that, in these cases, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business for the opportunity to render service or are in business for themselves."[1] Regardless of a worker's label, the worker is not an independent contractor where "the work done, in its essence, follows the usual path of an employee."[2]

A. Economic Realities Test

To answer whether a worker is an independent contractor or an employee, courts across the country have generally coalesced around the same set of "economic realities" factors:

1. The permanency of the relationship between the parties;
2. The degree of skill required for providing the services;
3. The parties' relative worker's investment in equipment or materials;
4. The worker's opportunity for profit or loss;
5. The degree of the alleged employer's right to control the manner in which the work is performed; and

[1] *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) (citing cases); *see also Solis v. Cascom, Inc.*, No. 3:09-cv-257, 2011 WL 10501391, at *3 (S.D. Ohio Sept. 21, 2011) ("no party has brought to the Court's attention a statutory basis for the 'independent contractor exception,' rather, it appears that 'independent contractor' is the label applied to a certain category of workers who fall outside of the FLSA's ambit, and one which might better have been called something like 'owner/operators of independent businesses.'").

[2] *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)).

6. Whether the service rendered is an integral part of the alleged employer's business.[3]

Each factor must be considered based on a totality of the circumstances and no one factor is dispositive. Whether the factor is met and the degree to which it is met are questions of fact, however, the legal conclusion drawn from the facts is a question of law.[4]

Recognizing the fact-intensive nature of the economic realities test, courts have generally agreed that relatively close cases require resolution by a jury.[5] In those cases, courts of review properly limit the analysis to whether a reasonable jury could have concluded that plaintiffs were in fact "employees."[6] Courts have further instructed that, when the economic realities analysis could be answered in either direction, they should resolve the question in favor of the employee because of the FLSA's broad coverage of employees.[7]

On July 15, 2015, the U.S. Department of Labor's Wage and Hour Division issued an Administrator's Interpretation ("AI") that provides guidance on independent contractor misclassification.[8] The AI notes that most workers are employees under the FLSA, citing the FLSA's broad definition of "employ" – to "suffer or permit to work."

The AI does not break new ground, but instead pulls into one place the key decisions that, in the Department's view, have correctly interpreted and applied the economic reality test. For example, with regard to the "integral to the business" factor, the Department notes that work can be integral to a business "even if the work is just one component of the business and is performed by hundreds or thousands of other workers."

The Department also clarifies that, with regard to the "opportunity for profit and loss" factor, "opportunity" does not include a worker's ability to work more hours, but instead focuses on whether a worker can earn a profit or suffer a loss through the exercise of managerial

---

3 *See, e.g.*, *Brock*, 840 F.2d at 1058-1059; *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *Scantland*, 721 F.3d at 1312 (stating that the court must asses the facts relevant to these factors "through the lens of 'economic dependence' and whether they are more analogous to the 'usual path' of an employee or an independent contractor.").

4 *Brock*, 840 F.2d at 1059.

5 *See Keller v. Miri Microsystems, Inc.* 781 F.3d 799, 816 (6th Cir. 2015) (holding that summary judgment was inappropriate where genuine disputes of fact existed and reasonable inferences could be drawn from which a jury could find that the plaintiffs were employees).

6 *Werner*, 529 Fed. Appx. at 543.

7 *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976); *see also* Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1, 2015 WL 4449086 (July 15, 2015) ("DOL Interpretation") ("A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA.").

8 U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1, 2015 WL 4449086 (July 15, 2015), *available at* http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

discretion. The Department endorses a comparative analysis with respect to the investment in the business factor, under which a "worker's investment must be significant in nature and magnitude relevant to the employer's investment" for this factor to weigh in favor of independent contractor status.

The AI endorses decisions holding that the skill and initiative factor looks to a worker's "business skill, judgment, and initiative," and business acumen, not technical skills. The AI de-emphasizes the control factor because the FLSA was intended to replace the common law control test for employment, and states that it "should not play an oversized role in the analysis." In particular, the AI opines that the fact that a worker controls the hours she works is "largely insignificant" where such freedom is typical in the worker's specific industry.

Courts have begun to cite the AI in independent contractor misclassification cases.[9]

B. Circuit Level Independent Contractor Decisions

Eberline v. Media Net LLC, No. 15-60413, 2016 WL 279092 (5th Cir. Jan. 21, 2016)

The Fifth Circuit affirmed the jury's finding that satellite television installers were independent contractors, rather than employees. Applying the economic realities test, the Fifth Circuit cited evidence that the installers were able to adjust their own work schedules based on the customers' needs, there was no supervision or inspection of the work, the installers could do custom work at the request of a customer, and the installers could hire assistants to help with their assignments.

Safarian v. Am. DG Energy Inc., 622 F. App'x 149, 152 (3d Cir. 2015)

The Third Circuit vacated the district court's grant of summary judgment to the company because the district court did not reason through each of the economic reality factors even though it cited them. Instead, the district court privileged the "structure" of the parties' working relationship, including that the plaintiff billed his work through a company that he owned and used to claim tax advantages.

Perez v. Howes, 790 F.3d 681 (6th Cir. 2015)

The Sixth Circuit upheld the district court's determination that cucumber pickers were employees, and not contractors. The district court had distinguished the case from *Donovan v. Brandel*,[10] another case involving cucumber harvesters, in which the Sixth Circuit reached the opposite conclusion. Unlike in that case, there was not the same opportunity for profit because the workers did not manage the fields. They were also paid based on how many pickles they picked and thus could only increase their wages by working longer, which is not an opportunity for profit. The district court also found that pickle harvesting did not require a high degree of skill, and that the employer had invested a disproportionate amount of capital in the business.

Keller v. Miri Microsystems, Inc. 781 F.3d 799 (6th Cir. 2015)

---

[9] *See Hanson v. Trop, Inc.*, No. 1:14-CV-01096-AT, 2016 WL 861347, at *2 (N.D. Ga. Mar. 3, 2016).

[10] 736 F.2d 1114 (6th Cir. 1984)

In another cable installer case, the Sixth Circuit reversed the district court's grant of summary judgment, finding genuine issues of material fact existed as to each economic reality factor. The Sixth Circuit contrasted carpenters, who have "unique skill, craftsmanship, and artistic flourish," with the cable installers at issue who did not have "unique skills" but rather were selected based on availability and location. The Sixth Circuit also found it relevant that the installers presented themselves to customers as employees of the company.

Alexander v. FedEx Ground Package System, Inc., 765 F.3d 981 (9th Cir. 2014)

Applying California law, the Ninth Circuit found that FedEx had misclassified their full-time delivery drivers as independent contractors, and they were in fact employees. The Ninth Circuit analyzed FedEx's right to control the manner and means of accomplishing the work – the focus under California law, finding particularly significant that FedEx controlled the appearance of the drivers and their vehicles, the times the drivers worked, and to some degree when drivers delivered their packages. While the drivers had some entrepreneurial opportunities, including the right to drive multiple routes or hire helpers, their rights were contingent on FedEx's consent. The Ninth Circuit found it was significant that the drivers were entirely dependent on FedEx for customers.

Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir. 2013)

The Eleventh Circuit reversed summary judgment in favor of defendants and found on appeal that plaintiff cable installers were employees covered by the FLSA. Applying the economic realities test, the Eleventh Circuit viewed the relevant facts "through the lens of 'economic dependence' and whether they are more analogous to the 'usual path' of an employee or an independent contractor." While the cable installers admitted that they were skilled workers, the court found that the "meaningfulness of this skill as indicating that [they] were in business for themselves or economically independent . . . is undermined by the fact that [the employer] provided most [of them] with their skills." The Eleventh Circuit found that only two factors weighed slightly in favor of independent contractor status, and neither factor – investment and special skill – contributed significantly to the workers' economic independence or to distinguishing the workers from the usual path of an employee.

C. "Gig Economy" Workers

The on demand economy is growing at a rapid pace. These companies need to provide goods and services quickly with the touch of an app. Many have hired large numbers of workers, and most, with some exceptions, have labeled these workers as independent contractors, not employees. While some of these jobs offer workers "flexibility" in terms of how many jobs they accept or whether the work is fulltime or part-time, these companies typically exert significant control over the workers when they do "choose" to work.

In recent years, enforcement efforts have increased in this area, with lawsuits challenging worker classification becoming common. Two recent cases against Uber and Lyft highlight the difficulty of determining whether "gig economy" workers are correctly labeled as independent contractors. In each case, the courts denied motions for summary judgment filed by the companies.

Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

Lyft drivers brought a putative class action against the company, alleging that it misclassified them as independent contractors under California law, denied them minimum wages, and required them to pay for work-related expenses. The court held that a genuine dispute of material fact existed as to whether Lyft controlled how the drivers drove because it issued "Rules of the Road" guidelines, and reserved the right to penalize drivers who did not follow its rules. In addition, Lyft could terminate a driver at any time, without cause, and the work performed by the drivers was "wholly integrated" into Lyft's business. The drivers' control over when to work, the parties' independent contractor agreement, and the drivers' investment in their own cars were not sufficient to make the drivers independent contractors as a matter of law.

O'Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015)

Uber drivers brought a class action against the company, claiming that they were employees and not independent contractors. Applying California law, the court held there was sufficient evidence to create a fact question for trial, including that Uber penalized drivers for failing to accept rides, and promulgated rules regarding their dress, communications with customers, and even what they listened to on the radio while transporting customers. The court held that whether Uber possessed the right to control the drivers by firing them at will was in dispute and, if resolved for the drivers, would be strong evidence that they were employees. The court also rejected Uber's contention that it was merely a technology company, not a transportation provider, holding, "Uber acts as more than a mere passive intermediary between riders and drivers."

II. Employees or Trainees?

The past five years have seen a burst of litigation brought by unpaid interns claiming that they are employees entitled to the minimum wage and overtime under the Fair Labor Standards Act ("FLSA"). Although the FLSA contains no exception for interns, employers have relied on *Walling v. Portland Terminal Co.*,[11] a 1947 case involving individuals training to be railroad brakemen, to justify their exclusion of interns from FLSA coverage. In that case, the U.S. Supreme Court held that the brakemen trainees were not employees of the railroads that provided the training. Certain facts were significant to the Supreme Court's decision. First, it was undisputed that the trainees' work did not provide any "immediate advantage" to the railroads.[12] Second, the railroads provided "the same kind of instruction" to the applicants that a vocational school would provide.[13] Third, the trainees worked solely for their own "personal purpose or pleasure."[14] Finally, the trainees did not displace any regular employees and actually impeded their work.[15]

Recently, courts have grappled with *Portland Terminal*'s application to unpaid interns, including the test that should be used to analyze interns' employment status under the FLSA.

---

11 330 U.S. 148, 153 (1947).

12 *Id*.

13 *Id.*

14 *Id*. at 152.

15 *Id.* at 150.

Advocates for employers argue that courts should apply a "primary beneficiary" test that evaluates whether the intern or the putative employer benefits more from the relationship.[16] As discussed below, some courts have used versions of this test to evaluate the status of "trainees" and students engaged in vocational programs, and two Circuits, including the Second Circuit, adopted it to evaluate unpaid internships. Employee advocates have argued that the primary beneficiary test is not appropriate for interns because it is inconsistent with *Portland Terminal* and the FLSA's broad employee definition and is difficult to apply.[17] Instead, they support the six criteria set forth in the test promulgated by the U.S. Department of Labor ("DOL Test"), discussed below, which are derived directly from *Portland Terminal*.

A. The Primary Beneficiary Test

The primary beneficiary test focuses on the benefits that each party derives from the purported employment relationship.

In *Solis v. Laurelbook Sanitarium and School, Inc.*, the Sixth Circuit used the primary beneficiary test to find that students who performed tasks as part of their school's vocational curriculum were not employees of the school because they were the primary beneficiaries of the relationship.[18] The Sixth Circuit rejected the DOL Test as "overly rigid and inconsistent with a totality-of-the-circumstances approach" because the Test requires all six criteria to be met in order for a trainee to fall outside of the FLSA's coverage.[19]

Applying the primary beneficiary test, the Sixth Circuit acknowledged that the school benefitted from the students' labor.[20] The students provided services to sanitarium patients for which the school received payment.[21] The school also sold produce that the students helped grow and earned revenue by selling wood pallets that the students helped build.[22] However, the Sixth Circuit concluded that any benefits the school received were offset by the time instructors spent supervising students at the expense of performing their own productive work.[23] The Sixth Circuit also found that the students received both tangible and intangible benefits, such as hands-on training that allowed them to be competitive in the job market and lessons in the value of hard work, responsibility, leadership, and the importance of a strong work ethic.[24] Overall, although the school received some benefit from the students' unpaid labor, the primary benefit of the program flowed to the students.

---

16 *See, e.g., Glatt v. Fox Searchlight Pictures, Inc*., No. 13-4478-cv(L), Dkt. No. 94 at 27-40; *Wang v. Hearst Corp*., 13-4480-cv, Dkt. No 112 at 15-26.

17 *See, e.g., Glatt v. Fox Searchlight Pictures, Inc*., No. 13-4478-cv(L), Dkt. No. 122 at 14-24; *Wang v. Hearst Corp*., 13-4480-cv, Dkt. No. 59 at 34-36, 55.

18 642 F.3d 518, 532 (6th Cir. 2011).

19 *Id.* at 525.

20 *Id.* at 530.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

The circumstances of *Laurelbrook* are unlike most unpaid intern cases because, in *Laurelbrook*, the school provided the training – not a private employer – and the training was part of an accredited vocational program.[25] In many intern cases, interns perform work as part of an employer's regular operations and receive the same (or less) training and supervision as a regular employee. Although many employers require interns to receive school credit, schools often provide little or no oversight over the internship and the work the interns perform may bear scant relationship to their academic learning. Courts have generally held that these circumstances support an employment relationship.[26]

In January 2016, the Second Circuit adopted the primary beneficiary test to evaluate unpaid internships at private employers.[27] The court held that the test has "three salient features" that the DOL Test does not: it "focuses on what the intern receives in exchange for his work;" it "accords courts the flexibility to examine the economic reality as it exists between the intern and the employer;" and it recognizes that *bona fide* internships provide "educational or vocational benefits that are not necessarily expected with all forms of employment[.]"[28]

To guide courts, the Second Circuit adopted seven non-exhaustive factors, some of which, as discussed below, overlap with the DOL Test. The factors are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The Eleventh Circuit adopted the Second Circuit's test and set of factors in a case involving interns in a nurse anesthetist master's program who were required to have clinical experience to obtain their licenses.[29]

---

25 *Id*. at 520.

26 *See, e.g., Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979); *Wirtz v. Wardlaw*, 339 F.2d 785 (4th Cir. 1964).

27 *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016).

28 *Id*.

29 *Schumann v. Collier Anesthesia P.A.*, 803 F.3d 1199 (11th Cir. 2015).

B. The DOL Test

The DOL Test applies in the private "for profit" sector.[30] It requires all six factors to be met for an intern to fall outside of the FLSA's coverage. The criteria are as follows: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervising of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern and on occasion is impeded by the intern; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[31]

Some courts have found that the DOL Test is entitled to deference,[32] however, others have rejected the checklist approach in favor of using the factors to guide a totality of the circumstances analysis.[33]

C. Intern and Trainee Merits Decisions

Petroski v. H&R Block Eastern Enterprises, LLC, 750 F.3d 976 (8th Cir. 2014)

The Eight Circuit held that the plaintiffs were trainees and not employees during a 24-hour period of re-hire training. Applying *Portland Terminal*, the Circuit Court held that the plaintiffs did not displace regular employees and that the training did not expedite the defendant's business. While the training indirectly benefitted the defendant by providing it with a pool of trained potential hires, the defendant would only reap the benefit if the trainee accepted the company's offer of employment. The trainee could instead accept another employer's offer because the skills the plaintiffs gained were transferable within the field. The Circuit Court supported its conclusion by finding that the training met all of the DOL Test criteria.

Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831 (11th Cir. 2013)

The Eleventh Circuit held that students who completed an unpaid externship at a hospital to further their medical billing coursework were not employees. The Circuit Court held that the defendants did not benefit economically from the plaintiffs' work because the plaintiffs' presence in the office caused defendant's business to run less efficiently and resulted in some duplication of effort. Defendants spent time away from their own regular duties to train and supervise plaintiffs. Moreover, the Circuit Court found important that the plaintiffs received academic credit at the end of their externships. In support of its conclusion, the Circuit Court held that each of the DOL Test criteria favored the employer.

---

30 *See* Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (Apr. 2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

31 *Id*.

32 *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 n.7 (5th Cir. 1982)

33 *See Laurelbrook*, 642 F.3d at 525.

Blair v. Wills, 420 F.3d 823 (8th Cir. 2005)

In a case similar to *Laurelbrook,* the Eight Circuit looked to the "economic reality of the arrangement" to determine whether a student who performed various chores at his boarding school was an employee. The Eighth Circuit held the chores performed by the plaintiff were "an integral part of the educational curriculum" of the school and were completed primarily for the benefit of the student. Weighing the totality of the economic circumstances, it found that the plaintiff was not an employee under the FLSA.

Reich v. Parker Fire Protection District, 992 F.2d 1023 (10th Cir. 1993)

Applying the DOL Test using a totality of the circumstances approach, the Tenth Circuit concluded that firefighter trainees were not employees while training at a firefighting academy. The training academy was similar to a vocational school because trainees learned skills that were fungible in the industry. The training program also primarily benefitted the trainees who performed no productive work for the defendant and did not displace regular employees. Although the defendant benefitted from creating a trained workforce, this benefit was offset by the amount of time defendant spent conducting the training.

Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982)

The Fifth Circuit held that flight attendants and reservation sales agents who attended a training program before being hired were trainees, not employees. The training was similar to that which was taught in a vocational program, involved classroom and simulated learning, and no productive work. Throughout the training program, plaintiffs did not interact with customers and did not displace paid employees.

Mark v. Gawker Media LLC, No. 13 Civ. 4347, 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016)

Mark worked as an intern for a videogame blog operated by Gawker Media LLC. At the time of his internship, for which he received academic credit, Mark was pursuing a degree in journalism at the New School. The parties cross-moved for summary judgment, and the court ruled in the defendant's favor, concluding that Mark, and not Gawker, was the primary beneficiary of the relationship notwithstanding some evidence that Mark displaced regular employees.

With respect to the second and third *Glatt* factors, which focus on the training provided and its connection to the intern's schoolwork, the record established that the plaintiff received "mentorship and opportunities to learn journalism skills" from his supervisor, including critique and comments on articles he drafted, and a lengthy process of drafting a "larger-scale reported story" that was ultimately published under Mark's byline. Mark testified that his relationship with his supervisor was similar to his relationship with his editor at journalism school, and that the comments he received from his supervisor were equally helpful to those he received in school. Based on this evidence, the court concluded that Mark received "the same sort of hands-on instruction [during his internship] he received from his educational institution."

There was also a close connection between Mark's journalism degree and the activities he performed during his internship. Mark was required to do coursework related to his internship, including taking a class, submitting several academic papers, submitting a "learning agreement," and receiving an evaluation from his supervisor.

With respect to the fifth factor, there was no evidence that the plaintiff's internship "extend[ed] beyond the point where he was learning new skills and having important new experiences." The "capstone" of his internship – his long-term writing assignment – was published shortly before his internship ended.

Benjamin v. B & H Educ., Inc., No. 13-CV-04993-VC, 2015 WL 6164891 (N.D. Cal. Oct. 16, 2015)

Applying the Second Circuit's primary beneficiary test, the district court ruled that students training to be hair dressers were not employees of the cosmetology school that provided the training. The school had set up a clinic to help its students receive the hundreds of hours of clinical training necessary to become licensed cosmetologists in California and hair designers in Nevada. Teachers supervised students at the clinic. Customers paid for the services, and the money went to the schools. The students did not receive pay for their clinical work.

The court found that nearly all of the Second Circuit's primary beneficiary factors weighed in favor of the school. For example, the internship provided training similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions (factor 2), the internship was tied to a formal educational program (factor 3), accommodated the interns' academic commitments (factor 4), and was limited to the period in which it provided students necessary clinical hours for obtaining their licenses (factor 5). Critically, because the school created the clinic for the purpose of enabling students to obtain the clinical hours required for their licenses, the clinics did not hire paid employees (with the exception of the teachers) so students would not be displacing paid employees (factor 6), and the students would not be able to obtain a paid job in the student clinic after they completed the training (factor 7), unless they became a teacher at the cosmetology school.

Alladin v. Paramount Managements, LLC, No. 12 Civ. 4309, 2013 WL 4526002 (S.D.N.Y. Aug. 27, 2013)

The district court found that the plaintiff was an employee during the initial two-week period when her employer classified her as an intern. The plaintiff sent packages, answered phones, made coffee, ran errands, and performed other administrative tasks. The district court found that the employer was the primary beneficiary of the plaintiff's work, especially because the plaintiff did not receive any training or education beyond the on-the-job training given to employees.

Archie v. Grand Central Partnership, Inc., 997 F. Supp. 504 (S.D.N.Y. 1998)

Then-district judge Sotomayor applied the DOL Test, which it held was a "reasonable application of the FLSA and *Portland Terminal* and entitled to deference by this court." After a bench trial, the court held that the plaintiffs – formerly homeless individuals who performed maintenance, outreach, food preparation, and clerical work for the defendants' homeless outreach programs – were employees, not trainees. The court found that their work provided an immediate advantage to the employer because it was the type of work for which the defendants' competitors paid the minimum wage.

Marshall v. Baptist Hospital, Inc., 473 F. Supp. 465 (M.D. Tenn. 1979)

The district court found that the plaintiff, an X-ray technician, who completed a two-year training program at a hospital was an employee under the FLSA. After a brief initial orientation, trainees treated patients on their own without supervision or training. The district court also found dispositive that the trainees displaced regular, paid employees. Overall, the district court found that because the program was educationally deficient, the hospital received the primary benefit of the trainees' work.

III. Who Is the Employer?

A. Joint Employment under the FLSA.

Joint employer liability arises under the FLSA where an employee is simultaneously employed by more than one employer. If established, all joint employers are jointly and severally liable for FLSA compliance. In addition, hours worked for all joint employers during a workweek are aggregated for purposes of calculating overtime wages due.[34] Thus, joint employer laws can be a powerful tool in the fight to enforce workers' rights by adding potential overtime damages and reaching employers with deeper pockets.

The need for this tool that has become more prevalent as outsourcing, whether through layers of contracting or hosting staffing firms on-site, has spiked in recent years. The industries most affected by this outsourcing are ones of high-growth and labor-intensive jobs, such as temporary work, personal and home health services, agriculture, manufacturing, and transportation.[35] For example, it is estimated that 37% of janitorial workers are hired by staffing firms or labor contractors rather than the company for whom they clean.[36] The consequences of this outsourcing can be devastating as studies have found that second-tier subcontractors

---

[34] 29 C.F.R. § 791.2(a).

[35] *The Low-Wage Recovery: Industry Employment and Wages Four Years into the Recovery*, NATIONAL EMPLOYMENT LAW PROJECT (April 2014), *available at* http://www.nelp.org/page/-/Reports/Low-Wage-Recovery-Industry-Employment-Wages-2014-Report.pdf?nocdn=1 (last visited April 27, 2016).

[36] Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* at 17 (Univ. of Cal. Berkeley: Inst. for Research on Labor and Emp't, Working Paper No. 100-12, 2014) *available at* http://irle.berkeley.edu/workingpapers/100-14.pdf. *See, also, Awuah v. Coverall No. Am.*, 554 F.3d 7, 8 (1st Cir. 2009).

routinely refuse to pay minimum wage, overtime, payroll taxes, or workers' compensation.[37] One survey found that at least 26 percent of building and ground service workers did not receive minimum wage payments and almost 71 percent did not receive overtime pay.[38]

Joint employer status is determined by applying an "economic realities test."[39] Generally speaking this test goes beyond the traditional agency and control principles of the common law and instead, examines the broader economic realities of the relationship to determine whether the employees in question are economically dependent on the putative employer.[40] This test and its various factors should not be considered mechanically, but rather are guides for determining whether a worker is economically dependent upon a potential joint employer.[41] "The issue is not whether a farmworker is *more* dependent upon the farm labor contractor or the grower. Rather, the inquiry must focus on the economic reality of the particular relationship between the farmworker and the alleged joint employer."[42]

The most common example of joint employer liability arises when a worker performs work for two or more separate employers. Sometimes referred to as vertical joint employment, this involves work performed for an intermediary employer that is economically dependent on another employer. For example, a construction worker works for a subcontractor that contracts to provide certain services to a general contractor.

The exact economic realities test applied varies by circuit or court and is a fact-intensive inquiry. In the seminal case for this test, the Supreme Court, in *Rutherford Food Corp. v. McComb*, held that a slaughterhouse jointly employed workers who de-boned meat despite the fact that they were under the direct control of a separate contractor.[43] The *Rutherford* court reached this conclusion after it considered: (1) whether the workers performed specialty work on a production line; (2) whether the company had the same contracts with each of the various intermediary contractors; (3) whether the workers worked on the company's premises using its equipment; (4) whether the workers did not have an independent business that could take on other contracts; (5) whether the company's managers closely monitored their work; and (6)

---

37 Arindarajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. REL. REV. 287 (2010).

38 Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index

39 *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726, 730 (1947).

40 *Walling v. Portland Terminal Co*., 330 U.S. 148, 150-51 (1947); *see also* U.S. Dept. of Labor Administrator's Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act (Jan. 20, 2016) ("Admin.'s Interpretation"); *available at* http://www.dol.gov/whd/flsa/Joint_Employment_AI.htm (last visited April 27, 2016).

41 *Antenor v. D & S Farms*, 88 F.3d 925, 932-933 (11th Cir. 1996).

42 *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997) citing *Antenor*, 88 F.3d at 932 ("[T]he question in 'joint employment' cases is not whether the worker is more economically dependent on the independent contractor or the grower, with the winner avoiding responsibility as an employer.").

43 *Rutherford Food Corp*., 331 U.S. at 730.

whether the worker's earning were akin to piece rate as opposed to being dependent on business acumen.[44] It further noted that these factors were not exclusive, but rather should be considered holistically to determine the totality of the relationship in question.[45]

The Seventh Circuit uses a similar six factor test for determining joint employer status, which examines: "(1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business."[46]

The Second Circuit applies a six factor "functional control" test, which examines: (1) whether the alleged employer's premises and equipment were used for the plaintiffs' work; (2) whether the subcontractors 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 employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the employer or its agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the employer.[47]

The Ninth Circuit applies a combination of factors that overlap with these other circuit tests.[48] Its factors are derived from several sources, including four control factors set forth by *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983),[49] the Migrant

---

44 *Id*.

45 *Id*.

46 *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1535-38 (7th Cir. 1987) (affirming that migrant farm workers were employees of farm based on their economic dependence on the farm as shown by 6-factor test).

47 *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (reversing trial court's grant of summary judgment in favor of garment manufacturer who hired contractors that immediately employed garment workers because the trial court improperly considered only control related factors and instead, should have applied the 6-factor test); *see also Barfield v. N.Y. City Health and Hosp. Corp*., 537 F.3d 132, 144-150 (2d Cir. 2008) (affirming finding of joint employer status against hospital and nursing referral agency on behalf of contracted nurse; applying 6-factor test).

48 *See Torres-Lopez*, 111 F.3d at 639-40 (reversing summary judgment favoring defendant and instead, finding grower was joint employer of farm workers under FLSA and MSPA based on a combination of factors).

49 These *Bonnette* factors are "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1470.

and Seasonal Agricultural Worker Protection Act's joint employment regulations,[50] and an additional 8- factor non-regulatory factor test.[51]

Unfortunately, some courts apply tests that only focus on a putative employer's control, which is contrary to plain language and legislative history of the FLSA that expands its definition of employment status beyond the narrower common law control tests. For example, the Third Circuit considers: "(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes, and the like."[52] The First Circuit applies a similar control test.[53] Other circuits have expressly rejected such control tests on the basis that "[m]easured against the expansive language of the FLSA, [a control only test] is unduly narrow, as it focuses solely on the formal right to control the physical performance of another's work…However, [that] test cannot be reconciled with the 'suffer or permit' language in the statute, which necessarily reaches beyond traditional agency law."[54]

As some of these tests demonstrate, courts often look to regulatory guidance to determine joint employer status. There are two sets of regulations that merit mention. The first is the Department of Labor's joint employer regulations. Found at 29 C.F.R. § 791.2, these regulations explain that joint employment relationships generally exist "(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other

---

[50] The *Torres-Lopez* court relied upon the following regulatory factors in its decision: (1) the nature and 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 the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5) preparation of payroll and the payment of wages. *Torres-Lopez*, 111 F.3d at 639-40, citing formerly 29 C.F.R. § 500.20(h)(4)(ii).

[51] Those 8 factors are: (1) whether the work was a specialty job on the production line; (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; (3) whether the premises and equipment of the employer are used for the work; (4) whether the employees had a business organization that could or did shift as a unit from one worksite to another; (5) whether the work was piecework and not work that required initiative, judgment or foresight; (6) whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill; (7) whether there was permanence in the working relationship; and (8) whether the service rendered is an integral part of the alleged employer's business. *Id.* at 640.

[52] *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012) (holding that parent company was not joint employer of managers and assistant managers because it did not exercise significant control over those workers).

[53] *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) ("To that end, we find that the factors used in *Bonnette*, 704 F.2d 1465, provide a useful framework.").

[54] *Zheng*, 355 F.3d at 69; *see also id*. at 79 ("Under the broad language of 29 U.S.C. § 203(g), as interpreted in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), a district court must look beyond traditional agency principles before declaring that the entity is not an employer under the FLSA.")

employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." While not particularly illuminating on their own, courts have relied upon these regulations to find joint employment status.[55]

In addition to the DOL regulations, courts have also relied upon Migrant and Seasonal Agricultural Worker Protection Act's ("MSPA") joint employment regulations. The MSPA involves the same scope of employment relationships as the FLSA because it defines "employ" the same as the FLSA and because its regulations explicitly incorporate FLSA's joint employment principles.[56] The MSPA regulations identify seven factors for determining joint employer status, which include: (1) whether there is power to direct, control, or supervise the work performed; (2) whether there is direct or indirect control over employment conditions, such as hiring or firing or affecting pay rates; (3) the permanency and duration of the relationship; (4) whether the work requires specialized skills as opposed to repetitive, rote actions; (5) whether the work is integral to the business of the potential joint employer; (6) whether the work performed occurred on premises owned and/or controlled by the potential joint employer; and (7) whether the potential joint employer performs administrative functions commonly done by employers.[57] Notably, many of these factors overlap with the factors used by the various circuits.

Just this January, the DOL issued an Administrator Interpretation No. 2016-1 directly on the subject of joint employment under the FLSA and MSPA.[58] This Intepretation is an excellent reference document to understand the historical context of the joint employment doctrine as well as the functional tests applied under both acts. It also reinforces the broad scope of joint employer status, the need to conduct an in-depth analysis of all circumstances that would reveal indicia of economic dependence, and social imperative to apply an expansive joint employer definition to achieve the remedial purpose of the FLSA.[59]

---

55 *See, e.g., Schultz v. Capital Int'l Sec., Inc*., 466 F.3d 298, 306 (4th Cir. 2006) (finding security firm and Saudi prince to be protected were joint employers of personal security workers because the work performed simultaneously benefited both under 791.2(b) and the firm and the prince were not completely disassociated with the respect to the workers' employment under 791.2(c)).

56 *See* 29 U.S.C. § 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA]); 29 C.F.R. 500.20(h)(5) ("The definition of the term employ includes the joint employment principles applicable under the Fair Labor Standards Act.").

57 29 C.F.R. § 500.20(h)(5)(iv)(A)-(G).

58 Admin.'s Interpretation at § 1.

59 *Id*. The Interpretation also discusses horizontal joint employment, which is where an employee is employed by two or more technically separate but related employers. *Id*. at § 2. For example, a waitress works for restaurant A and restaurant B in the same workweek, but both are sufficiently associated to constitute joint employers.

It is also worth noting that several states apply different joint employer doctrines that may provide greater protection than offered under the FLSA.[60] Practitioners should consider those state law options when confronted with joint employer issues.

B. Joint Employment under the NLRA.

In 2014 and 2015, the National Labor Relations Board ("Board") issued two decisions greatly impacting who and what are covered under the National Labor Relations Act ("Act"), *FedEx Home Delivery ("Fedex")*, 361 NLRB No. 55 (September 30, 2014) and *Browning Ferris Industries of California ("BFI")*, 362 NLRB No. 186 (August 27, 2015).

The Board's Fedex decision explained that analyzing all ten factors is required in determining whether one is an employee or an independent contractor rather than one or two factors predominating the analysis. A more comprehensive discussion of the independent contractor analysis is set forth earlier in this paper.

The Board's BFI decision essentially reaffirmed the NLRB's previously applied joint employer standard that had been in existence pre-1984. The Board returned to the common-law concept of control in evaluating whether a joint employer relationship existed. The two-part test consists of: (1) whether there is a common-law employment relationship with the employees in question and (2) whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

In evaluating whether sufficient control existed, the Board rejected that control must be direct and immediate. Rather, the Board found probative direct, indirect, and potential exercise of control over working conditions. Examples of control can be found in the direct involvement in the terms and conditions of the employees such as hiring and firing. Examples of control can be found in the indirect involvement of the putative employer imposing specific conditions over the other employer's employees, such has specific qualifications for an employee to retain a job. Examples of control can be found in unexercised contractual terms between the two employers.

The BFI's joint-employer standard is a fact intensive analysis. It requires an examination of the relationship between the putative joint employers and between the putative joint employers and the employees. It is noteworthy that while the examination entails reviewing all aspects of the relationship, the burden still remains with the party asserting the joint employer status.

Instructive in understanding the application of the Board's joint-employer standard is an NLRB Advice memorandum that issued in *Nationality, Inc. d/b/a Freshii*, 13-CA-134294. Although issued prior to the BFI decision, the analysis in the memorandum applied the NLRB's

---

[60] *See, e.g., Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010) (under California law, applying three tests for joint employer status, which include (1) exercising control over the wages, hours, or working conditions; (2) suffering or permitting work; and (3) engaging in a way to create a common law employment relationship).

General Counsel's proposed legal standard for joint employer that was largely adopted by the Board in BFI.

Analyzing the joint-employer under the totality of the circumstances, the NLRB's Division of Advice determined the employers were not joint-employer because "Freshii does not significantly influence the working conditions of Nutritionality's employees. . . because Freshii does not directly or indirectly control or otherwise restrict the employees' core terms and conditions of employment . . ."

Parties to Board proceedings, and indeed the dissent in BFI, have raised concerns on the manageability and uncertainty of the application of such a broad standard. Recently, those same concerns have been raised in the NLRB's General Counsel's ("GC") prosecution of a nation-wide unfair labor practice cases against McDonald Corporation and individually named franchisees as joint-employers, applying the standard enunciated in BFI. Given the volume of evidence the GC intends to introduce to establish the direct, indirect, and potential control McDonald Corporation exercises over the individually named franchisees, it is expected that the first stage of the trial involving the joint-employer issue will be quite extensive before the substantive unfair labor practice allegations will be litigated.

A potential significant application of the BFI joint employer standard can be found in the *Miller & Anderson, Inc.*, 5-RC-079249, case that is currently pending before the Board. One of the issues the Board invited amicus briefs on is whether to disallow inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers. If the Board rules in favor of allowing the inclusion, coupled with BFI's joint employer standard, the potential change in the dynamic of labor-management relationships could be considerable. Outside of traditional labor organizing efforts, the potential liability that putative joint employers may incur for meritorious unfair labor practices could also be substantial, such as backpay, reinstatements, and bargaining obligations.