Employment Law for Human Resource Practice 6th edition Walsh Solutions Manual

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CHAPTER 2
THE EMPLOYMENT RELATIONSHIP

OUTLINE

The Changing Workplace: Contingent Work and Alternatives to Direct Employment

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CASE QUESTIONS

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

Miri… operates in Michigan and provides installation services for HughesNet and iDirect, nationwide providers of satellite internet systems and services. Keller was one of approximately ten satellite-internet technicians who installed satellite dishes for Miri. Miri is one of many middlemen in the satellite-0installation-servfices business. *** Miri pays technicians by the job, not by the hour. *** Keller worked six days a week from 5:00 am to midnight, taking only Sunday off. Keller completed two to four installations per day, and he had to travel between jobs. Miri paid Keller $110 per installation and $60 for each repair he performed. Miri did not withhold federal payroll taxes from Keller's payments or provide Keller benefits.

On November 23, 2012, Keller stopped working for Miri. Soon thereafter, he filed this lawsuit, alleging that Miri's payment system violates the FLSA. *** The district court granted Miri's motion for summary judgment, holding that Keller was an independent contract for Miri, not an employee. Keller appealed. Applying the economic realities test, the appellate court determined that there were many genuine issues of disputed fact which precluded summary judgment, and from which a jury could reasonably determine that Keller was an employee. Judgment for Miri was vacated, and the case remanded for trial.

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

The legal issue in this case was whether Keller and the other technicians were employees or independent contractors. The appeals court vacated summary judgment in favor of Miri, and remanded the case for trial.

2. *Applying the economic realities test to the facts of this case, what are some of the main facts that would support the conclusion that the technicians were employees?*

The factors which tend to support Keller's claim that he is an employee are the fact that he worked for Miri exclusively for nearly 20 months, and for no other firms, he was provided training for his job by Miri, his capital investment was much less than that of Miri, that Keller had little opportunity to control his ability to earn profit, and that the work that Keller did was integral to the business of Miri.

3. *Applying the economic realities test to the facts of this case, what are some of the main facts that would support the conclusion that the technicians were independent contractors?*

Keller mostly controlled the manner in which he performed his work, after he had completed his training. In addition, he was paid a flat fee per job, for an installation or

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repair, rather than a salary. Other factors which tend to support Keller's contention that he was an employee could be determined by a jury to be instead factors which tend to support Miri's claim that he was an independent contractor.

4. *Considering the totality of the evidence, would you say that the technicians were working as employees or independent contractors? Why do you conclude that?*

Students may differ in their answers, and may consider factors as tending to support an opposite conclusion than others. They should, however, support their conclusion with relevant factors from the economic realities test.

5. *If it is determined on remand that the technicians are, in fact, employees, what should Miri do? Are there ways in which its relationship with the technicians could be restructured that would make the technicians more clearly independent contractors and also make business sense? Which ways?*

First, Miri could draft an independent contractor agreement listing emphasizing those factors which tend to prove independent contractor status. Their case would be much stronger if the technicians came to them with the knowledge of how to installs satellite systems. But if they make that a requirement of employment, they might have a much harder time finding an adequate number of technicians. Considering the factors which tend toward an employee status, Miri would have to counter those as best they could in the independent contractor agreement.

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 was the legal issue in this case? What did the Appeals court decide?*

The legal issue in this case was under what circumstances an unpaid intern must be deemed an "employee" under the FLSA and entitled to compensation for his work in compliance with the FLSA. The appeals court vacated the judgment of the District Court that the interns at issue were employees entitled to compensation, and remanded the case for further proceedings, consistent with its opinion.

2. *What had been the basis for the district court's decision that Glatt and Footman were employees under the FLSA? Why did the appeals court reject that decision?*

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The district court had considered the factors set out by the DOL in its Intern Fact Sheet, by balancing them to see which favored an employment status, and which favored an intern status. However, the DOL had set forth the factors designating that ALL were required to establish that an employment relationship did not exist. Instead, the District Court weighed the factors.

3. *What criteria does the appeals court say should generally be used in deciding whether interns at for-profit firms are employees?*

The appeals court designated a non-exhaustive list of factors to be applied in such cases, which consist of:

- One. 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.

- Two. The internship experience is for the benefit of the intern.

- Three. The intern does not displace regular employees, but works under close supervision of existing staff;

- Four. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

- Five. The intern is not necessarily entitled to a job at the conclusion of the internship; and

- Six. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

4. *Given what we know about the facts of this case, what should the district court decide on remand when it applies the appeals court's criteria to the cases of Glatt and Footman? Why?*

Students' answers may differ, but if the rule is that *all* of the factors must apply, then it is likely the District Court will find that the workers were employees, and not unpaid interns. Much of the work the interns performed did not advance their education in this area because much of it was basic clerical work. In addition, that work likely displaced the work of other paid employees. Their duties as recited did not provide training in entertainment, and rendered an immediate benefit to the employer.

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5. *Do you agree with the decision of the appeals court in this case? Did the decision succeed in striking the right balance between protecting workers from exploitation and promoting the availability of internships? Why or why not?*

Again, student answers may differ. Also, as students, they are more likely to readily see the point of view of the interns than the point of view of the studio. The appeals court adopted the DOL rule that ALL of the stated factors must exist for a finding that the employment relationship did not exist. In that decision, it did not balance protecting workers from exploitation and promoting the availability of internships.

SALINAS V. COMMERCIAL INTERIORS, 848 F.3d 125 (4th Cir. 2017)

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

The legal issue in this case was whether Commercial Interiors was a joint employer of Salinas and others who had worked for J.I. General Contractors. The appeals court decided that Commercial Interiors was a joint employer of Salinas and the other employees of J.I. General Contractors.

2.) *Which criteria had the district court used to determine joint employment? What additional criteria does the appeals court say must be applied? Which alternative test does the appeals court put forth?*

The district court granted summary judgment to Commercial because it said that Commercial and JI had a recognized, legitimate contractor-subcontractor relationship, and did not intend to avoid compliance with the FLSA or state laws. The appeals court held that entities constitute joint employers for purposes of the FLSA when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.

3.) *How does the appeals court apply its test of joint employment status to the facts case?*

The appeals court referenced the DOL's regulations, which stated, *inter alia*, that separate employment exists when "all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the individual's employment." ***By contrast, joint employment exists when "the facts establish…that employment by one employer is not completely disassociated from employment by the other employer[]."

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In furtherance of this test, the appeals court designated three non-exclusive factors to determine whether joint employment exists:

- One. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;

- Two. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to this employee; or

- Three. 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.

4.) *What are the practical implications of this decision for relationships between general contractors and subcontractor firms? Is the appeals court convincing when it argues that this decision should not have adverse effects on general contractors? Why or why not?*

The practical implications of this decision are that general contractors must take steps to avoid being determined joint employers by controlling the employees of the subcontractor. Commercial's argument that it had the right to supervise the work of the employees for purposes of contract compliance and quality control did not dissuade the appeals court of its status as joint employer, because Commercial exercised other types of control over J.I's employees. The appeals court quotes from an earlier decision in which the court stated that no additional costs would be incurred by general contractors in these arrangements unless they deliberately try to avoid the legal requirements of the FLSA and state laws, or their subcontractors do. Whether this will prove true in practice is hard to determine.

5.) *Do you agree with the decision in this case? Why or why not?*

Students' answers will vary.

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JUST THE FACTS

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To become a driver with Uber, an individual must complete an application form; provide evidence of a driver's license, registration and insurance; undergo a background check; pass a "city knowledge test;" and be interviewed. Drivers sign a contract with Uber that specifies that their relationship is "solely that of independent contracting parties." Drivers use their own vehicles and are responsible for fuel and maintenance. They set their own hours and work schedules. Drivers can, and frequently do, also work for other online car services. When they transport passengers who have arranged for rides via Uber's app, Uber receives the full payment, deducts approximately 20 percent of the total fare as a "fee per ride," and remits the remaining amount to drivers.

Uber sets fares charged to passengers unilaterally and without any input from drivers. The company prohibits drivers from soliciting passengers regarding future rides or booking rides outside of the Uber platform. Violation of this rule results in "immediate suspension from the Uber network." In addition, the company terminates driers who do not meet its performance standards. Its agreement with drivers gives the company the sole discretion to remove drivers from its app at any time and for any reason.

Drivers are not strictly required to accept all referrals when on duty. Nevertheless, Uber's Driver Handbook says that "we expect on-duty drivers to accept all ride requests" and drivers with ride acceptance rates of less than 80 percent are in danger of having their Uber accounts suspended. Drivers work unsupervised, but are told to "dress professionally," send waiting passengers text messages shortly before pickup, restrict radio use to soft jazz or NPR, follow specific customer pickup procedures, and open the car door for passengers. Passengers, in turn, are asked by Uber to complete performance ratings of drivers.

The specific details of Uber's arrangements with its drivers vary over time and across locations. But under these facts, are Uber drivers employees or independent contractors? Why? (O'Connor v. Uber Technologies, 2015 U.S. Dist. LEXIS 30684 (N.D. Cal.))

The court denied Uber's Motion for Summary Judgment to declare all Uber drivers as independent contractors as a matter of law, holding that plaintiffs are presumptive employees because they "perform services" for the benefit of defendant, and that whether individuals should ultimately be classified as employees or independent contractors under California law presented mixed questions of law and fact, preventing the entry of summary judgment. The case then proceeded with a challenge by Uber to the plaintiff's lawsuit, contending that they were subject to binding arbitration. The case was then placed on hold pending the U.S. Supreme Court's decision in three pending cases questioning whether the NLRB has jurisdiction in the matter.

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A for-profit college in Florida offers an accredited program for training nurse anesthetists. The college's owners also have ownership interests in a company that provides anesthesia services. Students in this program spend their last four semesters primarily engaged in unpaid clinical practice. Most of this clinical experience occurs at facilities operated by this one company. The state and the professional associations overseeing nurse anesthetist programs both require that students participate in substantial amounts of clinical training. Graduation from an accredited program is a requirement to sit for the board examination and to become a nurse anesthetist.

Students remain registered in the program and receive course credit for their clinical work. Supervising nurse anesthetists or anesthesiologists write daily evaluations of students' performance. Students work more than 40 hours per week and are assigned to the company's facilities on a year-round basis. The students are identified to patients as student RNAs and wear scrubs with the college's logo. While most of their work is supervised, they ready rooms, stock carts, prepare preoperative forms, and perform other functions without direct supervision.

The extent to which the students reduce the need for other paid staff is disputed. A former office manager said that fewer paid professionals were needed because of the students, while other managers contend that the company is capable of meeting its patient safety and legal obligations with existing licensed personnel, without using the students and without incurring additional personnel costs. They also point to ways in which having to train students, including writing daily evaluations, impedes the delivery of anesthesia services. The company is reimbursed for the students' work under a Medicare rule that allows it to bill 100 percent for two patients being treated at the same time if the certified professional is assisted by a student in each case. The students claim that they are employees entitled to proper payment under the FLSA. What should the court decide? Why? Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015)).

The appeals court did not take a position on whether or not the interns were employees for purposes of the FLSA, but vacated summary judgment in favor of Collier Anesthesia. The court remanded the case for determination of the "primary beneficiary" in the intern relationship, in particular by considering the following seven factors:

1. The extent to which the intern and employer clearly understand there is no expectation of compensation.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment.
3. The extent to which the internship is tied to the intern's formal education program by integrated course work 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.

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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.

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PRACTICAL CONSIDERATIONS

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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

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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

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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.

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CHAPTER QUESTIONS

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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 overwrites 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

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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.) *"Black cars" are for-hire vehicles that provide ground transportation by prearrangement with customers. Black-car drivers rent or purchase their franchises directly from franchisors. The franchise agreements require franchisees to pay additional fees and to obtain a New York City Taxi & Limousine Commission ("TLC") license, insurance, and a vehicle that they are responsible for maintaining. Franchise agreements state that "Franchisee is not an employee or agent of Franchisor, but merely a subscriber to the services by Franchisor. Franchisee shall at all times be free from the control or direction of Franchisor in the operation of Franchisee's business, and Franchisor shall not control, supervise, or direct the services to be performed by Franchisee." The franchise agreements also require that drivers comply with "Rulebooks"—manuals setting our certain standards of conduct. The Rulebooks forbid, for instance, harassing customers or other drivers and submitting fraudulent vouchers. The Rulebooks include a dress code, which requires drivers to dress neatly in specified business attire, as well as guidelines for keeping vehicles clean. Drivers are not required to wear a uniform, however, or to mark their cars with franchisor insignias. Compliance with the Rulebooks is enforced by Franchisor Security Committees, composed entirely of drivers who serve elected terms. If a Security Committee determines that a driver has broken a rule, it can impose a monetary penalty on the driver, temporarily suspend the driver, or even terminate the driver's franchise agreement. Black-car drivers signal their availability to work by consulting a smartphone app, choosing a zone, and "booking into" it. Drivers determine when and how often to drive, choose which area in which to work, and are free to accept or decline jobs. Most of the drivers drive for other black-car companies regularly. Once a driver picks up a client, he or she is free to choose the route to that client's designation. The franchisors negotiate rates with clients, supply a proprietary dispatch technology, and operate the dispatch system. Drivers take home the majority (in some cases up to 85 percent) of each fare. Drivers classify themselves as independent contractors on their tax returns and take substantial business deductions. Are the drivers employees covered by the FLSA or independent contractors? Why?* (Saleem v. Corp. Transp. Group, 854 F.3d 131 (2nd Cir. 2016).

The appeals court affirmed the judgment of the district court, rejecting plaintiff's claims, and finding that they were independent contractors within the meaning of the FLSA. Reviewing the judgment of the district court *de novo*, the appeals court viewed the evidence in the light most favorable to plaintiffs, found that there was no genuine issue as to any material fact, and that judgment for defendants (CTG) was warranted as a

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matter of law. The district court had applied the rule of the totality of the circumstances in addressing whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves. The record established that plaintiffs independently determined (1) the manner and extent of their affiliation with CTG, (2) whether to work exclusively for CTG accounts or provide rides for CTG's rivals' clients and/or develop business of their own; (3) the degree to which they would invest in their driving businesses; and (4) when, where, and how regularly to provide rides for CTG clients. While none of these facts was determinative on its own, considered as a whole, the district court correctly determined that plaintiffs are, as a matter of law, properly classified as independent contractors for purposes of the FLSA and state law. (*Saleem v. Corp. Transp. Group*, 854 F.3d 131 (2d Cir. 2016).

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 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*

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fundraising. In all, the coach spent an estimated 400–450 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 more than $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 predicted 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? Why? (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."

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).

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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 a 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 the seed company's work rules. The seed company had supervisors in the fields to inspect work and determine when jobs needed to be redone. The labor contractor had no clients other than this seed company. The seed company 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 the seed company. The workers brought suit under the Fair Labor Standards Act against both the labor contractor and the seed company. Is the seed company 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 the seed company, Remington Hybrid Seed Company. 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.

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7). The plaintiff is one of approximately 200 operators working for a marketing company that provides "customer relationship management services" to corporate clients nationwide. Since early 2006, she 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 the operators. The bank oversees day-to-day operations by monitoring phone calls to ensure that its procedures are being followed. The plaintiff works in a call center owned by the marketing company. She was hired and is paid and scheduled by the marketing company, which also maintains her personnel records. The plaintiff and the other operators brought a class-action lawsuit against both the marketing firm and the client bank, alleging improper compensation. Is the bank a joint employer of these call center workers? Why or why not? (Lepkowski v. Telatron Marketing Group and Bank of America, 2011 U.S. Dist. LEXIS 9388 (W.D. Pa.).

No, and Bank of America's Motion to Dismiss was granted. In making its ruling, the court considered (1) Did BoA have the power to hire or fire Telatron employees? (2) Did BoA possess authority to supervise and control work schedules or employment conditions? (3) Did BoA have authority to determine rates and methods of payment? (4) Did BoA maintain employment records for Telatron employees? (5) Did plaintiffs use BoA's premises and equipment for their work? (6) Were the plaintiffs part of a business that could shift as a unit from one putative joint employer to another? (7) Can the responsibilities of the direct employer be transferred to the putative joint employer without material changes?

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 is your view of unpaid internships? Should they ever be lawful? A long-time critic of unpaid internships has argued that the court erred in Glatt v. Fox Searchlight*

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Pictures by focusing on whether internships are overseen by colleges: "these very same institutions have been complicit in the internship boom by ignoring abuses, requiring internships for graduation and charging students for academic credit when they go off campus to do unpaid work." Do you agree or disagree with this sentiment? Why? (See Ross Perlin, "Interns, Victimized Yet Again." New York Times (July 3, 2015, A19.)

Students' answers will vary.

10.) *Should "student-athletes" who participate in "big-time" college sports programs 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.)*

Students' answers will vary.

11.) *What are the consequences of denying back pay and other individual remedies to undocumented workers? Justice Stephen 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?*

Students' answers will vary.

12.) *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 worker's 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 by held responsible for the employment practices of companies with which they contract? (See Steven Greenhouse, "Middlemen in the Low-Wage Economy." New York Times [December 28, 2003], WK10).*

Students' answers will vary.

13.) *Is the employee/independent contractor dichotomy adequate to capture the legal essence of all working relationships or – particularly in the case of "on-demand" or "gig economy" workers—is a more refined set of distinctions needed? For example, a middle-ground category of "independent workers" has been proposed that would enjoy some, but not all, of the legal protections available to employees. Does that sound like a good idea? Why or why not? (See Seth D. Harris and Alan B. Krueger. "Is Your Uber Driver an Employee or an Independent Contractor?" Perspectives on Work 20 [2016], 30-33, 80.)*

Students' answers will vary.

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Employment Law
for Human Resource Practice
Sixth Edition

DAVID WALSH

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Part 1 – Introduction to Employment Law

Chapter I – Overview of Employment Law

Chapter 2 – The Employment Relationship

Chapter 3 – Overview of Employment Discrimination

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Chapter 2 – The Employment Relationship (1 of 1)

- The Importance of Determining Whether an Employment Relationship Exists
- Who is an Employee?
- Who is the Employer?

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The Employment Relationship (1 of 1)

- This chapter delves into the meaning of the terms **employee** and **employer**, and the legal significance of determining whether an employment relationship exists
- You might be surprised by how slippery the definitions of "**employee**" and "**employer**" turn out to be

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The Importance of Determining Whether an Employment Relationship Exists (1 of 2)

- First, if someone is an employee, her employer is required to withhold income taxes and to pay the employer's share of Social Security and Medicare taxes
- Additional payments must be made for worker's compensation and unemployment insurance
- But audits disclose that 10 to 30% of employers misclassify at least some employees as independent contractors

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The Importance of Determining Whether an Employment Relationship Exists (2 of 2)

- Second, most of the laws discussed in this book do not apply without an employment relationship
- Also, contractual benefits from employer's policies and benefit programs apply only to employees
  - **Contingent work (nonstandard work)** represents other work situations
- In addition, employment laws often apply or not, depending on how many employees a firm has
- And even when a person is an employee, there can be questions about the identity of the employer

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Who is an Employee? (1 of 16)

- In Title VII, Congress defined an employee as “an individual employed by an employer…”, a definition which is hopelessly circular
- The fact that a person performs work for another and is paid does not distinguish between employees and independent contractors
- Difficulties also arise with temps, interns, students, volunteers, and partners

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Who is an Employee? (2 of 16)

- **Independent Contractors**
  - The **economic realities test** to distinguish between employees and independent contractors includes:
  - 1. Who has the right to control how, when, and where the work is done?
  - 2. Who provides the tools, materials, and the resources needed for the work to be performed?
  - 3. Does the method of payment afford opportunity for profit or loss, depending on how well the work is managed?

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Who is an Employee? (3 of 16)

- Independent Contractors (cont)
  - The **economic realities** test includes: (cont)
  - 4. What is the duration of the working relationship?
  - 5. Does the work require some type of special skill?
  - 6. How integral to the business is the work that is being performed?
  - 7. Overall, how dependent is the person performing the work on the hiring party?

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Who is an Employee? (4 of 16)

- Independent Contractors (cont)
  - The **common law test** to distinguish between employees and independent contractors includes:
  - 1. The extent of the hiring party's right to control the manner and means by which the work is done
  - 2. The level of skill required
  - 3. The source of necessary tools and materials
  - 4. The location of the work
  - 5. The duration of the work

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Who is an Employee? (5 of 16)

- Independent Contractors (cont)
  - The **common law test** includes: (cont)
  - 6. The extent of the hiring party's right to assign additional projects to the hired party
  - 7. The extent of the hired party's discretion over when and how long to work
  - 8. The method of payment
  - 9. The hired party's role in hiring and paying assistants
  - 10. The extent to which the work is part of the regular business of the hiring party

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Who is an Employee? (6 of 16)

- Independent Contractors (cont)
  - The **common law test** includes: (cont)
  - 11. Whether the hiring party is in business
  - 12. Whether benefits of any kind are provided to the hired party
  - 13. The tax treatment of the hired party
  - The common law test emphasizes **right of control**, while the economic realities test focuses on the **market** for the contractor's services

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Who is an Employee? (7 of 16)

- Using Independent Contractors (ICs)
  - A firm cannot establish independent contractor status simply by labeling its workers that way
  - Because **right of control** is so important in determining worker status, firms must be prepared to relinquish most of their control over how the work is done if they want to use independent contractors rather than employees

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Who is an Employee? (8 of 16)

- Using Independent Contractors (cont)
  - To achieve IC status, most of the following conditions must be met:
    - Require that ICs supply their own tools, materials, and equipment, and pay their own business expenses
    - Require that ICs hire their own assistants
    - Pay ICs a flat fee for the work performed rather than an hourly or weekly rate

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Who is an Employee? (9 of 16)

- Using Independent Contractors (cont)
  - To achieve IC status: (cont)
    - Closely review long-term ICs and do not assign new projects without renewing agreements
    - Do not have ICs do the same work that regular employees do or work that is central to the business
    - Do not provide benefits to ICs, nor paid time off
    - Make it clear that ICs are free to work for others

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Who is an Employee? (10 of 16)

- Using Independent Contractors **(cont)**
  - **Practical Considerations:** Try your hand at drafting an independent contractor agreement that a firm 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

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Who is an Employee? (11 of 16)

- **Temporary Workers**
  - Legal problems can arise when **temporary workers** (“temps”) - especially those kept on for long periods of time and doing the same work as regular employees – challenge their exclusion from employee benefits
  - Microsoft’s “permatemps” is a case in point

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Who is an Employee? (12 of 16)

- Students and Interns
  - If work is performed for educational institutions by students, at least partly for educational purposes, are those people employees, students, or both?
  - Most recently, the NLRB concluded that:
    - Graduate teaching and research assistants are employees (as well as students)
    - Student athletes have the right to unionize

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Who is an Employee? (13 of 16)

- **Volunteers**
  - Disputes occasionally arise regarding **volunteers**
    - A nonprofit agency serving addicts and the homeless also ran several commercial for-profit businesses to raise operating funds, and the agency's clients received food, clothing, shelter and medical, but not wages
    - The Supreme Court held they were employees entitled to minimum wage

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Who is an Employee? (14 of 16)

- **Partners**
  - To distinguish between employees and **partners**, the EEOC considers:
  - 1. Whether the organization can hire or fire the individual or set rules and regulations controlling the individual's work
  - 2. Whether and to what extent the organization supervises the individual's work
  - 3. Whether the individual reports to someone higher in the organization

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Who is an Employee? (15 of 16)

- **Partners** (cont)
  - The EEOC considers: (cont)
  - 4. Whether and to what extent the individual is able to influence the organization
  - 5. Whether the parties intend for the individual to be an employee or a partner, as expressed in a written agreement or contracts
  - 6. Whether the individual shares in the profits, losses, and liabilities of the organization

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Who is an Employee? (16 of 16)

- Other Issues Concerning Employee Status
  - Managers and supervisors are generally considered employees, but they are not protected by the NLRA and are often exempted from coverage under wage and hour laws
  - Undocumented workers are treated the same as other employees and allowed to pursue their legal claims, but their remedies may be limited

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Who is the Employer? (1 of 5)

- Even when it is agreed that a worker is an employee, identification of the employer is important because it generally determines who will be held legally responsible for any award or damages if an employee's rights are violated
- We will consider three aspects of this issue:
  - Agency
  - Integrated Enterprise
  - Joint Employers

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Who is the Employer? (2 of 5)

- Agency
  - As a general rule, employers are legally responsible for the actions of their employees, so ***must carefully select, train, monitor them and review their actions***
  - Employer liability is usually limited to employee actions taken within the **scope of employment:**
    - Actions that relate to the kind of work the employee was hired to perform
    - Take place substantially within the workplace during work hours
    - Serve at least partially the interests of the employer

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Who is the Employer? (3 of 5)

- **Integrated Enterprise**
  - Organizational structures are complex
  - To determine whether two or more ostensibly separate entities should be considered parts of an integrated enterprise, the EEOC considers the degree:
    - 1. of interrelation between the operations
    - 2. to which the entities share common management
    - 3. to which there is centralized control of human resources and labor relations policies
    - 4. of common ownership or financial control over the entities

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Who is the Employer? (4 of 5)

- **Joint Employers**
  - **Joint employers** maintain employment relationships with some of the same employees; they may exist when:
    - Firms get their workers from temporary staffing firms or other labor providers
    - Firms agree to share staff
    - Firms subcontract with other firms to produce goods or services
    - Firms operate through the sale of franchises

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Who is the Employer? (5 of 5)

- **Joint Employers** (cont)
  - **Practical Considerations**: 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?

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What Would You Do?

- You have an idea for a new service that picks up and drops off dry cleaning and uniforms throughout the city, for which the client uses your app
- Will you form the business using an independent contractor model like Uber? Or an employee model like Sprig?
- What are the pros and cons of each?
- Is your decision ethical?

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Next:

- Chapter 3 – Overview of Employment Discrimination
  - Does employment discrimination still exist?
  - How hard is it to prove discrimination?
  - Can they fire me for that?
- The answers to these and other questions are our next topic

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Instructor's Notes for What Would You Do (1 of 1)

- Students should address the pros and cons of independent contractor vs. employee status, and the relative costs of each, as well as the risks of each
- It is likely that most students will prefer the independent contractor model, despite its risks
- The most difficult part may be for them to decide whether their decision is ethical, and to try to justify that decision, something the average businessperson struggles with routinely

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