

## Articles

### **EMPLOYEES, EMPLOYERS, AND QUASI-EMPLOYERS: AN ANALYSIS OF EMPLOYEES AND EMPLOYERS WHO OPERATE IN THE BORDERLAND BETWEEN AN EMPLOYER-AND-EMPLOYEE RELATIONSHIP**

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Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.

*Justice Wiley Blount Rutledge  
U.S. Supreme Court 1944<sup>1</sup>*

#### ABSTRACT

In most cases, coverage under our nation's employment laws boils down to the question of whether or not the individuals in question are "employees" and whether or not the entity in question is an "employer."

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1. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944).

Significantly, however, there are burgeoning numbers of cases where employer status is found in the absence of a direct relationship to a statutory employer. This Article refers to these entities as quasi-employers because they are not employers in the traditional sense, yet they are subject to the dictates of employment law legislation.

This Article reviews the following theories of quasi-employer responsibility: the Sibley Interference Theory, the Spirt Delegation Theory, the Joint Employer Theory, and the Single Employer Theory. This Article also reviews the issue of individual supervisory liability as employers under the major employment statutes. Individuals are not normally thought of as employers, but they sometimes have a great deal of influence over the terms and conditions of employees' employment. Therefore, this Article considers them to be a type of quasi-employer.

In order to analyze the definitional status of employers and quasi-employers, it is necessary to examine the definitional status of employees. Significantly, however, the law is in a complete state of disarray with regard to the definition of employee. Therefore, it should come as no surprise that the definition of employer is also often unclear. Nevertheless, there is a significant body of law that supports treating quasi-employers as employers. Unfortunately, there has not been much scholarship focusing on employer status and virtually no academic commentary discussing the status of quasi-employers.

As with employee status, it is important for there to be a clear definition of who is an employer so that both employees and employers know what their rights and responsibilities are. The consequences of not knowing who one's employer is can be fatal to any litigation. It is also important to outline clear criteria because future generations will be looking to established case law to determine employer status in work environments that may look very different from work environments of today.

It is hoped that this Article contributes to bringing about certainty to, in Justice Rutledge's words, "the borderland" between what is an employer-employee relationship and what is not.

2012] EMPLOYEES, EMPLOYERS AND QUASI-EMPLOYERS 607

## TABLE OF CONTENTS

I.	INTRODUCTION .....	608
II.	WHO IS AN EMPLOYEE? .....	612
	A. <i>Common Law Agency Test</i> .....	617
	1. <i>Common Law Entrepreneurial Control Test</i> .....	619
	B. <i>Statutory or Primary Purpose Test</i> .....	622
	C. <i>Economic Realities Test</i> .....	625
	D. <i>Hybrid Test</i> .....	626
III.	WHO IS AN EMPLOYER?.....	629
	A. <i>Private Sector vs. Public Sector Employers</i> .....	629
	B. <i>Employer Definitions</i> .....	632
IV.	QUASI-EMPLOYERS.....	638
	A. <i>Employer Status in the Absence of a Direct</i> <i>Employment Relationship</i> .....	639
	B. <i>Sibley Interference Theory</i> .....	642
	C. <i>Spirit Delegation Theory</i> .....	644
	D. <i>Joint Employer Theory</i> .....	647
	1. <i>Professional Employer Organizations</i> .....	649
	E. <i>Single Employer Theory</i> .....	651
	F. <i>Individual Supervisory Liability Theory</i> .....	653
V.	CONCLUSION.....	657

## I. INTRODUCTION

The world of work has long been important to individuals as well as to society. Not only does it enable us to provide for our families, but it often defines who we are.<sup>2</sup> Many individuals spend more time at work than with their families. Indeed, Sir William Blackstone referred to work as one of the three great relations in private life.<sup>3</sup>

As this author and others have recognized, remarkably, there is no clear understanding about how the law should distinguish between employees and non-employees whether they are characterized as volunteers, independent contractors, or shareholders.<sup>4</sup> This lack of clarity is largely due to the fact that the statutory language defining employee status in virtually all of our nation's employment laws is vague, conclusory, and largely useless.<sup>5</sup>

This Article hopes to bring attention to a related issue, namely, how courts should distinguish between who is and who is not an "employer" under this country's labor and employment laws. Particular attention is paid to employers who are, in Justice Rutledge's words, on the

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2. See Vivian Berger, *Respect in Mediation: A Counter to Disrespect in the Workplace*, 63 DISP. RESOL. J. 18, 18 (2009) (stating that much of our sense of identity, worth, and self-respect stems from how well we are doing at work).

3. 1 WILLIAM BLACKSTONE, COMMENTARIES \*422 ("The three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the care incumbent upon him. 2. That of *husband and wife*. . . [and] 3. That of *parent and child*. . ."). In England, the master-servant relationship was the pre-industrial age analogue to the employer-employee relationship. Jeffrey E. Dilger, Comment, *Pay No Attention to the Man Behind the Curtain: Control as a Nonfactor in Employee Status Determinations Under FedEx Home Delivery v. NLRB*, 26 A.B.A. J. LAB. & EMP. LAW 123, 125 (2010) (discussing origins of the distinction between employee and independent contractor).

4. Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. OF PA. J. LAB. & EMP. L. 147, 158-60 (2006) (discussing the employment status of volunteers); see also Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296 (2001) (describing statutory definitions of employee status as "baffling"); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 76-77 (1984) (criticizing the common law test of employee status); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 353 (2011) (explaining that the struggle to distinguish between employees and independent contractors has been lengthy and confusing).

5. The Supreme Court, for example, has referred to the definition of an employee under the Americans with Disabilities Act as a "mere 'nominal definition,'" *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444 (2003), and has stated that the definition of an employee under the Employee Retirement Income Security Act is "completely circular and explains nothing," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

“borderland” between being an employer and a non-employer.<sup>6</sup> This Article examines a category of these putative employers referred to as quasi-employers. However, in order to examine these non-traditional employers, the definition of employer with respect to traditional employers must first be examined. This Article demonstrates that, like courts trying to distinguish between employees and non-employees, the definition of “employer” is often vague and inconsistent.

This is not helpful for anyone. Both employees and employers need to be able to determine what rights they do or do not have. When employment status is unclear, employment rights are unclear. Uncertainty can become a breeding ground for litigation.

Unlike other areas of law, employers and employees cannot simply legislate their status by entering into a contractual agreement declaring that the individual in question is or is not an employee of a particular employer.<sup>7</sup> There are, of course, public policy implications by characterizing an individual as an employee, which include protection under various state and federal employment laws as well as a requirement that withholding taxes must be paid.<sup>8</sup> Indeed, it has been estimated that classifying individuals as independent contractors instead of as employees might result in a savings of twenty to forty percent of labor costs.<sup>9</sup>

In any event, at some level one can understand the struggle modern-day courts are having with employees and employers at the margins. Most

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6. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944).

7. See, e.g., Narayan v. EGL, Inc., 616 F.3d 895, 903–04 (9th Cir. 2010) (holding that a contractual agreement which purports to declare that an individual is an independent contractor and not an employee is not dispositive); accord, Schwiager v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 483 (8th Cir. 2000); Feldmann v. New York Life Ins. Co., No. 4:09-CV-2129-MLM, 2011 WL 672647 (E.D. Mo. Feb. 17, 2011); *In re O'Connor*, 67 A.D.3d 1302, 1303, 890 N.Y.S.2d 663, 664 (2009) (holding the same under New York Unemployment Insurance Law); S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 256 Cal. Rptr. 543, 547 (Cal. 1989) (“The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”).

The fact that a contract designates that an individual is an independent contractor may however, be entitled to some weight in making the determination whether the individual in question is in fact an employee. See generally *Nat'l Van Lines, Inc. v. NLRB*, 273 F.2d 402, 406 (7th Cir. 1960) (explaining that the contractual designation of an individual as an independent contractor is indicative of the intentions of the parties); *NLRB v. A. S. Abell Co.*, 327 F.2d 1, 6–7 (4th Cir. 1964) (finding that an agreement stating that an individual is not an employee is of some importance, but not controlling); accord, *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009) (finding that an independent contractor agreement, while not dispositive, is strong evidence of independent contractor status). But see *Fortune v. Principal Fin. Group, Inc.*, 465 S.E.2d 698, 700 (Ga. App. 1995) (stating under Georgia law independent contractor agreements are presumed to be valid).

8. See, e.g., *Spirides v. Reinhardt*, 613 F.2d 826, 830 (D.C. Cir. 1979) (stating that employee status is of crucial significance in determining applicability of Title VII).

9. Jenna Amato Moran, Note, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 121 (2010).

of our labor and employment laws were drafted with the notion of full time traditional employment in mind, which is often no longer the case.<sup>10</sup> More fundamentally, the definition of “employee” that employer status is heavily dependent upon, developed from common law tort principles involving vicarious liability of employers—not employment law dogma.<sup>11</sup>

This confusion, however, may also be due to the fact that courts have not paid enough attention to analyzing the case law. In defining employer status, many courts simply focus on the definition of employee and only pay lip service to the definition of employer.<sup>12</sup> Thus, it should come as no surprise that litigation has ensued with respect to employers who are in the borderland.<sup>13</sup> What is surprising is that there is a paucity of academic scholarship focusing on employer status.

On the other hand, perhaps the confusion is simply an inherent part of our common law system. The Supreme Court recognized more than seven decades ago that social legislation, such as the National Labor Relations Act,<sup>14</sup> is not subject to a mathematical formula and “seldom attains more than approximate precision of definition.”<sup>15</sup> Most, if not all, employment laws are a product of social legislation.

Whatever the cause, in defining employee and employer status, most cases are obvious and courts have little difficulty in distinguishing between employees and non-employees and therefore, between employers and non-employers.<sup>16</sup> However, the employer status of what I call quasi-employers is not obvious and is the product of much litigation.

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10. Deanne M. Mosley & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 *MISS. L.J.* 613, 613 (1998) (“The ever increasing intervention of the federal government into the labor arena has provided incentives for employers to restructure their work forces so that they employ fewer full-time employees and more part-time or temporary employees and/or independent contractors.”).

11. *Hearst Publ’ns, Inc.*, 322 U.S. at 120 n.19 (explaining that the common law definition of employee evolved from tort principles involving vicarious liability); see also Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 *B.C.L. REV.* 329, 334 (1998) (reviewing the development of the common law definition of an employee).

12. See *infra* notes 157–64 and accompanying text.

13. The definitions of employee and employer are not only of significance to labor and employment law. They are also critical in determining tort liability, as well as tax liability. Mosley, *supra* note 10, at 628; see also *Mayo Found. for Med. Educ. & Research v. U.S.*, 131 S.Ct. 704, 714–16 (2011) (upholding tax regulations that provide that individuals scheduled to normally work forty or more hours per week are not exempt as students who perform work as an incident to pursuing a course of study); *Schramm v. Comm’r of Internal Revenue*, T.C. Memo., No. 8938-09 (T.C. Aug. 30, 2011) (holding that an adjunct professor who taught an online class was not an independent contractor for tax purposes).

14. 29 U.S.C. § 151 (2006).

15. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

16. JOHN E. HIGGINS, JR., 2 *THE DEVELOPING LABOR LAW* 2260 (5th ed. 2006).

Quasi-employers are not employers in the traditional sense; however, the law considers them to be employers because they may significantly interfere with an employment relationship, may have been delegated a significant amount of responsibility with respect to terms and conditions of employment, may be joint or single employers, or otherwise have effective control over employees.

In defining employment relationships, the Supreme Court has long recognized that it is appropriate for a court construing one employment statute, such as the Fair Labor Standards Act (FLSA), to look to other employment law statutes, such as the NLRA, for guidance.<sup>17</sup> This Article follows that same path by discussing employment laws in general and not focusing in on any particular employment law statute.<sup>18</sup>

Before employer status can be examined, it is first necessary to understand employee status. Therefore, Part II of this Article examines the

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17. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947)

The Fair Labor Standards Act of 1938 . . . is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act . . . and the Social Security Act . . . . Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act.

Because most employment statutes define employee and employer status with virtually identical language, several courts have indicated that it is appropriate to look to various employment law cases under other employment law statutes for guidance. *See e.g.*, *Dellinger v. Science Applications, Int'l Corp.*, 649 F.3d 226, 231(4th Cir. 2011) (King, J., dissenting) (stating that it is appropriate to interpret FLSA in the same manner as Supreme Court did under Title VII); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06-CV-1495, 2009 WL 3602008 at \*5 (W.D. Pa. Oct. 28, 2009), *aff'd*, 2010 WL 2780927, No. 09-4498 (3d Cir. 2010) (stating that the court interprets the term "employee" in the same manner under Title VII, FLSA and state human rights law).

However, it is not always appropriate to assume that all employment statutes will be interpreted in exactly the same manner. *See, e.g.*, *Gross v. FBL Fin. Serv. Inc.*, 129 S.Ct. 2343, 2348–49 (2009) (explaining that Title VII has a materially different burden of persuasion than the ADEA); *Dellinger*, 649 F.3d at 227 (holding that FLSA anti-retaliation provision does not apply to job applicants and court refused to follow case law holding to the contrary under Title VII, the NLRA, and OSHA).

18. It should be noted that neither employee nor employer status is required for coverage under certain anti-discrimination statutes, *see, e.g.*, *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999) (applying 42 U.S.C. § 1981, an anti-discrimination statute, in a non-employment case), or for coverage under the First Amendment, *see, e.g.*, *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996) (holding that independent contractors are protected from retaliation under the First Amendment).

Additionally, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(1) (2006), authorizes the Secretary of Labor to enjoin the sale of so called "hot goods" which were produced in violation of that statute without considering whether or not the individuals are employees. *See* Timothy P. Glynn, *Taking The Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 219–24 (2011) (discussing the FLSA hot goods provision).

differing definitions of “employee” that have been utilized by courts in labor and employment cases. In this section, the Common Law Test, the Common Law Entrepreneurial Test, Statutory or Primary Purpose Test, Economic Realities Test and the Hybrid Test are each separately examined. In Part III, this Article then turns to a discussion of employer status that is heavily dependent on cases concerning employee status. Part IV then discusses “quasi-employers.” Quasi-employers are liable as employers under employment law, but their status is not obvious because they do not easily fit into the definition of an employer. A quasi-employer relationship can be found under a variety of legal theories which this Article then discusses *in seriatim*: *Sibley* Interference Theory, *Spirt* Delegation Theory, Contractor Employees and Third-Party Employers, Joint Employer Theory, and Single Employer Theory. Additionally, under certain employment statutes, individual supervisors can be held personally liable because they are considered to be a type of quasi-employer and this issue is discussed at the end of Part IV. Part V concludes by explaining that holding quasi-employers responsible for compliance with this nation’s labor and employment laws is analogous to other principles of labor and employment and, therefore, legally appropriate. This Article then summarizes applicable law and makes a call for uniformity with respect to this important area of law.

## II. WHO IS AN EMPLOYEE?

In order to understand the legal issues surrounding employee status, it is necessary to first examine and define the term “employee.” Unfortunately, that has proven difficult to do as there is not a single accepted test for employee status.<sup>19</sup> This is largely because the terms “employee”<sup>20</sup> and “employer”<sup>21</sup> are not well-defined in most of our nation’s

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19. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (stating that the determination of employee status is not subject to a bright line test and is “a long-recognized rub”); *Smith v. Castaways Family Diner*, 453 F.3d 971, 975 (7th Cir. 2006) (indicating that the threshold question of who is an employee is “a recurring question”); Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case For Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. REV. 239, 243 (1997) (noting that the distinction between independent contractors and employees remains unsettled).

20. The National Labor Relations Act (“NLRA”), states that the term “employee” shall be defined as “includ[ing] any employee, and shall not be limited to the employees of a particular employer . . .” 29 U.S.C. § 152(3) (2006). The Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e(f) (2006), and The Americans With Disabilities Act (“ADA”), 29 U.S.C. § 1211(4), define an employee as “an individual employed by an employer . . .” Similarly, the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 630(f), and the Employee Retirement Income and Security Act (“ERISA”), 29 U.S.C. § 1002(6) define an employee as “any individual employed by an employer . . .” FLSA defines an

employment laws, and as a result a significant amount of litigation has been generated which attempts to clarify what these terms mean.<sup>22</sup> The lack of statutory and judicial clarity has no doubt contributed to the problem of misclassification.

The problem of employee misclassification is particularly acute. While it is difficult to quantify just how widespread this problem is, a scholarly study looking at New York State estimated that 10.3% of private-sector workers were misclassified each year.<sup>23</sup> In Maine, another scholarly study found that 14% of construction employers misclassify workers as independent contractors and 11% of Maine employers under report wages and unemployment compensation tax liability.<sup>24</sup> A U.S. Department of Labor study indicated that between 10% and 30% of audited employers misclassify their employees.<sup>25</sup> Indeed, as this Article goes to print, the

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“employee” as “any individual employed by an employer” 29 U.S.C. § 203(e)(1), but it also defines “employ” as “to suffer or permit work.” *Id.* at § 203(g). The Family and Medical Leave Act (“FMLA”), expressly incorporates the FLSA definition of employee. 29 U.S.C. § 2611 (3).

21. The NLRA defines an employer simply as “any person acting as an agent of an employer, directly or indirectly . . . .” 29 U.S.C. § 152(2). Title VII, 42 U.S.C. § 2003(b), and the ADA, 42 U.S.C. § 12111(4) defines an “employer” as “a person engaged in an industry effecting commerce who has fifteen or more employees . . . and any agent of such a person . . . .” The ADEA defines an employer as “a person engaged in an industry affecting commerce who has twenty or more employees . . . .” 29 U.S.C. § 630(b). ERISA defines an employer as “any person acting directly as an employer, or indirectly in the interest of an employer . . . .” 29 U.S.C. § 1002(5). The FLSA defines employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 202(d). The FMLA defines employer as “any person engage in commerce or in any industry or activity affecting commerce who employs fifty or employees . . . .” 29 U.S.C. § 2611(4).

22. It should be noted that to be covered under federal employment laws, an employer must also be engaged in a certain volume of “interstate commerce.” Katherine V. W. Stone, *Legal Protections For Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 259 (2006); *see, e.g., Vega v. Peninsula Household Services, Inc.*, No. C-08-03815 JCS, 2009 WL 656291, at \*4 (N.D. Ca 2009) (FLSA case).

23. LINDA H. DONAHUE, JAMES R. LAMARE & FRED B. KOTLER, *THE COST OF WORKER MISCLASSIFICATION IN NEW YORK STATE* 5 (2007). *See also* M. PATRICIA SMITH, JENNIFER S. BRAND, *ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION* (2009) (discussing problem of worker misclassification under New York law).

24. ELAINE BERNARD & ROBERT HERRICK, *THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN MAINE CONSTRUCTION INDUSTRY* 1–2 (2005).

25. In August 2009, the federal government released a report highlighting the extent of the problem of worker misclassification. The IRS last did a study of worker misclassification in 1984 and concluded that about fifteen percent of the workforce was misclassified. Additionally, a 2000 U.S. Department of Labor study concluded that between ten and thirty percent of the firms audited had misclassified employees as independent contractors. The IRS is expected to issue an updated report on the extent of employee misclassification in 2013. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, *EMPLOYEE*

Internal Revenue Service (“IRS”) as well as the U.S. Department of Labor are increasingly auditing employers with respect to the issue of worker classification.<sup>26</sup>

Both the U.S. Department of Labor and several state legislatures have begun to pay greater attention to the problem of employee misclassification.<sup>27</sup> Indeed, in 2009 President Obama created a Middle Class Task Force headed by Vice President Biden to detect and remedy the problem of worker misclassification.<sup>28</sup> As part of that initiative, on September 19, 2011, the IRS and the U.S. Department of Labor as well as seven states entered into a Memorandum of Understanding to share information and other materials and to coordinate law enforcement activities designed to reduce worker misclassification.<sup>29</sup>

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MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 10–14 (2009) [hereinafter EMPLOYEE MISCLASSIFICATION].

26. See Susan A. Berson, *IRS Gets Class Conscious: Switching To Independent Contractors Draws Scrutiny*, 97 A.B.A. J. 27 (2011) (stating that during 2011–2014, the IRS plans to increase random audits of employers and that the Department of Labor has increased its auditing activity as well).

27. See, e.g., Bran Noonan, *The Campaign Against Employee Misclassification*, 82 N.Y.S. Bar. J. 42, 47 (2010) (noting that because of the problem of worker misclassification, legislation has been proposed in New York which would utilize a single unified test of employee status). Indeed, during a 2011 New York State Bar Association Conference sponsored by the Section of Labor and Employment Law, the problem of worker misclassification was described as the issue of the year. Sharon P. Stiller, *Worker Misclassification Issues In New York*, at 1 (N.Y.S. Bar Assoc. Labor and Employment Law Section Annual Meeting Jan. 28, 2011) (unpublished manuscript) (on file with author).

In October of 2011, California passed legislation that subjects employers to civil penalty and government contractors to debarment if they willfully misclassify individuals as independent contractors. Chapter 706, to be codified at CALIF. LAB. CODE § 226.8 (approved Oct. 9, 2011). California also made a person who knowingly advises an employer to treat an individual as an independent contractor, to avoid a finding of employee status, jointly and severally liable with the employer. *Id.* at § 2753(a).

28. Press Release, White House Announces Middle Class Task Force (Jan. 30, 2009).

29. See WHD News Release 11-1373-NAT, Labor Secretary, IRS Commissioner Sign Memorandum of Understanding to Improve Agencies’ Coordination on Employee Misclassification Compliance and Education (Sept. 19, 2011). Deputy Secretary of Labor Seth Harris explained the significance of the problem of worker misclassification in his testimony before Congress:

“Misclassification” seems to suggest a technical violation or a paperwork error.

But “worker misclassification” actually describes workers being illegally deprived of labor and employment law protections, as well as public benefits programs like unemployment insurance and workers’ compensation because such programs generally apply only to “employees” rather than workers in general. . . . Misclassification is no mere technical violation. It is a serious threat to workers and the fair application of the laws Congress has enacted to assure workers have good, safe jobs.

*Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification Before the S. Comm. On Health, Education, Labor and Pensions*, 111th

It is somewhat surprising that before these recent developments, the problem of employee and employer misclassification has not received more legislative and political attention. Indeed, the distinction between employee and independent contractor, which generates the most litigation, is by no means a new phenomenon and actually dates back to Roman law.<sup>30</sup>

Moreover, the Supreme Court recognized almost seven decades ago that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.”<sup>31</sup> While that particular court case dealt with the status of independent contractors,<sup>32</sup> the situation is no less confusing when courts try to define the line between employers and non-employers or between employees and non-employees, such as volunteers<sup>33</sup> and retirees.<sup>34</sup>

On some level the ambiguity and confusion over employee status is understandable, at least with respect to some employers. There is, of course, a great variety of workplaces. Employers as a group are in business to earn a profit. As such, many want to maintain a maximum amount of discretion over the terms and conditions of employment of their workers. Therefore, some employers may desire to maintain control, which is a major factor in any analysis of employee status. Others may, of course, be engaging in purposeful manipulation in order to avoid a finding of employee status at all costs.<sup>35</sup>

Maximization of the right of control makes it more likely that the workers in question are employees. Most employees are entitled to protection under employment and labor law statutes, including the NLRA, and its prospect for unionization.<sup>36</sup> Thus, some employers may purposely

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Cong. (2010) (statement of Seth Harris, Deputy Sec’y of Labor).

30. KENNETH G. DAU-SCHMIDT, ROBERT N. COVINGTON & MATTHEW W. FINKIN, *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 41 (4th ed. 2010).

31. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 121 (1944) (footnote omitted).

32. Since its enactment in 1935, the NLRA has lacked clarity with respect to employee classification. Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees And Entrepreneurialism Under The National Labor Relations Act: A Worker-By-Worker Approach*, 68 WASH. & LEE L. REV. 311, 317 (2011).

33. I have previously explained that it is important to distinguish between volunteers and employees because most of our nation’s employment laws only apply to employees. Rubinstein, *supra* note 4, at 150.

34. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) (holding retired persons are not employees under the NLRA).

35. On Oct. 11, 2011, California made it unlawful for a person to knowingly advise an employer to misclassify an individual as an independent contractor. Interestingly, attorneys are exempt from the reach of this statute. See Chapter 706, codified at CAL. LAB. CODE. § 2753 (approved Oct. 9, 2011).

36. 29 U.S.C. § 151–52.

seek to place their workers in a zone of ambiguity in order to give them the ability to argue against employee status while maintaining a modicum of control.<sup>37</sup>

Despite the ambiguity that is often in play in these types of cases, courts must often draw lines because they simply do not have jurisdiction if the individual in question is not an employee.<sup>38</sup> Without the counting of the putative employee, the corporation at issue might not meet the statute's numerosity requirement necessary to being considered an employer.<sup>39</sup> The consequences of finding that an individual is not an employee are also significant to the individual as they may not be eligible for a public pension,<sup>40</sup> collective bargaining,<sup>41</sup> or protection by employment laws.<sup>42</sup>

In most instances, mere misclassification of an employee is not unlawful.<sup>43</sup> California, however, recently enacted a statute which makes it unlawful to willfully misclassify an individual as an independent contractor.<sup>44</sup> Otherwise, worker misclassification merely leads to a finding

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37. Jost, *supra* note 32, at 315 (stating that given the lack of clarity in the law, some employers may manipulate work relationships or deliberately and illegally misclassify workers).

38. FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (D.C. Cir. 2009) (stating that the line between who is an employee and who is an independent contractor under the NLRA is jurisdictional because the NLRB does not have jurisdiction over independent contractors); Brown v. J. Kaz, Inc., No. 07-0859, 2008 WL 2129887, at \*3 (W.D. Pa. May 20, 2008), *aff'd in part and rev'd in part*, 581 F.3d 175 (3d. Cir. 2009) (same under Title VII).

39. See *infra* note 167 and accompanying text (discussing numerosity in employment law).

40. See, e.g., Scheurer v. N.Y.C. Emps. Ret. Sys., 636 N.Y.S.2d 291, 292 (N.Y. App. Div. 1996) (finding that a hearing examiner is not an employee of the City and therefore, not entitled to retirement system membership).

41. See, e.g., Levitt v. Bd. of Certification of the Office of Collective Bargaining, 710 N.Y.S.2d 324 (N.Y. App. Div. 2000) (holding that hearing officers who are not employees are not eligible for collective bargaining under Civil Service Law); Brown Univ., 342 N.L.R.B. 483 (2004) (finding that graduate students are not employees under the National Labor Relations Act and therefore, NLRB dismisses union election petition). The NLRB has indicated that it is going to review *Brown*. N.Y. Univ., 356 NLRB No. 7, slip op. at 2 (Oct. 25, 2010).

42. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 509 (2d Cir. 1994) (holding that the ADEA prohibits employers from discriminating against employees and does not cover claims brought by independent contractors); Cleveland v. City of Elmendorf, 388 F.3d 522, 529 (5th Cir. 2004) (holding that unpaid police officers are not subject to FLSA as they are not employees and dismissing the FLSA claim); Tadros v. Coleman, 717 F. Supp. 996, 1011 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10, 11 (2d Cir. 1990) (holding that a volunteer doctor is not an employee in dismissing the Title VII employment discrimination claim). Accord, Richard Bales & Lindsay Mongenas, *Defining Independent Contractor Protection Under the Rehabilitation Act*, 34 HAMLINE L. REV. 435 (2011) (discussing whether independent contractors are protected from discrimination under the Rehabilitation Act).

43. EMPLOYEE MISCLASSIFICATION, *supra* note 25, at 7.

44. Act of Oct. 9, 2011, 2011 Cal. Stat. ch. 706, (to be codified at CAL. LAB. CODE. §

that a particular employment law was violated. For example, if the employer does not comply with the Family and Medical Leave Act, it will be found to have violated that statute by not applying it to the employee in question.<sup>45</sup>

Remarkably, some courts have assumed that the definition of an employee is uniform across federal law.<sup>46</sup> That is simply wrong. At least four well-established definitions exist: the common law agency test, the primary or statutory purpose test, the economy reality test, and a hybrid combination of the common law and economic reality tests. A fifth may be emerging, which this Article defines as the “common law entrepreneurial test.”<sup>47</sup> This Article now turns to a discussion of those tests.

#### A. Common Law Agency Test

The starting point for most employee status analysis cases<sup>48</sup> is the “common law right to control” test, which may be considered simplistic, but in reality is quite difficult to apply.<sup>49</sup> Under the common law, labels placed on employees, are not controlling and the entire circumstances must be examined.<sup>50</sup> One Title VII case illustrative of this standard is *Salamon v. Our Lady of Victory Hosp.*<sup>51</sup> In *Salamon*, the Second Circuit held that the common law agency test should be the default standard. The court reached this result by looking to the Supreme Court’s decision in *Nationwide Mutual Insurance Company v. Darden*,<sup>52</sup> in which the Court

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226.8). Employers who violate this statute could be subject to a civil penalty and in addition, governmental contractors could be subject to disbarment.

45. Family and Medical Leave Act of 1993, 29 U.S.C. § 2615 (2006) (prohibiting interference with rights provided under the Act).

46. See, e.g., *Fichman v. Media Ctr.*, 512 F.3d 1157, 1161 (9th Cir. 2008) (illustrating the understanding of some courts that the definition of employee is uniform federally).

47. See *supra* notes 66–85 and accompanying text; Rubinstein, *supra* note 4, at 161. Some courts have also noted that there is little difference between the common law test and the hybrid test. *Id.* at 168–69; see also *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009) (indicating that hybrid test is not materially different from common law test).

48. See *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011) (stating that “[o]ne of the foremost status distinctions at common law is that between an employee and an independent contractor.”).

49. *Mosley*, *supra* note 10, at 632 (stating that the common law test is “rather simplistic”).

50. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”); see also *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (stating that there is no magic phrase to be applied and all incidents of the relationship must be examined under the common law standard).

51. *Salamon v. Our Lady of Victory Hosp.*, No. 06-1707-cv, 2008 WL 2609712, at \*1061 (2d Cir. Jan. 16, 2008).

52. 503 U.S. 318 (1992).

held that the common law standard was the appropriate one to use where a statute fails to specifically define “employee.”<sup>53</sup>

The circuit court summarized the common law right to control test by quoting the factors examined in *Community for Creative Non-Violence v. Reid*.<sup>54</sup> Those factors are as follows:

1 the hiring party’s right to control the manner and means by which the product is accomplished; . . . 2 the skill required; 3 the source of the instrumentalities and tools; 4 the location of the work; 5 the duration of the relationship between the parties; 6 whether the hiring party has the 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 whether the work is part of the regular business of the hiring party; 11 whether the hiring party is in business; 12 the provision of employee benefits; 13 and the tax treatment of the hired party.<sup>55</sup>

These *Reid* factors are non-exhaustive and other factors may be considered. While these factors are not to be applied in a “mechanistic fashion,” special weight is given to the control of the manner and means by which assigned tasks are completed.<sup>56</sup>

In a footnote, *Salamon* added that, prior to even analyzing the *Reid* factors, a plaintiff must have received some form of remuneration to establish that he or she was hired.<sup>57</sup> I have addressed the remuneration issue elsewhere and referred to the test of employee status as involving a two-step inquiry: whether a hiring took place (which generally requires remuneration) and whether the common law agency standards as reflected in *Reid* are satisfied.<sup>58</sup> The law is still developing with respect to whether or not the first factor, which requires a hiring, is a necessary part of the test for employee status.<sup>59</sup>

Outside cases involving volunteers, there is usually no issue with respect to whether a hiring took place or whether remuneration is received.

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53. *Salamon*, 2008 WL 2609712, at \*1060.

54. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

55. *Salamon*, 2008 WL 2609712, at \*1061 (quoting *Reid*, 490 U.S. at 751–52); *see also Darden*, 503 U.S. at 322–24 (adopting *Reid* factors to determine whether individual was employee under ERISA).

56. *Salamon*, 2008 WL 2609712, at \*1061 (citing numerous authorities). *But see FedEx Home Delivery v. NLRB*, 563 F.3d 492, 503 (D.C. Cir. 2009) (putting special weight on the possibility of entrepreneurial opportunity).

57. *Salamon*, 2008 WL 2609712, at \*1061 n.10.

58. Rubinstein, *supra* note 4, at 175–79.

59. *Compare O’Connor v. Davis*, 126 F.3d 112, 115–16 (2d Cir. 1997) (adopting two-factor test) *with Bryson Middlefield Volunteer Fire Dep’t, Inc.*, 656 F. 3d 348, 352–56 (6th Cir. 2011) (rejecting two-factor test). *See also Junino v. Livingston Parish Fire Dist. No. 5*, No. 11-466, 2012 WL 527972 (M.D. La. Feb. 14, 2012) (discussing conflicting case law).

Therefore, whether or not this two-factor test applies is immaterial to the vast majority of U.S. employers.

In addition to most Title VII cases<sup>60</sup> and ERISA cases,<sup>61</sup> the common law test is utilized in NLRB cases,<sup>62</sup> cases under the Uniform Services Employment and Reemployment Act,<sup>63</sup> and other employment law statutes, including many state employment laws.<sup>64</sup>

### 1. Common Law Entrepreneurial Control Test

There is some support for the possible development of another test of employee status (or at least another aspect of the common law right to control test) that can be called the “common law entrepreneurial control test.”<sup>65</sup>

The Restatement (Third) of Employment Law<sup>66</sup> links the definition of independent business, which is crucial in analyzing whether or not an

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60. In *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), the Supreme Court arguably approved of the common law test in Title VII cases.

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

62. *The Arizona Republic*, 349 N.L.R.B. 1040 (2007) (noting that news carriers are independent contractors). An interesting twist to this case is that it generated a strong dissent from former NLRB Member Wilma Liebman, in which she factored into the equation the economic dependence of the putative employee. It appears that Liebman would adopt a type of hybrid test for employee status, as utilized in many cases under Title VII, where the common law test is combined with the economic reality test (in which the focus is on economic dependence).

Query as to whether Liebman’s dissent is consistent with the Supreme Court’s adoption of the common law test of employee status in NLRB cases. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968) (reviewing definition of employee under NLRA); Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 F.I.U. L. REV. 495 (2010) (examining the definition of employee). In any event, the NLRB continues to apply the common law test. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (Dec. 27, 2011).

63. *Evans v. Massmutual Fin. Grp.*, No. 09-CV-6028 CJS, 2009 WL 3614534 (W.D.N.Y. Oct. 26, 2009) (applying common law test of employee status under this statute).

64. See, e.g., *In re Concourse Ophthalmology Assocs., P.C.*, 456 N.E.2d 1201, 1201 (N.Y. 1983); *Matter of Viig v. Comm’r of Labor*, 886 N.Y.S.2d 246 (N.Y. App. Div. 2009).

65. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT LAW* 18–19 (3d ed. 2008) (raising the question of whether entrepreneurial control test differs from common law agency test); see also Dilger, *supra* note 3, at 124 (stating that common law right to control test has been replaced with test of entrepreneurial opportunity).

66. On May 19, 2009, the Restatement (Third) of Employment Law was adopted by the American Law Institute, subject to additional discussion and editorial prerogative. *86th Annual Meeting*, ALI.ORG, [http://www.ali.org/index.cfm?fuseaction=meetings.annual\\_updates\\_09](http://www.ali.org/index.cfm?fuseaction=meetings.annual_updates_09) (last visited Feb. 14, 2012). *RESTATEMENT (THIRD) OF EMPLOYMENT LAW* (Tentative Draft No. 4, 2011). It is important to note, however, the Restatement of Law Third Employment Law has not been adopted by any jurisdiction.

individual is an employee, to entrepreneurial control.<sup>67</sup> The Comment to the Restatement explains that the right to control inquiry is only part of the common law analysis, in that “the more fundamental question of whether the service provider has entrepreneurial discretion to operate an independent business.”<sup>68</sup>

*FedEx Home Delivery v. NLRB*<sup>69</sup> is the leading case involving entrepreneurial opportunity as a factor in determining employee status. In *FedEx*, the D.C. Circuit faced the issue of whether drivers are independent contractors. The court held that in determining whether the individuals in question were independent contractors under the NLRA common law right to control test, courts should examine whether “the position presents the opportunities and risks inherent in entrepreneurialism.”<sup>70</sup> The majority did not view this as a new test for employee status, but instead relied on an earlier decision which indicated that the court and NLRB shifted emphasis away from the right to control inquiry toward “a more accurate proxy.”<sup>71</sup> That proxy is whether the individuals in question have a significant entrepreneurial opportunity for gain or loss.<sup>72</sup> In finding the drivers to be independent contractors, the majority indicated that it considered all the common law factors and balanced them.<sup>73</sup> Thus, the majority was attempting to apply the common law right to control test, at least on paper.

By contrast, the dissent stated that the majority’s shift in emphasis to entrepreneurial opportunity amounted to a new test for employee status. The dissent indicated that the majority’s determination was contrary to existing law. It criticized the majority’s adoption of a new standard based on a single instance of entrepreneurial opportunity possibly being enough to defeat employee status.<sup>74</sup>

Professor Jeffrey M. Hirsch has questioned whether the focus on entrepreneurial opportunity is the start of a new test. He has cautioned that

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67. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(2)–(3).

68. *Id.* at § 1.01 cmt. d (citing *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)) (stating that the critical distinction between employee and independent contractor is “the degree to which each functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.”); *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097–99 (9th Cir. 2008) (placing particular significance on the fact that drivers cannot engage in entrepreneurial opportunities and that they lack a substantial investment in property); *see also Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 337 (Cal. Ct. App. 2007) (holding that drivers are employees because they do not have a separate business and are not given a “true entrepreneurial opportunity”).

69. *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

70. *Id.* at 497 (citation omitted).

71. *Id.* at 497.

72. *Id.*

73. *Id.*

74. *Id.* at 504 (Garland, J., dissenting).

by focusing on entrepreneurial “opportunity,” as opposed to actual engagement, this standard is subject to abuse by employers who may adopt policies expressly accounting for putative independent contractors’ “entrepreneurial opportunities,” even though those opportunities may only exist on paper.<sup>75</sup>

Any test, however, is subject to manipulation by employers who can structure a putative job to either facilitate or avoid a finding of employee status.<sup>76</sup> I have previously questioned whether this “entrepreneurial opportunity” standard was a new test and concluded that was simply an offshoot of the common law test.<sup>77</sup> In *FedEx*, the D.C. Circuit expressly stated that it was retaining the common law test and simply focusing the inquiry on entrepreneurialism.<sup>78</sup> That holding is reasonable and justified because the common law test itself does not consist of rigid factors set in stone.<sup>79</sup> Stated another way, entrepreneurial opportunity is simply another factor that can be examined under the common law standard.

More fundamentally, because the Supreme Court in *United Insurance* held that the common law test was applicable under the NLRA, the NLRB and lower federal courts could not simply abandon this standard.<sup>80</sup> While

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75. Jeffrey M. Hirsch, *New “Entrepreneurial Opportunity” Test for Independent Contractor Status?*, WORKPLACE PROF BLOG (Apr. 22, 2009), [http://lawprofessors.typepad.com/laborprof\\_blog/2009/week17/index.html](http://lawprofessors.typepad.com/laborprof_blog/2009/week17/index.html); Hirsch, *supra* note 4, at 355; *but see*, Dilger, *supra* note 3, at 148–49 (2010) (concluding that entrepreneurial opportunity is a new test of employee status which has the potential to change the legal landscape because of the ability of NLRB cases to be reviewed in the D.C. Circuit).

76. *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMPL. L. 279, 282–83 (2011) (explaining that employers have the power to shape business practices to avoid unionization by classifying individuals as independent contractors); David Millon, *Keeping Hope Alive*, 68 WASH. & LEE L. REV. 369, 370 (2011) (same); *see also* Glynn, *supra* note 18, at 104 (2011) (explaining that in order to reduce employment law liability exposure, employers may shift work to third parties).

77. Rubinstein, *supra* note 4, at 161 n.69 (2006).

78. *FedEx*, 563 F.3d at 497.

79. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)) (stating that since the common law test contains “no shorthand formula or magic phrase that can be applied to find the answer [with respect to the definition of an employee], . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”); *Salamon*, 2008 WL 2609712, at \*1060 (same).

In section 220(2) of the Restatement (Second) of Agency (1958), which outlined the factors courts should examine in determining whether or not an individual is an employee, it was recognized that those factors were not the only ones that could be considered. The Restatement of Agency standard is essentially the same common law standard adopted by the Supreme Court in *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) and *Nationwide Mut. Ins. Co.*, 503 U.S. at 323–24. The Restatement of Agency was the closest analogy to employment law before the adoption of the Restatement of Employment.

80. *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968).

none of the more recent Supreme Court decisions on employee status discuss the issue of entrepreneurialism, language can be found in *United Insurance* to support the propriety of entrepreneurialism as a factor in the common law analysis. Specifically, the Court stated in *United Insurance* that “[o]n the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor.”<sup>81</sup> The phrase “initiative and decision-making authority” can be read as a suggestion to look at entrepreneurial opportunity that a putative independent contractor may possess as a factor in the common law analysis.

There is thin support for concluding that entrepreneurial opportunity should be characterized as a new test. Indeed, it appears that despite the D.C. Circuit decision, NLRB decisions are continuing to apply the traditional “right to control” test.<sup>82</sup> In the NLRB’s recent decision concerning independent contractor status, it expressly stated that one of the factors in determining independent contractor status was whether or not the individual bears an entrepreneurial risk of loss and opportunity for entrepreneurial gain.<sup>83</sup> At most, the issue of entrepreneurial opportunity and risk is an additional factor to look at, but not a separate test.<sup>84</sup> Of course, while the above discussion primarily involved NLRB case law, there is no reason why the same form of analysis would not apply to other areas of employment law.

#### B. *Statutory or Primary Purpose Test*

The Supreme Court has also looked to the primary purpose of a particular employment statute to determine whether or not certain individuals should be covered as employees. The statutory or primary purpose test is considered broader than the common law standard.<sup>85</sup> In

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81. *Id.* at 258.

82. See Dilger, *supra* note 3, at 124 (citation omitted); see also *BWI Taxi Mgmt., Inc.*, NLRB Case No. 5-RC-16489, 2010 WL 4836874 (N.L.R.B. Sept. 16, 2010) (providing example of NLRB decision continuing to apply right to control test).

83. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (Dec. 23, 2011).

84. *Lancaster Symphony* did not cite to *FedEx* or even discuss the issue of whether or not entrepreneurial opportunity involved the application of a new test for independent contractor status. *Id.* Additionally, the majority in *Lancaster Symphony* disagreed with the dissent with respect to exactly what constitutes entrepreneurial opportunity. *Id.* Specifically, the majority held that the fact that the symphony orchestra musicians, whose status was at issue in this case, could decide to work more and therefore, earn more, was not indicative of entrepreneurial opportunity. The dissent considered this factor as indicative of entrepreneurial opportunity based on the idea that by controlling how much they work, they control how much they make. One can expect additional litigation focused on exactly what constitutes entrepreneurial opportunity.

85. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

*NLRB v. Hearst Publications, Inc.*, the Court held that independent contractors were not excluded from the definition of employee under the NLRA.<sup>86</sup> The Court rejected the common law test because it resulted in inconsistent rulings.<sup>87</sup> The Court explained this test of employee status as follows:

Whether, given the intended national uniformity, the term ‘employee’ includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word ‘is not treated by Congress as a word of art having a definite meaning . . . .’ Rather, ‘it takes color from its surroundings [in] the statute where it appears,’ and derives meaning from the context of that statute, which ‘must be read in light of the mischief to be corrected and the end to be attained.’<sup>88</sup>

Significantly, however, in that same decision, the Court indicated that in doubtful cases, courts could examine “underlying economic facts” and “economic relationships” which blurs the distinction between the primary purpose test and what later became known as the economic reality test.<sup>89</sup>

It is important to note that in 1947, the NLRA was amended to exclude independent contractors from the definition of employee.<sup>90</sup> However, that does not diminish the importance of the Court’s analysis, particularly when one considers the fact that Congress provided little guidance with respect to distinguishing between independent contractors and employees.<sup>91</sup>

More recently, and outside the NLRA, the Supreme Court in *Robinson v. Shell Oil Co.*, seems to have once again approved of a type of primary purpose test.<sup>92</sup> There, the Court was faced with having to decide whether the anti-retaliation provisions in Title VII applied to former employees who were given a negative post-employment reference.<sup>93</sup> In holding that the term “employee” applied to former employees, the Court reasoned in part:

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86. 322 U.S. 111, 120 (1944).

87. *Id.* at 123.

88. *Id.* at 124 (citations omitted).

89. *Id.* at 128–29. Indeed, one scholar has gone so far as to describe the test adopted by the Supreme Court in *Hearst* as an “economic realities” test. Zatz, *supra* note 76, at 281.

90. 29 U.S.C. § 152 (3) (2006); *see* *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968) (discussing this statutory amendment to the definition of employee). In *United Insurance*, the Court adopted the common law test in defining employee status under the NLRA. *Id.*

91. *See* Zatz, *supra* note 76, at 281 (explaining that the NLRA statutory amendments did not provide significant guidance with respect to how to draw the line between employees and independent contractors).

92. 519 U.S. 337 (1997).

93. *Id.* at 339.

According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. Those arguments carry persuasive force given their coherence and their consistency with a *primary purpose of antiretaliation provisions*: Maintaining unfettered access to statutory remedial mechanisms. The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII—for example, complaints regarding discriminatory termination. We agree with these contentions and find that they support the inclusive interpretation of ‘employees’ in § 704(a) that is already suggested by the broader context of Title VII.<sup>94</sup>

Similarly, in *Smith v. Castaways Family Diner*, in examining if a husband and mother of a restaurant owner were employees for purposes of whether the restaurant met the numerical employee threshold, the Seventh Circuit relied in part upon the underlying purposes of Title VII.<sup>95</sup> I have previously explained that the NLRB, at times, has looked to the primary purpose of the NLRA to determine whether or not certain individuals are employees protected under the law.<sup>96</sup>

In a fairly well-known FLSA case, Judge Easterbrook in a concurrence criticized both the common law right to control test and the economic reality test as unfocused and unpredictable.<sup>97</sup> He advocated a return to a standard where employee status is determined by examining the putative employee responsibilities and comparing that to the underlying purposes of the statute.<sup>98</sup> Thus, Judge Easterbrook essentially advocates for the adoption of the statutory purpose test. This demonstrates that the statutory purpose test may still be a relevant consideration in determining employment status even if the court is not applying it exclusively.

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94. *Id.* at 346 (emphasis added) (citations omitted).

95. 453 F.3d 971, 985–86 (7th Cir. 2006); *see also* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002) (“Statutory purpose is [a] relevant” factor courts could consider in determining whether partners in a large law firm should be treated as employees or employers).

96. Rubinstein, *supra* note 4, at 164–65 (2006).

97. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539–40 (7th Cir. 1987) (Easterbrook, J., concurring).

98. *Id.*

### C. *Economic Realities Test*

By contrast, the economic realities test focuses on “whether the employee, as a matter of economic reality, is dependent upon the business to which he [or she] renders service.”<sup>99</sup>

The Supreme Court appears to have adopted this standard in an early FLSA case because it approved of the lower court’s statement that the common law test did not apply because “the Act concerns itself with the correction of economic evils through remedies which were unknown at common law . . . [and] the ‘underlying economic realities . . . lead to the conclusion that the boners were and are employees of Kaiser . . . .’”<sup>100</sup> Given that the Supreme Court did expressly state that it was adopting the economic realities test, it is not entirely clear that the Court actually intended to adopt a new standard or test.<sup>101</sup>

In any event, the Supreme Court eventually expressly adopted the economic reality test in a case examining whether volunteers were covered by the FLSA.<sup>102</sup> Unfortunately, the Court’s decision did not clearly define this standard or provide much guidance with respect to how courts should distinguish between employees and non-employees.<sup>103</sup>

Later, the Fifth Circuit issued a lengthy, well-written opinion where it extensively examined and discussed the economic realities test. The court explained that this test involved an examination of the following factors:

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99. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 505 (5th Cir. 1994).

100. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27 (1947) (*quoting* *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516–17 (10th Cir. 1946)).

101. *See* *Stone*, *supra* note 22, at 257 (describing economic realities test and collecting authorities).

102. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985) (citations omitted).

103. *Id.* at 301. The Court described this test as follows:

The test of employment under the Act is one of ‘economic reality’. . . . Whereas in *Portland Terminal*, the training course lasted a little over a week, in this case the associates were ‘entirely dependent upon the Foundation for long periods, in some cases several years’. . . . Under the circumstances, the District Court’s finding that the associates must have expected to receive in-kind benefits—and expected them in exchange for their services—is certainly not clearly erroneous. Under *Portland Terminal*, a compensation agreement may be ‘implied’ as well as ‘express’ . . . and the fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial.

*Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (citations omitted). Many lower courts, in turn, have adopted the economic realities test in FLSA cases. *See* *Zheng v. Liberty Apparel Co.*, 335 F.3d 61, 66–67 (2d. Cir. 2003) (applying economic reality test in FLSA case); *accord*, *Hopkins v. Cornerstone Am*, 545 F.3d 338, 343 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 1635 (2009). *See also* *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234–35 (11th Cir. 2004) (adopting economic reality test under Title VII).

(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.<sup>104</sup>

The economic realities test has been described by several well-known authors in a Casebook as the default test under federal protective legislation when the statute gives little guidance with respect to the appropriate test of employee status, though there is considerable authority which indicates that the common law right to control is the default standard.<sup>105</sup> In any event, this illustrates that this it is important to be aware of this test.

The economic realities test has been criticized as a “rearticulat[ion] and appl[ication of] common law agency principles.”<sup>106</sup> Indeed, the very first factor noted above concerns the right of control which is a central part of the common law test.<sup>107</sup> It should be noted that the economic realities test was originally developed to be more expansive than the common law test.<sup>108</sup>

#### D. Hybrid Test

The hybrid test combines both the common law and economic realities tests and attempts to steer a middle ground.<sup>109</sup> There has been widespread adoption of this test, particularly under Title VII.<sup>110</sup> However, a number of

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104. *Hopkins*, 545 F.3d at 343 (emphasis in original) (citations omitted); see also *Thibault v. Bellsouth Telecomms., Inc.*, 612 F.3d 843 (5th Cir. 2010) (following *Hopkins*); *Strom v. Strom Closures, Inc.*, No. 06-C-7051, 2008 WL 4852998, at \*3 (N.D. Ill. Nov. 7, 2008) (adopting a multi-factor economic reality test under FLSA and state wage and hour statute).

105. DAU-SCHMIDT, *supra* note 30, at 42. But see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (stating in the context of ERISA that the common law standard is the default test of employee status where Congress has not spoken)

106. *Perry v. City of Country Club Hills*, 607 F. Supp. 771, 773 n.2 (E.D. Mo. 1983).

107. See also *Spirides v. Reinhardt*, 613 F.2d 826, 831–32 (D.C. Cir. 1979) (applying the economic realities test to a Title VII case, but the court also states that the right of the putative employer to control work is a critical factor).

108. MARK ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, 1 EMPLOYMENT LAW § 2.3 (3d ed. 2005); see also *Darden*, 503 U.S. at 326 (noting that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”); *Hopkins*, 545 F.2d at 343 (stating that the definition of employee under FLSA is particularly broad).

109. *Mosley*, *supra* note 10, at 636–37.

110. *Id.* at 638. See, e.g., *Muhammad v. Dallas Cnty. Cmty. Supervision*, 479 F.3d 377,

courts have also rejected the adoption of this test in light of the statement in *Darden*, which indicated that the common law test is the default standard where Congress has not specified an appropriate standard.<sup>111</sup> The use of the hybrid test is also questionable under Title VII because in *Walters v. Metropolitan Educational Enterprises, Inc.*, the Supreme Court arguably indirectly approved of one of the party's arguments, which called for the adoption of the common law test of agency.<sup>112</sup> It is by no means entirely clear, however, that the Supreme Court actually meant to approve of this standard because the Court did not expressly state whether it agreed with that part of the argument.<sup>113</sup> On the other hand, in *Robinson v. Shell Oil Co.*, the Court, in a Title VII retaliation case, approved of the primary purpose test.<sup>114</sup> With these caveats in mind, it is important to explain what the hybrid test entails as many courts still apply it. One court described the hybrid test as follows:

In determining whether an employment relationship exists within the meaning of Title VII and the ADEA, we apply a 'hybrid economic realities/common law control test.' The right to control an employee's conduct is the most important component of this test. When examining the control component, we have focused on whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule. The economic realities component of our test has focused on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.<sup>115</sup>

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380 (5th Cir. 2007) ("To determine whether an employment relationship exists within the meaning of Title VII, we apply a hybrid economic realities/common law control test.") (internal citation and quotation omitted); *EEOC v. Zippo Mfr., Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (mentioning the use of hybrid test for Title VII cases); *see also* *Hill v. City of Austin Pub. Works*, No. A-08-CV-079 LY, 2008 WL 750566, at \*2 (W.D. Texas Mar. 19, 2008) (utilizing the hybrid test to find that workers were not employees of plaintiff-employer); *D'Annunzio v. Prudential Ins. Co.*, 927 A.2d 113, 121 (N.J. 2007) (utilizing hybrid test under the state whistleblower statute).

111. *Stouch v. Bros. of Order of Hermits of St. Augustine*, 836 F. Supp. 1134, 1139 (E.D. Pa. 1993) ("Recently, however, the United States Supreme Court held that in statutes where Congress does not helpfully define 'employee,' courts should use the common-law agency test") (citation omitted).

112. 519 U.S. 202, 211-12 (1997).

113. *Id.* at 212-13. *See also* *Lopez v. Massachusetts*, 588 F.3d 69, 84 (1st Cir. 2009) (holding that *Walters* adopted the common law test under Title VII).

114. *See supra* notes 92-94 and accompanying text (discussing *Shell Oil* and primary purpose test).

115. *Deal v. State Farm Mut. Ins.*, 5 F.3d 117, 118-19 (5th Cir. 1993) (citations omitted); *accord*, *Roque v. Jazz Casino*, 388 Fed. Appx. 402 (5th Cir. 2010); *see also* *Martin v. UT Southwestern Med. Ctr.*, 3:07-CV-1663-0, 2009 WL 77871, at \*5 (N.D. Tex.

In *Magallanes v. Penske Logisitics*, the court utilized the hybrid test to find that an individual who worked at a company that supplied a truck and a truck driver pursuant to a contract with another company was an employee of the original company and not the contractor.<sup>116</sup> This is notwithstanding the fact that he was assigned to work at the contracting company and the contractor instructed him as to when and where to deliver the goods.<sup>117</sup> Though several elements of control were exercised by the contracting company, on balance the court held that he was economically dependent on the first company.<sup>118</sup>

As I have explained elsewhere, it makes no sense, from a public policy perspective to have multiple tests for employee status.<sup>119</sup> Indeed, because different statutes and different tests are involved, an individual can be an employee for some purposes, but an independent contractor for others.<sup>120</sup> Thus, for example, an employee can be considered an employee under the NLRA, but not under other statutes.<sup>121</sup>

One Circuit, while acknowledging this problem referred to it merely as a “semantic inconsistency.”<sup>122</sup> While I am not exactly sure what the court meant by that, I do note that several academic commentators<sup>123</sup> and

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Jan. 12, 2009) (applying the hybrid test in Title VII case); *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522, 526 (5th Cir. 2001), cert. denied, 535 U.S. 928 (2002) (discussing the hybrid test).

116. *Magallanes v. Penske Logistics LLC*, 570 F. Supp. 2d 907, 911 (W.D. Tex. 2008).

117. *Id.*

118. *Id.* at 912–13.

119. Rubinstein, *supra* note 4, at 169–70 (2006).

120. *Id.* at 151 (citing *Seattle Opera v. NLRB*, 292 F.3d 757, 759 (D.C. Cir. 2002)) (holding that an individual was an employee under NLRA even though he was not paid the minimum wage and did not receive tax form W-2); see also *Hopkins v. Cornerstone Am*, 545 F.3d 338, 347 (5th Cir. 2008) (stating that it is not inconsistent to be considered an employee under the FLSA, but an independent contractor under other statutes); *City Cab Co. of Orlando*, 285 N.L.R.B. 1191, 1193 (1987) (holding that employee status determinations of other governmental agencies are not controlling, but should be given consideration by the NLRB). But see *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06-CV-1495, 2009 WL 3602008 (W.D. Pa. Oct. 28, 2009), *aff'd*, 2010 WL 2780927, No. 09-4498 (3d Cir. July 15, 2010), cert. denied, 131 S.Ct. 925 (2011) (noting that all parties agreed that Title VII, the FLSA, and state human rights law should be similarly interpreted with respect to employee and employer status).

121. This does not happen often, but it does happen. See *BWI Taxi Mgmt*, No. 5-RC-4836874, 2010 WL 4836874, at \*9 n.15 (NLRB Reg. Dir. Sept. 16, 2010) (stating that the petitioner received a letter saying he was an independent contractor under the EEOC, but was considered an employee under the NLRA); *Seattle Opera*, 292 F.3d at 761–62 (holding individual was an employee even though he was treated as an independent contractor for tax purposes in that he did not receive a W-2 tax form).

122. *Hopkins*, 545 F.3d at 347.

123. Jeff Clement, *Lerohl v. Friends of Minnesota Sinfonia: An Out Of Tune Definition of “Employee” Keeps Freelance Musicians From Being Covered By Title VII*, 3 DEPAUL BUS. & COM. L.J. 489, 509 (2005); Maltby, *supra* note 19, at 254; Valerie L. Jacobson, *Bringing A Title VII Action: Which Test Regarding Standing To Sue Is The Most*

courts<sup>124</sup> have stated that there is very little substantive difference between each of the various tests of employee status.

The multitude of various tests is still a serious problem, however, because even a small difference can lead to a different result. Unfortunately, despite a formal commission being established in the Clinton Administration to examine our nation's employment laws and despite a specific recommendation being made for one uniform definition of employee status, (which was the economic realities test), Congress has not acted.<sup>125</sup>

Finally, with respect to the distinction between employees and independent contractors, U.S. courts tend to focus on specific tests, which can be somewhat wooden.<sup>126</sup> However, it is worth noting that the problem of employee status is not a uniquely American problem.<sup>127</sup> Some countries have developed intermediate categories. In Germany, for example, "employee-like persons" may be covered by labor legislation as "parasubordinated" persons, and "dependent contractors" may be covered in Italy and Canada respectively.<sup>128</sup> If Congress were ever to seriously consider evaluating the problem of defining who an employee is, perhaps something can be learned from other industrialized nations.

### III. WHO IS AN EMPLOYER?

#### A. *Private Sector vs. Public Sector Employers*

Fundamentally, when dealing with any question of labor and employment law, one of the first questions to be examined is whether or not a private or public employer is involved. Quite simply certain statutes may not be applicable if the putative employer is an arm of government.<sup>129</sup>

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*Applicable?*, 18 FORDHAM URB. L. J. 95, 108 (1990).

124. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 175 n.2 (3d Cir. 2009); *Lambertsen v. Utah Dep't of Corrs.*, 79 F.3d 1024, 1028 (10th Cir. 1996); *Wilde v. County of Kaniyohi*, 15 F.3d 103, 106 (8th Cir. 1994); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993); *Burt v. Broyhill Furniture Indus.*, No. CV-04-2929-PHX-MHM, 2006 WL 2711495 (D. Ariz. Sept. 18, 2006).

125. Rubinstein, *supra* note 4, at 170. Specifically, in 1993 a formal commission headed by former Labor Secretary John Dunlop was established to examine the U.S. labor market and make recommendations to Congress. One of the Dunlop Commission's recommendations was the adoption of a single uniform definition of employee. *Id.* (citing U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 64–66 (1994)).

126. DAU-SCHMIDT, *supra* note 30, at 45.

127. *Id.*

128. *Id.*

129. For example, ERISA only applies to private sector pension plans. Wilmington

The converse is also true.<sup>130</sup>

The private/public sector issue can arise under a number of different employment statutes, but is most often litigated under the NLRA and therefore, this Article will focus on NLRA standards as examples.<sup>131</sup> The NLRA is the grandfather of most of today's labor and employment laws. As such, courts adjudicating labor and employment issues often look to decisions under the NLRA for guidance.<sup>132</sup>

Section 2(2) of the NLRA, as amended,<sup>133</sup> excludes "political subdivisions" from the coverage under the Act and it is this exclusion that is often litigated. However, the term "political subdivision" is not defined in the statute.<sup>134</sup> The exemption has been construed by the Supreme Court in *NLRB v. Natural Gas Util. Dis. of Hawkins County* to be limited to entities that are either (1) created directly by the State so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.<sup>135</sup> This exemption is considered narrow.<sup>136</sup>

For example, the NLRB found that the State Bar of New Mexico was directly created by the New Mexico Supreme Court and was an administrative arm of the judicial branch of government. Therefore, it was exempt under *Hawkins* first prong.<sup>137</sup> Similarly, a hospital that was established by a city and continued to operate pursuant to a local law was exempt from NLRB jurisdiction, notwithstanding the fact that it had an autonomous board of trustees.<sup>138</sup>

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Shipping Co. v. New England Life Ins. Co., 496 F.3d 326 (4th Cir. 2007).

130. For example, certain Whistleblower protection statutes only apply in the public sector. See, e.g., New York Civil Service Law § 75-b. Additionally, neither causes of action under the First Amendment, *George v. Lab. Corp. of America Holdings*, 522 F.Supp.2d 761, 764 (N.D. W. Va. 2007), nor 42 U.S.C. § 1983, *German v. Fox*, 267 Fed. Appx. 231 (4th Cir. 2008), apply to private employers.

131. See, e.g., *New York Pub. Library v. New York Pub. Emp't. Relations Bd.*, 374 N.Y.S. 2d 625 (1975) (holding employees employed by a public library were not public employees under the New York Taylor law, Civil Service § 200 et seq.).

132. Mitchell H. Rubinstein, *Duty of Fair Representation Jurisprudential Reform, The Need To Adjudicate Disputes In Internal Union Review Tribunals and The Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J.L. REFORM 517, 542, 543 n.121 (2009).

133. Section 2(2) of the NLRA, 29 U.S.C. s 152(2), provides: "The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ."

134. *NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 177 (4th Cir. 1991).

135. *NLRB v. Natural Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604-05 (1971); *NLRB v. Austin Developmental Ctr., Inc.*, 606 F.2d 785, 789 (7th Cir. 1979).

136. Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y. 885, 924 (2007).

137. *State Bar of New Mexico*, 346 N.L.R.B. 674 (2006).

138. *Camden-Clark Mem'l Hosp.*, 221 N.L.R.B. 945 (1975).

Under *Hawkins County*, an entity can satisfy the second prong only if a majority of its board of directors is responsible to the general electorate.<sup>139</sup> They must be appointed and subject to removal by public officials.<sup>140</sup> Under this standard, the NLRB routinely asserts jurisdiction over private employers that contract with the government to provide governmental type services.<sup>141</sup>

For example, a non-profit corporation that administered public research grants for the City University of New York, a public university, was not an exempt political subdivision where the employer was administered by its own board of directors, a majority of which were not responsible to the electorate.<sup>142</sup> Similarly, a non-profit tax exempt corporation that provided educational and management services to public school academies was not exempt from the National Labor Relations Act.<sup>143</sup>

Issues involving the distinction between private and public employers can also arise under a host of other statutes including state labor relations acts such as New York's Taylor Law.<sup>144</sup> One such developing area concerns the status of Charter Schools. The New York Public Employment Relations Board, the administrative agency responsible for administering the Taylor Law, has held that Charter Schools are public schools and, as such, are subject to jurisdiction under the Taylor Law.<sup>145</sup> The New York statutory scheme states that Charter Schools are public schools.<sup>146</sup> Similarly, an NLRB Regional Director held that a Chicago Charter School, designated by state statute as a public school, was a public employer and

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139. *FiveCap, Inc., v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002).

140. *Charter Sch. Admin. Servs., Inc.*, 353 NLRB No. 35, at \*5 (2008); *Research Found. of CUNY*, 337 N.L.R.B. 965, 969 (2002).

141. *Charter Sch. Admin. Servs.*, 353 NLRB at \*6. The circuits have regularly agreed with the NLRB's assertion of jurisdiction in such cases. *Id.* at n.23.

142. *Research Found. of CUNY*, 337 N.L.R.B. at 969 (2002); *see also* Conn. State Conference Bd., 339 NLRB 760 (2003) (discussing whether employer that has contract with state of Connecticut to provide public bus service is subject to the jurisdiction of NLRB); *Family Healthcare, Inc.*, 354 NLRB No. 29 (2009) (non-profit corporation that operated medical clinics where eighty percent of its funding was received from Medicare and Medicaid reimbursement was found not to be an exempt political subdivision).

143. *Charter Sch. Admin. Servs.*, 353 NLRB at \*1; *see also* *FiveCap, Inc., v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002) (non-profit welfare agency that received public funding not exempt political subdivision as a majority of its board of directors was not responsible to general electorate). *But see*, *Council of School Supervisors*, 44 PERB ¶ 3001 (2011) (holding that Charter Schools are public employers notwithstanding the fact that they have a type of joint employment relationship with a private management company).

144. N.Y. Civil Service Law § 200 et. seq.

145. *In re Council of School Supervisors*, 44 PERB ¶ 3001 (2011).

146. *See* N.Y. Education Law § 2854.3(a) (expressly defining Charter Schools as public employers).

therefore, not subject to the jurisdiction of the NLRB. An appeal before the full Board is pending.<sup>147</sup>

As this Article goes to print, however, the legal status of Charter Schools around the country remains unsettled. This is because as PERB recognized, federal courts have the ultimate authority with respect to NLRA preemption.<sup>148</sup> The federal courts have not yet addressed the status of Charter Schools.

### B. *Employer Definitions*

When one gets beyond the distinction between public and private sector employers, cases involving the definition of an employer are, like the definition of employee, somewhat elusive. As with employee status,<sup>149</sup> a contractual disclaimer of employer status is not conclusively binding.<sup>150</sup> Little academic commentary addresses employer status, yet this issue has spawned a significant litigation.<sup>151</sup> While we know that the misclassification of employees is profuse, there is no current nationwide data which documents just how wide spread a problem this is with respect to employers.

The existing data mainly concerns misclassification under the IRS Code, and Department of Labor data suggests that as much as ten and thirty percent of employers misclassify their employees.<sup>152</sup> A New York State Survey estimated that approximately 10.3% of workers in that state are misclassified.<sup>153</sup> A survey of Maine construction employers put that number at fourteen percent.<sup>154</sup> Given these numbers one can extrapolate that employer misclassification is a significant issue as well.

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147. Chicago Mathematics & Science Academy Charter Sch., Inc., 13-RM-1768 (Sept. 20, 2010); Press Release, NLRB (Jan. 10, 2011) (stating that the NLRB will be reviewing this case and inviting briefs to discuss status of Charter Schools).

148. *In re* Council of School Supervisors, 44 PERB ¶ 3001 (2011).

149. *See infra* note 8 and accompanying text.

150. *See, e.g.*, J.J. Gumberg Co., 189 N.L.R.B. 889 (1971); Met. Chicago, Inc., 13-RC-20098 (Nov. 12, 1999); *accord*, La Gloria Oil & Gas Co., 337 N.L.R.B. 1120 (2002), *enforced without op.*, 71 Fed. Appx. 441 (5th Cir. 2003) (where NLRB refuses to find joint employer relationship notwithstanding the fact that parties previously entered into a NLRB stipulated election agreement defining bargaining unit).

151. For an extensive review of the applicable case law for determining whether or not an entity is an employer under Title VII, see *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006). *See also* Annotation, *When Are Separate Business Entities "Joint Employers" of Same Employees For Purposes Of Application of Federal Labor Laws*, 73 A.L.R. Fed. 609, § 2(a) (1985).

152. *See* EMPLOYEE MISCLASSIFICATION, *supra* note 25.

153. DONAHUE, LAMARE & KOTLER, *supra* note 23, at 8.

154. *See supra* note 24 and accompanying text.

The Supreme Court has stated that an employer is “the person, or group of persons, who own and manage the enterprise.”<sup>155</sup> Many courts, however, simply focus on the definition of an “employee”<sup>156</sup> and only pay lip service to the statutory definition of “employer” by only examining whether the employer meets the statute’s numerosity requirements.<sup>157</sup> The Fifth Circuit, for example, has characterized the applicable test in a Title VII case as follows:

Determining whether a defendant is an “employer” under Title VII or the ADEA involves a two-step process. First, the defendant must fall within the statutory definition. Second, there must be an employment relationship between the plaintiff and the defendant.

To determine whether an employment relationship exists within the meaning of Title VII, we apply a hybrid economic realities/common law control test.<sup>158</sup>

Other courts simply cite to one of the tests for employee status, such as the economic realities test<sup>159</sup> or the common law right to control test.<sup>160</sup>

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155. *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 450 (2003).

156. Indeed, in examining the definition of an employer under Section 2(2) of the NLRA, the leading treatise on labor law focuses on determining who is an employee under the Act. See HIGGINS, *supra* note 16, at 2241–42.

157. Indeed, that is what the Supreme Court did in *Clackamas*, 538 U.S. at 454, in examining whether a small medical practice was subject to jurisdiction under the ADA.

158. *Deal v. State Farm County Mut. Ins. Co.*, 5 F.3d 117, 118 n.2 (5th Cir. 1993) (citation omitted) (ADEA and Title VII case); see also, *Johnson v. Manpower Professional Services, Inc.*, 442 Fed. Appx. 977 (5th Cir. 2011) (applying same hybrid test in Title VII & 42 U.S.C. § 1981 case); *Muhammad v. Dallas Cnty. Cmty. Supervision & Corrs. Dep’t*, 479 F.3d 377, 380 (5th Cir. 2007) (purporting to apply this test to Title VII case); *Hill v. City of Austin Public Works*, No. A-08-CV-079 LY, 2008 WL 750566, at \*2 (W.D. Texas 2008), *aff’d*, 360 Fed Appx. 582 (5th Cir. Jan. 14, 2010), *cert. denied*, 131 S.Ct. 461 (2010) (applying hybrid test in Title VII case); *Thomson v. Prudential Ins. Co.*, 866 F. Supp. 1329, 1334 n.8 (D. Kans. 1994) (applying hybrid test in Title VII and state law case).

159. *Rodriquez v. Jones Boat Yard*, No. 10-15326, 2011 WL 3252569 (11th Cir. July 26, 2011) (FLSA case); *Lambert v. Ackerley*, 180 F.3d 997, 1011–12 (9th Cir. 1999) (FLSA case); *Hale v. Ariz.*, 993 F. 2d 1387, 1394 (9th Cir. 1993) (FLSA case); *St. John v. NCI Bldg. Sys.*, 537 F. Supp. 2d 848 (S.D. Tex. 2008), *aff’d. on other grounds*, 299 Fed. Appx. 308 (5th Cir. 2008) (ADA case); *Callais v. Shell Oil Co.*, No. 10-2105, 2011 WL 3490064 (E.D. La. 2011) (Title VII case).

160. *Shah v. Bank of America*, 346 Fed. Appx. 831, 2009 WL 415619, at \*6–7 (D. Del. Feb. 18, 2009) (applying common law right to control test to employee in order to determine whether or not defendant was plaintiffs employer under Title VII); *King’s Brass Ceremonial v. Comm’r of Labor*, 904 N.Y.S. 2d 543 (App. Div. 2010) (explaining that in determining whether an entity was liable for unemployment insurance contributions, the court looks to see if an employment relationship exists by applying common law right to control test); *Gulino v. N.Y.S. Educ. Dep’t*, 460 F.3d 361, 378 (2d Cir. 2006) (applying common law test in Title VII case); *accord*, *Forsythe v. NYC Dep’t of Citywide Admin. Servs.*, 733 F. Supp. 2d 392 (S.D.N.Y. 2010), *aff’d*, No. 10–3230–cv, 2011 WL 2473496 (2d Cir. 2011) (in

Indeed in a recent article, a well-known employment scholar, Timothy Glynn, in discussing employer status simply cited to the Restatement's common law test.<sup>161</sup> Additionally, in one high profile case when faced with the issue of whether law firm partners were employers or employees, the court focused simply on whether or not the partners were in fact employees—not whether they met the definition of employer.<sup>162</sup>

In *Gulino*, the Second Circuit issued an important decision that illustrated this principle of employer status.<sup>163</sup> The court was faced with whether the State Education Department could be held liable as an employer under Title VII because it developed a certification test that teachers had to pass in order to receive a license. Though the court was faced squarely with the issue of whether the State Education Department was an employer under Title VII, the court simply looked to whether the plaintiffs in question were employees under the applicable test for employee status.

The court ultimately held that the plaintiffs were not employees because they could not meet the threshold showing that the State Education Department hired and compensated them. Additionally, a master-servant relationship was not established under the common law right to control test.<sup>164</sup>

There is also some Supreme Court precedent under the FLSA that supports the notion that employer status can be determined by looking to

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determining whether or not joint employer status was established, the court held that such a relationship exists where there is sufficient evidence that one entity had immediate control over another company's employees) (citations omitted).

161. Glynn, *supra* note 18, at 108 (citing Restatement (Second) of Agency, § 220 and Restatement (Third) of Agency § 7.07(3)(a)).

162. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 707 (7th Cir. 2002); *see also* *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006) (same). *But see* *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2009 WL 3602008, No. 06-CV-1495, at \*2 n.4 (W.D. Pa. Oct. 28, 2009), *aff'd*, No. 09-498, 2010 WL 2780927 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 935 (2011) (relying on *Clackamas* factors to distinguish between attorney shareholder employers and attorney shareholder employees and holding that shareholder attorney was an employer); *see also* *N.Y. Hotel & Casino*, 356 NLRB No. 119 (2011) (focusing on the definition of employee in holding that under certain circumstances, a third party employer can commit an unfair labor practice with respect to employees of a contractor). In another high profile litigation, the EEOC settled a case alleging that a law firm's mandatory retirement policy violated the ADEA and therefore, the court did not have to decide whether law firm partners were employees. *See*, Joseph Palazzolo, *Kelley Drye Settles with EEOC over Age Bias Claims*, Wall Street Journal Law Blog, [blogs.wsj.com/law/2012/04/10/kelley-drye-settles-with-eeoc-over-age-bias-claims/](http://blogs.wsj.com/law/2012/04/10/kelley-drye-settles-with-eeoc-over-age-bias-claims/) (April 10, 2012).

163. 460 F.3d at 378.

164. *Id.* at 379. As the court explained: SED does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but SED does not exercise the workday supervision necessary to an employment relationship. *Id.*

employee status, but the Court did not directly hold that employer status is determined by examining employee status.<sup>165</sup> Unfortunately, however, the U.S. Supreme Court has never expressly defined the term “employer.”

The closest the Supreme Court has come in defining who an employer is was in *Clackamus Gastroenterology Associates v. Wells*,<sup>166</sup> where the Court had to address whether a small medical practice was an employer under the ADA. In deciding the case, the Court did not focus on the definition of employer under the statute, but instead focused on the definition of an employee.

This is understandable in this case, as well as in some of the others, because the issue was whether the medical practice met the ADA’s employee-numerosity requirement of having fifteen or more employees.<sup>167</sup> The ADA, like most employment statutes,<sup>168</sup> simply defined an employer as having “15 or more employees for each working day.”<sup>169</sup> If the four physician shareholders counted, then the practice would be subject to the ADA.

The Court struggled with whether or not the shareholders were employees. The Court stated that the definition of an employee under the

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165. In *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961), the Court, in examining whether or not a cooperative was an employer and its members who mostly worked at home were employees under the FLSA, saw “nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.” *Id.* at 32. In making a determination as to employment status, the Court stated that “‘economic reality’ rather than ‘technical concepts’ is to be the test of employment.” *Id.* at 33. Thus, the Court appears to have not seen a distinction between the test of employee and employer status. *Accord*, *Xue Liam Lin v. Comprehensive Health Mgmt, Inc.*, No. 08 Civ. 6519 (PKC), 2009 U.S. Dist. LEXIS 64625, slip op. at \*2 (S.D.N.Y. July 23, 2009) (stating that in determining employer status under FLSA, the overarching concern is whether the employer has the power to control workers with an eye towards the economic reality of the facts). *Whitaker House* may not be of much significance outside of the context of the FLSA. Section 3(g) of the FLSA, 29 U.S.C. § 203(g), defines the term “employ” as to “suffer or permit work” and that statutory language is not included in most other employment laws. That language is also considered to be particularly broad. *Barfield v. NYC Health & Hosp. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008). The issue in this case also had to do with the validity of a regulation concerning industrial homework.

166. 538 U.S. at 440. Indeed, the Court noted in a footnote that it was distinguishing between an employee and an employer. *Id.* at 445 n.5.

167. The term “employee-numerosity requirement,” as far as I can tell, is a phrase coined by the Supreme Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 (2006). The actual counting of employees is not as simple as it may seem when one considers that employees may be hired and discharged by an employer and some employees work part-time. See ROTHSTEIN ET AL., *supra* note 108 (discussing how to count employees for the purpose of defining employer status). I have previously noted the importance of numerosity requirements in employment law. Rubinstein, *supra* note 4, at 151–52.

168. See EMPLOYEE MISCLASSIFICATION, *supra* note 25 (quoting the definition of employer contained in various statutes); See also *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 207 (1997) (discussing definitions of employer under Title VII).

169. 42 U.S.C. § 12111(5) (2006).

statute—“an individual employed by an employer”<sup>170</sup>—was “nominal,” that it is “completely circular and explains nothing.”<sup>171</sup> The Court then had to determine the appropriate test that it would apply.

The Court refused to adopt the common law right to control test that it had earlier adopted in an ERISA case,<sup>172</sup> because the issue did not involve the line between employees and independent contractors. Rather, the issue the Court was faced with was “whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer.”<sup>173</sup>

Nevertheless, the Court did recognize that the common law right to control standard provided helpful guidance and adopted the position of the EEOC, which implied that shareholders could not be employees. The Court adopted the EEOC’s six-factor, non-exhaustive test (which does not have a name), *in haec verba* that examines:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work; and
2. Whether and, if so, to what extent the organization supervises the individual’s work; and
3. Whether the individual reports to someone higher in the organization; and
4. Whether and, if so, to what extent the individual is able to influence the organization; and
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.<sup>174</sup>

The Court also recognized that titles are not controlling and that there is no “shorthand formula or magic phrase” that could provide a quick answer with respect to employer status. Rather, the issue is to be resolved by looking at the totality of the circumstances.<sup>175</sup>

Justice Ginsburg, writing for herself and Justice Breyer, wrote an important dissent where she did not see anything inherently inconsistent

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170. *Id.* § 12111(4).

171. 538 U.S. at 444.

172. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 730 (1989)).

173. *Id.* at 445.

174. *Id.* at 626; *see also* *De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16, 20 (1st Cir. 2007) (holding that *Clackamus* applies to both cases under the ADA as well as Title VII).

175. *Id.*; *see also* *Feldmann v N.Y. Life Ins. Co.*, No. 4:09-CV-2129 MLM, 2011 WL 382201, at \*9 (E.D. Mo, Feb. 3, 2011) (stating that under Title VII whether an individual is an employee or an independent contractor “requires more than simply tallying factors on each side and selecting the winner on the basis of a point score”) (quoting *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 489 (8th Cir. 2003)).

between individuals having both proprietary and employment relationships. This is because the physician-shareholders often functioned as common law employees.<sup>176</sup>

In an exhaustive law review article which discusses the employer status of shareholders and partners, Professor Ann McGinley has criticized *Clackamas* precisely on this point. Professor McGinley reasoned that many partners work for the partnership in the same fashion as employees.<sup>177</sup> As Professor McGinley explains:

Although the vice president or other upper level manager of a corporation can be simultaneously an “employer” and an “employee” under the anti-discrimination acts, the Court assumes that a partner or shareholder cannot serve both roles of “employer” and “employee.” The language of Title VII, the ADEA, and the ADA do not distinguish between partnerships and general corporations in their definitions of who is a “person” under the acts; neither does the statutory language distinguish between partnerships and corporations as “employers.” It cannot be correct, therefore, that partners are not “employees” merely because they are “employers.”<sup>178</sup>

The very next year, however, Justice Ginsburg voted with the majority in a case that dealt with whether a working owner, who was the sole shareholder and president of a professional corporation, was a “participant” under ERISA. The Court rejected the notion that business owners could only be considered employers under ERISA.<sup>179</sup> ERISA defines “participant” as “any employee or former employee of an employer.”<sup>180</sup>

The Court, however, did not discuss the common law or other employment law tests, which dominated *Clackamas*, but instead simply focused on the language of ERISA. Thus, under ERISA a participant can be an employer and an employee. However, beyond ERISA, under *Clackamas* it would appear that an individual cannot be an employer and an employee at the same time under most employment statutes.<sup>181</sup>

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176. The Seventh Circuit has indicated that the purpose of the *Clackamas* test is to distinguish between employers and employees. *Smith v. Castaways Family Diner*, 453 F.3d 971, 979 n.4 (7th Cir. 2006).

177. Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 34–35 (2004).

178. *Id.* Professor McGinley also noted that the anti-discrimination acts include “agents” in the definition of “employer” and partners can be seen as agents of the employer. *Id.*

179. *Yates v. Hendon*, 541 U.S. 1, 6 (2004).

180. 29 U.S.C. § 1002(7) (2006).

181. *See Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06-CV-1495, 2009 WL 3602008 (W.D. Pa. Oct. 28, 2009), *aff’d*, No. 09-4498, 2010 WL 2780927 (3d Cir. July 15, 2010) (holding that there is a threshold issue of employee status for the attorney partner because if the partner is an employer he is not protected under Title VII, the FLSA and state human rights law). *Clackamas* would not, however, prevent a partner from being

Finally, it should be noted that the same issue of employment status is involved when examining whether Board of Director members who also work at the company may be subject to the control of the business just like any other employee.<sup>182</sup>

#### IV. QUASI-EMPLOYERS

In most cases, coverage under our nation's employment laws boils down to the question of whether or not the individuals in question are "employees" and whether or not the entity in question is an "employer." In fact, one important commentator referred to contemporary labor and employment law as involving privity of contract between an employer and employee as the basis for coverage under law.<sup>183</sup>

Significantly, however, there are a burgeoning number of cases<sup>184</sup> where employer status is found in the absence of a direct relationship to a statutory employer. I refer to these entities as quasi-employers because they are not employers in the traditional sense, yet they are subject to the dictates of employment law legislation.<sup>185</sup>

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considered an employee if the person truly functioned as an employee, they just could not be considered both under the statute. As the Court explains:

Today there are partnerships that include hundreds of members, some of whom may qualify as "employees" because control is concentrated in a small number of managing partners. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 79 n.2, (1984) (Powell, J., concurring) ('[A]n employer may not evade the strictures of Title VII simply by labeling its employees as partners.');

*EECO v. Sidley Brown & Wood*, 315 F.3d 696, 709 (CA7 2002) (Easterbrook, J., concurring in part and concurring in judgment); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (CA9 1996). Thus, asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question.

*Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 446 (2003).

182. *Smith v. Castaways Family Diner*, 453 F.3d 971, 986 (7th Cir. 2006); *see also Kern v. City of Rochester*, 93 F. 3d 38, 47 (2d Cir. 1996) (stating that while Board members are generally considered employers under Title VII, they can be considered employees depending upon their responsibilities); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1539–40 (2d Cir. 1996) (concluding that Board of Director members were employees under ADEA because each performed traditional employee duties, worked full-time and reported to others).

183. Craig Becker, *Labor Law Outside The Employment Relation*, 74 TEX. L. REV. 1527, 1537 (1996); *see also Gulino v. N.Y.S. Educ. Dep't*, 460 F.3d 361, 374 (2d Cir. 2006) (indicating that a direct employment relationship is the typical Title VII case).

184. Indeed, one court has stated that there is an overwhelming amount of authority that rejects the notion there must be a direct employment relationship between an employer and an employer for Title VII liability to attach. *Gore v. The RBA Group*, No. 03-CV-9442, 2008 WL 857530, at \*5 (S.D.N.Y. Mar. 31, 2008) (collecting cases).

185. Some courts are apparently unaware of this line of case law because they state that Title VII "only" authorizes suit against employers, employment agencies, labor

A. *Employer Status in the Absence of a Direct Employment Relationship*

While at first blush it might seem a bit odd to apply our nation's employment laws to entities that are not employers in the traditional sense, upon close examination, there is quite a bit of support for this principle. The Supreme Court has interpreted Title VII to apply to former employees even though Title VII simply uses the term "employee." Thus, former employees could bring suit for post-employment retaliatory actions (such as a negative employment reference).<sup>186</sup> This demonstrates that the term "employee," and by extension the term "employer," is not limited to individuals who have a direct and explicit ongoing employment relationship.

Additionally, Congress has chosen to regulate, through our labor laws, situations where there is no direct employer-employee relationship in the context of secondary activity of unions. Through its provisions on secondary boycotts, the NLRA protects employers who are not themselves the employer of the union employees in question. Rather, the NLRA protects those employers that are simply doing business with an entity that the union has a labor dispute with.<sup>187</sup> The union is prohibited from imposing significant secondary pressure, such as picketing, on that "neutral" employer.<sup>188</sup>

Moreover, a similar legal concept to quasi-employer liability is the "controlling employer" citation policy under the Occupational Safety and

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organizations and training programs. *Shah v. Bank of America*, 598 F. Supp. 2d 596 (D. Del. 2009), *aff'd*, 346 Fed. Appx. 831 (1st Cir. 2009); *see also* *Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp. 2d 311, 315 n.5 (S.D.N.Y. 2002) (stating "that direct employment relationship is a necessary trait of a Title VII 'employer'"); *Burke v. Nalco Chem. Co.*, No. 96-C-981, 1996 WL 411456, at \*3 (N.D. Ill. July 18, 1996) (stating that "[a]n employer who does not fit within the FMLA's definition is not bound by its terms.>").

186. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997). In holding that Title VII applies to former employees, the Court noted that the statute does not contain any temporal qualifier which indicates whether it applies to former employees, but the statute does contain remedial provisions concerning reinstatement and hiring. *See* 42 U.S.C. §§ 2000e-5(g)(1) (2006) (containing the language discussed by the Court). Because current employees are not normally reinstated, this supports the holding that Title VII applies to former employees. *Robinson*, 519 U.S. at 347. The Court also looked to the purposes of Title VII's anti-retaliation provisions and reasoned that it would be destructive to the statutory purpose if an employer were able to retaliate with impunity against former employees. *Id.* at 349.

187. In labor relations parlance, the employer that the union has the dispute with is the primary employer and the secondary employer that the union seeks to pressure is the entity that has some type of relationship with the primary employer. *HIGGINS*, *supra* note 16, at 1741. The secondary employer is considered to be neutral. *Id.* at 1746.

188. *See* *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 614-15 (1980) (holding that union picketing aimed at customers of secondary employer is prohibited unless picket signs expressly ask consumers not to purchase products of the primary employer).

Health Act (hereinafter “OSHA”).<sup>189</sup> OSHA provides that a controlling employer has a general duty to furnish a safe worksite for its own employees as well as other employees on a multi-employer work site.<sup>190</sup>

The “controlling employer” citation policy provides that the agency may issue citations to general contractors at construction sites that have the ability to prevent or abate hazardous conditions, regardless of whether the general contractor’s employees were involved.<sup>191</sup> In effect, such general contractors are quasi-employers because they do not directly employ the subcontractors, yet they are subject to employment regulation. Some states have enacted similar legislation with respect to liability for unpaid wages.<sup>192</sup>

More fundamentally, the nature of work and American workplaces has changed and will likely continue to change. There are fewer full-time employees and more part-time employees, temporary employees, independent contractors, and home workers.<sup>193</sup> Today, there can even be workers without workplaces,<sup>194</sup> and some employees work together in virtual worlds.<sup>195</sup> Indeed, some believe that there is a movement away from employees having long-term, established relationships with their employers in favor of a more short-term contingent relationship.<sup>196</sup>

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189. 29 U.S.C. §§ 651–52 (2006).

190. *Id.* § 654; *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599–600 (8th Cir. 1977).

191. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009) (upholding Secretary of Labor’s controlling employer citation policy after extensively reviewing its history and applicable case law). OSHA’s controlling employer policy is somewhat related to case law examining whether or not an individual can be held liable as an employer under the FLSA. In several FLSA cases, corporate officers and individuals with operational control of the enterprise could be held responsible if they are involved in day to day operations or have some direct responsibility for the employee in question. *Patel v. Wargo*, 803 F.2d 632, 637–38 (11th Cir. 1986); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1303 (N.D. Ga. 2008). *See infra* notes 289–308 and accompanying text (discussing supervisory liability under employment law statutes).

192. A California state law imposes liability on garment manufacturers if the employing subcontractor is unable to pay even though the manufacturer does not have an employment relationship with the subcontractor’s employees. Glynn, *supra* note 18, at 121 (citing CAL. LAB. CODE § 2673.1 (West 2010)). Illinois and New York have enacted similar legislation. *Id.* at 121–22.

193. Mosley, *supra* note 10; *see also* Stone, *supra* note 22.

194. An example of workers without a workplace would be home workers and telecommuters. *See* Stone, *supra* note 22, at 271 (discussing increasing use of home workers and telecommuters). An example of employees without employers would be individuals who work for small employers that do not meet the numerosity requirements under a given statute, as well as independent contractors who may work side to side with employees. *See id.* (discussing the changing nature of the workplace). The notion that the American workplace is undergoing change is hardly new. *See* Becker, *supra* note 183 (arguing that existing legal doctrines are ineffective in regulating new forms of work).

195. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011) (discussing in detail the new forms of work that are arising due to technological advances).

196. DAU-SCHMIDT, *supra* note 30.

In the workplaces of the future, litigation with respect to the status of employers is likely to continue because relationships will be increasingly atypical and will not involve a direct employer-employee relationship. It is, therefore, important to examine the status of quasi-employers.<sup>197</sup>

Several courts have recognized that the term “employer” is not limited to employers that have a direct relationship with employees.<sup>198</sup> In such cases there are several theories concerning the liability of third party quasi-employers: *Sibley* Interference Theory, *Spirt* Delegation Theory, Joint Employer Theory, Single Employer Theory, and Individual Supervisory Liability Theory. This Article now turns to a discussion of each of these legal doctrines.<sup>199</sup>

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197. Indeed, the work environment of the future may not look anything like the work environment today. In 2009, Time Magazine ran a special report on the future of work and concluded that in the future, work will be more flexible, more freelance, more collaborative, and far less secure. Alex Altman et al., *The Way We'll Work*, TIME, May 25, 2009, at 39. Moreover, the traditional notions of an office environment may become completely obsolete. Thus, the workforce of the future often may not even involve showing up to a physical workplace at all. As one article in Time's Special Report explained:

More and more, though, the need to actually show up at an office that consists of an anonymous hallway and a farm of cubicles or closed doors is just going to fade away. It's too expensive, and it's too slow. I'd rather send you a file at the end of my day (when you're in a very different time zone) and have the information returned to my desktop when I wake up tomorrow. We may never meet, but we're both doing essential work.

Seth Godin, *The Last Days Of Cubicle Life*, TIME, May 25, 2009, at 5. Indeed, the future may already be upon us. In 2008, a San Francisco corporate law firm called Virtual Law Partners opened. This firm has no physical office, has forty partners and all the attorneys work remotely. See Stephanie Francis Ward, *Virtually Practicing: Those Wanting Face Time Need Not Apply*, A.B.A. J., at 51 (June 2009) (discussing the dispersed nature of the firm).

198. *Assoc. of Mexican-American Educators v. California*, 231 F.3d 572, 580 (9th Cir. 2000) (en banc) (“A direct employment relationship is not a prerequisite to Title VII liability”); *Gore v. RBA Group*, No. 03-CV-9442, 2008 WL 857530 (S.D.N.Y. Mar. 31, 2008); *Laurin v. Pokoik*, No. 02-CIV-1938, 2004 WL 513999, at \*4 (S.D.N.Y. Mar. 15, 2004). *Contra*, *Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp.2d 311, 315 n.5 (S.D.N.Y. 2002) (stating that “a direct employment relationship is a necessary trait of a Title VII ‘employer’”).

199. Nevertheless, it is still recognized that the existence of an employer-employee relationship is the primary element of a Title VII claim. *Gulino v. N.Y.S. Educ. Dep't*, 460 F.3d 361, 370 (2d Cir. 2006); *Pratt v. Hustedt Chevrolet*, Index No. 05-4148 (DRH) (MLO), 2009 U.S. Dist. Lexis 26312, at \*6 (E.D.N.Y. Mar. 27, 2009). When liability is found under a quasi-employer theory, there is still an employer relationship. It is simply not a direct employment relationship and therefore not an employment relationship in the traditional sense.

B. *Sibley Interference Theory*

In 1973, the D.C. Circuit held that employers had a duty under Title VII not to discriminate against employees whose employment opportunities could be affected by an employer even if that employer did not directly employ the individual in question.<sup>200</sup> The plaintiff was a private duty nurse who worked at the defendant hospital, but who was paid exclusively by the patient and only worked with that patient.<sup>201</sup> The plaintiff alleged sex discrimination under Title VII after the hospital prevented him from working with female patients.<sup>202</sup>

The hospital sought dismissal because there was no direct employment relationship between the plaintiff and the defendant hospital. In rejecting the hospital's argument, the court reasoned in part:

To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.<sup>203</sup>

The court found it significant that Title VII provided that a charge of discrimination could be filed with the EEOC by a "person aggrieved" as opposed to the narrower class of "employees."<sup>204</sup> Equally significant to the court was the fact that Title VII coverage is not limited to "employers" in that labor unions and employment agencies are also subject to Title VII.<sup>205</sup> Therefore, the court held that Title VII coverage was appropriate because of the plaintiff's close nexus to the employer as well as the spirit and language of the Act.<sup>206</sup>

As the *Sibley* court's holding was largely based upon the interference with employment opportunities, subsequent decisions involving similar issues have been referred to by some courts as "interference" theory.<sup>207</sup>

In *Association of Mexican-American Educators v. California*, the Ninth Circuit endorsed the *Sibley* interference theory by holding that California was subject to liability, even though the state did not directly

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200. *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). *Sibley* has been described by a major employment law treatise as the leading case in this area of law. ROTHSTEIN ET AL., *supra* note 108.

201. *Sibley*, 488 F. 2d at 1341.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 1342.

206. *Id.*

207. *Gulino*, 460 F.3d at 373 (2d Cir. 2006); *Assoc. of Mexican-American Educators v. California*, 231 F.3d 572, 580 n.4 (9th Cir. 2000) (en banc).

employ the plaintiffs, because it “interfered” with the employment relationship between school teachers and the employing schools.<sup>208</sup> That case involved a claim, under Title VII, that challenged the validity of California’s Basic Education Skills test, a prerequisite for employment as a teacher in California.<sup>209</sup>

Though several courts have followed the D.C. Circuit’s lead in *Sibley*,<sup>210</sup> a conflict in the circuits developed after the First Circuit’s decision in *Lopez v. Massachusetts*.<sup>211</sup> In *Lopez*, the court rejected *Sibley*, reasoning that the definition of an employer is limited to the common law standard.<sup>212</sup> As support, the First Circuit cited to several U.S. Supreme Court cases which held that “when a statute contains the term ‘employee’ but does not define it, a court must presume that Congress has incorporated traditional agency principles . . . .”<sup>213</sup> The problem, of course, with the First Circuit’s rationale is that when examining the *Sibley* Interference Theory the court is examining employer status, not employee status.

The First Circuit, however, is not entirely alone. The Second Circuit, has essentially rejected *Sibley*, but for different reasons than the First Circuit in *Lopez*.<sup>214</sup> The court reasoned that the term “employer” should not be interpreted expansively and indicated that the straightforward language of Title VII does not appear to support a *Sibley* like claim.<sup>215</sup> This led the court to state that while Congress imposed liability under Title VII on additional parties who are not “employers” (such as labor unions), “absent some evidence that Congress intended otherwise, we conclude that all other parties with a similar ‘nexus’ to a plaintiff’s employment are

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208. 231 F.3d at 581.

209. *Id.* at 577.

210. ROTHSTEIN ET AL., *supra* note 108, at § 2:3. See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Assoc. of New England, Inc.*, 37 F.3d 12, 17–18 (1st Cir. 1994) (ADA case); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir. 1994) (Title VII case); *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 876–77 (6th Cir. 1991) (Title VII case); *Assoc. of Mexican-American Educators*, 231 F.3d at 580 (9th Cir. 2000) (en banc) (Title VII case); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988) (Title VII case); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 294 (11th Cir. 1988) (Title VII and 42 U.S.C. § 1981 case).

211. 588 F.3d 69 (1st Cir. 2009); see also *Smiley v. Ohio*, No. 1:10-CV-390, 2011 WL 4481350 (S.D. Ohio Sept. 27, 2011) (discussing conflict in the circuits).

212. 588 F.3d at 83.

213. *Id.* (citing *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)); *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 211–12 (1997); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989).

214. *Gulino v. N.Y.S. Educ. Dep’t*, 460 F.3d 361, 374–76 (2d Cir. 2006); see also *Salamon v. Our Lady of Victory Hosp.*, No. 06-1707-CV, 2008 WL 2609712, at \*14 (2d Cir. Jan. 16, 2008) (stating that it has no need to decide whether *Gulino* closed the door entirely to the *Sibley* interference theory of liability).

215. *Gulino*, 460 F.3d at 374.

excluded from the Title VII liability scheme.”<sup>216</sup>

The Supreme Court has never addressed the *Sibley* interference theory.

### C. *Spirit Delegation Theory*

In *Spirit v. Teachers Insurance & Annuity Association*, the defendant insurance company managed a pension fund to which employees were required to contribute.<sup>217</sup> That pension fund distributed higher pension payments to males, based on actuarial tables that showed longer average life expectancies for women than for men.<sup>218</sup> The defendant insurance company sought dismissal of the sex discrimination charge under Title VII because they were not the employer of the employees in question.<sup>219</sup>

In holding that the insurance company could indeed face liability, the Second Circuit broadly interpreted the term “employer” somewhat similarly to *Sibley*. It stated that “the term ‘employer,’ as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities . . . .”<sup>220</sup> Moreover, the court reasoned that “exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII . . . .”<sup>221</sup> The *Spirit* Court wanted to avoid suggesting that “an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to ‘any agent’ of a covered employer . . . .”<sup>222</sup>

In *Arizona Governing Committee v. Norris*, the Supreme Court held that the corollary was also true. A traditional employer could be liable for the acts of insurance companies that discriminate in how they offer benefits to employees. The *Norris* Court’s reasoning was as follows:

Since employers are ultimately responsible for the “compensation, terms, conditions, [and] privileges of employment” provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on

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216. *Id.* at 375. It should also be noted, however, that the D.C. Circuit itself did not extend *Sibley* by refusing to impose liability on the Bureau of Engraving and Printing as a “consumer” of tour guide services, holding that Congress never intended to impose civil rights liability on consumer choice. *See* *Redd v. Summers*, 232 F.3d 933, 941 (D.C. Cir. 2000); *see also Smiley*, No. 1:10-CV-390, 2011 WL 4481350, at n.6 (stating that *Sibley* is limited to an “intermediary” between employees and organizations that employ them).

217. 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983).

218. *Id.* at 1058.

219. *Id.* at 1060.

220. *Id.* at 1063.

221. *Id.*

222. *Id.* (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978)).

the basis of race, religion, sex or national origin violates Title VII regardless of whether third parties are also involved in the discrimination.<sup>223</sup>

The First Circuit followed *Spirt* in *Carparts Distribution Center v. Automotive Wholesaler's Association of New England, Inc.*<sup>224</sup> Specifically, the court invoked *Spirt* to hold that a trade association could be held legally responsible as an employer under the Americans with Disabilities Act with respect to benefits.<sup>225</sup> The court reasoned, however, that liability would only be found if the plan existed for the purpose of allowing the employer to delegate its responsibility to provide health insurance benefits to its employees.<sup>226</sup>

The Sixth Circuit, however, reached a seemingly opposite result from *Spirt* and held that the same pension plan, TIAA-CREF, could not be held liable for employment discrimination.<sup>227</sup> It disapproved of the lower court's rationale for finding liability: that the close ties between the university and TIAA-CREF were too great to allow each to deny liability.<sup>228</sup> The court also indicated that the university did not retain TIAA-CREF as an agent or delegate any responsibility to it.<sup>229</sup> Unfortunately, the court's decision in this regard is brief and conclusory. This decision was also vacated by the Supreme Court.<sup>230</sup> Therefore, it is difficult to draw any conclusions from it.

In 2008, the Second Circuit, in the same case which questioned *Sibley's* interference theory, narrowly limited *Spirt* to cases where the direct employer delegated a core responsibility to a third party, such as an entity providing pension benefits.<sup>231</sup> Therefore, it held that the State of New York, which required teachers to pass a test to receive a teacher's license, could not be held liable under Title VII merely because the State imposed a regulation in the exercise of its concern over teacher competence.<sup>232</sup> It is unclear what situations today would fall into the

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223. *Ariz. Governing Comm. v. Norris*, 463 U.S. 1073, 1089 (1983) ; *see also Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211, 1214–15 (9th Cir. 1989) (footnote omitted) (stating that an employer can be vicariously liable for a discriminatory deferred compensation plan administered by a third party, where the employer has some control over the program).

224. 37 F.3d 12, 17–18 (1st Cir. 1994).

225. *Id.*

226. The court held that relevant to this inquiry was whether the trade association had the authority to determine benefit levels, whether alternate plans were available to employees, and whether the traditional employer shared administrative responsibilities. *Id.*

227. *Peters v. Wayne State Univ.*, 691 F.2d 235, 241 (6th Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983).

228. *Id.* at 238.

229. *Id.*

230. 463 U.S. 1223 (1983).

231. *Gulino v. N.Y.S. Educ. Dep't*, 460 F.3d 361, 376–77 (2006).

232. *Id.* at 378.

category of delegation, other than a direct delegation of a pension or health insurance plan.<sup>233</sup>

In 2009, however, the Second Circuit issued a significant decision with respect to employer status without citing *Spirt* or any of the cases concerning quasi-employer status. In *Halpert v. Manhattan Apartments, Inc.*, the court held that an employer could be held liable for the actions of an independent contractor where the employer authorized the independent contractor to make hiring decisions or where the independent contractor had the apparent authority to make such decisions.<sup>234</sup>

Though *Halpert* does not expressly address *Spirt* or even employer status, it implicitly supports that line of case law because it recognizes that an entity can be held liable for discrimination where it delegated important functions to a third-party independent contractor.<sup>235</sup>

Additionally, the Labor Board's controversial decision in *New York Hotel and Casino*<sup>236</sup> appears to provide additional support for both the *Sibley* interference theory and the *Spirt* delegation theory. Though the Board did not cite to either decision, and this decision dealt with the issue of unfair labor practices, the Board held that a property owner could violate the Act by barring employees of a contractor from its premises.<sup>237</sup>

As is so often done in cases involving the definition of employers, the Board focused on the definition of employee and held that the "Act clearly regulates the relationship between an employer (such as NYNY) and employees of other employers . . . ."<sup>238</sup> While this decision is consistent with Supreme Court precedent under the Act, which held that the definition of an employee is not limited to situations where the disputants stand in a proximate relation of employer and employee,<sup>239</sup> it should be pointed out

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233. Even before *Gulino*, one lower court questioned whether *Spirt* was good law, but for different reasons. *Seaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp. 2d 311, 315 n.5 (S.D.N.Y. 2002). The court's questioning of *Spirt* was based upon later cases holding that for an employee relationship to exist, there must be a hiring and the putative employees must receive some form of remuneration. *Id.* However, that aspect of *Seaglione* is limited to defining *employee* status, and does not appear relevant to *employer* status.

234. 580 F.3d 86, 88 (2d Cir. 2009).

235. *Halpert* followed the Seventh Circuit's decision in *Dunn v. Washington County Hospital*, 429 F. 3d 689, 691–92 (7th Cir. 2005), where the court held that an employer can be held responsible for sexual harassment by an independent contractor-doctor who had privileges at the hospital that employed the plaintiff. The court reasoned that employers have a responsibility to provide nondiscriminatory working conditions. Unfortunately, the court did not cite *Spirt* or any of the cases concerning quasi-employers. *But see* *Houston v. Manheim-New York*, No. 09 Civ. 4544(SCR)(GAY), 2010 WL 744119, at \*7 (S.D.N.Y. Mar. 3, 2010) (stating that agency theory does not create liability for individuals under Title VII).

236. 356 NLRB No. 119 (Mar. 25, 2011).

237. *Id.* at \*14.

238. *Id.* at \*5.

239. *See* *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 192 (1941) (noting the

that the NLRB expressly relied upon a statute which states that liability is not limited to employers who have a direct relationship with employees.<sup>240</sup>

While the utility of this decision, as well as the body of jurisprudence it relies upon beyond NLRB case law, is unknown, it is included here because it supports the notion that third-party employers who have no direct employment relationship with the employees in question can be held liable. Therefore, such employers fit within the definition of a quasi-employer as that term is used in this Article.

Finally, it should be noted that if *Spirit* and *Sibley* remain viable, it is possible that an employer may face liability under both theories. A lower court cited both *Spirit* and *Sibley* for the proposition that an employer can be liable as a third party where it interferes with the employment relationship and controls access to or the working environment of the plaintiff.<sup>241</sup>

#### D. Joint Employer Theory

The concept of a joint employer cannot be discussed without also discussing the related single employer doctrine, which this Article discusses below.<sup>242</sup> The terms are often used interchangeably and the line between the two is often blurred.<sup>243</sup> Under a joint employer analysis, each employer has control over the employees, while under a single employer theory, two separate entities are considered as one.<sup>244</sup>

This Article considers both joint and single employers to be within the rubric of quasi-employers, because both of these concepts involve atypical employment relationships where one entity may not directly employ the individuals in question.

The issue of joint employer status has been subject to much litigation<sup>245</sup> and has long been recognized in traditional labor law.<sup>246</sup> The issue frequently arises in the context of closely related companies, such as a

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congressional belief “that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . .” (quoting H.R. REP. NO. 1147, at 9 (1935)).

240. 356 NLRB No. 119, 2011 WL 1113038, at \*5 (citing 29 U.S.C. § 152(3) (2006) (providing in part that the term employee “shall not be limited to employees of a particular employer. . . .”)).

241. *People v. Holiday Inns, Inc.*, No. 83-CV-564S, 1993 WL 30933, at \*5–7 (W.D.N.Y. Jan. 28, 1993).

242. *See infra* Section IV(E).

243. HIGGINS, *supra* note 16, at 2247.

244. *Dias v. Cmty. Action Project*, No. 07-CV-5163, 2009 WL 595601 (E.D. of N.Y. Mar. 6, 2009), at \*3–4; *see also* *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117 (3d Cir. 1982) (distinguishing between single and joint employers).

245. *See* ALR, *supra* note 151.

246. *See* Becker, *supra* note 183, at 1540–44 (discussing NLRB joint employer doctrine).

parent and its subsidiary corporations, where both are alleged to be the employer of a certain employee.<sup>247</sup>

Additionally, the Supreme Court has held that under the FLSA, an employee can have more than one employer, and indicated that it was appropriate to look at whether related activities are involved, whether unified operation exists, and whether the entities shared common control and a common business purpose.<sup>248</sup>

A finding of joint employment status is significant because all joint employers may be individually and jointly responsible for compliance with employment statutes such as the FLSA and the NLRA.<sup>249</sup> A determination that two separate entities are in fact, joint employers, generally involves a fact-intensive inquiry.<sup>250</sup>

Joint employer status has been defined a bit differently by some courts. Indeed, one commentator, Professor Cynthia Estlund, has noted that the issue of joint employer status under the FLSA “continues to puzzle and divide the courts.”<sup>251</sup>

In a 2003 FLSA case, the Second Circuit exhaustively analyzed the case law concerning joint employment and held that in determining whether or not there is joint employment the following, non-exclusive factors should be examined:

1. The equipment and premises of work;
2. Whether the corporations in question “had a business that could or did shift as a unit from one putative joint employer to another;”
3. The “extent to which the plaintiff performed a discrete line job that was integral to” the “process of production” of the putative joint employer;
4. Whether responsibility under contracts could pass from one employer subcontractor to another without material change;
5. The degree of supervision by the putative joint employer;

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247. See ALR, *supra* note 151, § 2[a].

248. *Falk v. Brennan*, 414 U.S. 190, 192–93, 195 (1973) (holding that building owner and maintenance company were joint employers of maintenance workers, even though contractual provision stated that these workers were employed by the building owner). Today, regulations under the FLSA, 29 C.F.R. § 791.2 (2011), expressly recognize that there can be a joint employment relationship. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) (discussing joint employer status under the FLSA).

249. *Lopez v. Silverman*, 14 F. Supp. 2d 405, 412 (S.D.N.Y. 1998); *LeSaint Logistics, Inc.*, 324 N.L.R.B. 1051 (1997); *Capital EMI Music, Inc.*, 311 N.L.R.B. 997 (1993).

250. *Zheng*, 355 F.3d at 76 (2d Cir. 2003) (observing that “historical findings of fact . . . underlie each of the relevant factors” coupled with “findings as to the existence and degree of each factor”).

251. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 110 (2010).

6. Whether the plaintiffs “worked exclusively or predominantly for the” putative joint employer.<sup>252</sup>

The NLRB describes joint employer status as follows:

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment . . . . To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.<sup>253</sup>

In an appeal of an NLRB case, the Second Circuit explained that “an essential element” of any joint employer determination is “sufficient evidence of immediate control over the employees . . . .”<sup>254</sup>

Joint employer status has also been litigated under the FMLA,<sup>255</sup> the Rehabilitation Act of 1973,<sup>256</sup> as well as under a host of other employment laws such as Title VII.<sup>257</sup> Therefore, it is important for lawyers and scholars to be aware of this theory.

#### 1. Professional Employer Organizations

A Professional Employer Organization (“PEO”) is a contractual arrangement that purports to define the employer relationship. Typically, the PEO assumes responsibility to administer and comply with employment laws, while the original employer or client continues to run the business.<sup>258</sup>

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252. *Zheng*, 355 F.3d at 72 (2d Cir. 2003). *But see* *Dias v. Cmty. Action Project*, No. 07-CV-5163, 2009 WL 595601, at \*4 (E.D.N.Y. Mar. 6, 2009) (examining several different but related factors to determine joint employer status).

253. *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984). *See also* *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (discussing joint employer status under the NLRA); *La Gloria Oil & Gas Co.*, 337 N.L.R.B. 1120 (2002), *aff’d*, 71 F. App’x 441 (5th Cir. 2003) (agreeing with administrative law judge’s finding that respondent was not a joint employer); *LeSaint Logistics, Inc.*, 324 N.L.R.B. 1051 (1997).

254. *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) (footnote omitted) (quoting *Clinton’s Ditch Cooperative Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1995)).

255. *See, e.g., Almeida v. Athena Health Care Assocs.*, No. 3:07CV517 (PCD), 2009 WL 490066, at \*4 (D. Conn. Feb. 26, 2009) (discussing joint employer status).

256. *See, e.g., McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (2004) (holding that Rehabilitation Act did not provide for private right of action).

257. *See, e.g., Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 611 F. Supp. 344, 347 (S.D.N.Y. 1984) (clarifying statutory text by noting that “Title VII does not refer to ‘employee’ but to ‘the person aggrieved,’” thus bringing plaintiff’s action “within the ambit of Title VII . . .”).

258. *See What is a PEO?*, NAPEO.ORG, <http://www.napeo.org/peoindustry/coemployers.cfm> (last visited Feb. 25, 2012).

The employees are often said to be leased employees of the PEO.<sup>259</sup> Thus, the theory is that leased employees are employed by the PEO.<sup>260</sup> The National Association of Professional Employer Organizations, a national trade group, considers such an arrangement to be “co-employment,” but it does not describe the significance of co-employment.<sup>261</sup>

Because of this duality of responsibility, it is considered by this commentator to be a type of a quasi-employer relationship.<sup>262</sup>

There has not been a significant amount of employment litigation involving the status of PEO’s as employers.<sup>263</sup> In *LeSaint Logistics, Inc.*,<sup>264</sup> a PEO that provided payroll and human resources, handled workers compensation paycheck deductions and inspections for a client employer was found not to be a joint employer. Significantly, the PEO played no role in the day-to-day operations of the business or with respect to the

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259. See Stone, *supra* note 22, at 251 (discussing concept of employee leasing); Ariel D. Weindling, *Effective Management of a Contingent Workforce: A Brief Overview of Using Contingent Workers*, IBA LEGAL PRACTICE DIV. (Emp’t & Indus. Relations Law Comm.), Apr. 2008, at 1 (discussing employee leasing firms and professional employer organizations); see also Metro. Chi., Inc., NLRB Case No. 13-RC-20098 (Decision Nov. 12, 1999), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45800c8ff6> (utilizing the term “leased employees” when discussing whether PEO was a joint employer); *LeSaint Logistics, Inc.*, 324 N.L.R.B. 1051, 1062 (1997) (concluding that respondent PEO held itself out “as an employer or joint employer of the employees,” but was “an employer only in an administrative sense.”).

The New York State Department of Labor, charged with administering the New York Professional Employer Act, N.Y. LAB. LAW §§ 915–24 (McKinney 2002), placed professional employer associations under the same category as employee leasing firms, which indicates that the two classes of organizations are the same or similar. *Professional Employer Associations*, N.Y.S. DEP’T OF LABOR, <http://www.labor.state.ny.us/workerprotection/laborstandards/employer/peo.shtm> (last visited Feb. 1, 2012). While it is recognized that the term used by the New York State Department of Labor is “Professional Employer Association,” as opposed to a “Professional Employer Organization,” it appears that these terms are one and the same.

260. Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158–60 (2003) (defining leased employees as employed by an employee leasing firm, but who provide services for a separate firm).

261. See *id.*

262. Some firms chose to enter into a PEO relationship because it would enable them to take advantage of economies of scale. Outsourcing employment law responsibility enables small and medium-sized businesses with an expertise that they might not normal have. A large PEO may also be able to obtain much more favorable insurance rates than a smaller company. See Weindling, *supra* note 259.

263. Issues with regard to responsibility for unemployment insurance tax, *Matter of Robsonwoese, Inc.*, 840 N.Y.S. 2d 638, 639 (N.Y. App. Div. 2007) (holding both PEO and client employer are responsible for payment of Unemployment tax), as well as *Workers Compensation, Gray v. Johnson Employment Services*, No. CA10-62, 2010 WL 4983129, at \*2 (Ct. App. Dec. 8, 2010) (holding that PEO can assert a Workers Compensation defense), have arisen.

264. 324 N.L.R.B. 1051 (1997).

development of the terms and conditions of employment.<sup>265</sup>

The Board reached this result by applying joint employer law and concluded that the PEO and the client company did not share or codetermine matters governing significant and essential terms and conditions of employment.<sup>266</sup>

Indeed, the analysis utilized by the Labor Board is consistent with case law addressing the joint employment status of employers (who are not organized as a PEO) that provide payroll and other administrative services. NLRB law is clear that simply outsourcing this function, without more, does not establish a joint employment relationship.<sup>267</sup>

Though the case law is still developing in this area, based upon the case law that has developed, the fact that a firm is organized as a PEO appears to be largely irrelevant to joint employer status. Rather, the focus is on substance of how the organization is run and controlled as opposed to the form of the organization.

#### *E. Single Employer Theory*

In labor relations, the single employer theory is often invoked by a union in order to prevent an employer from using double-breasted operations where it shifts work from a unionized plant to a non-union facility.<sup>268</sup> The non-union facility is essentially an “alter ego” of the unionized facility and an employer would be able to evade the requirements of its labor agreement if such practices were permitted.<sup>269</sup>

The single employer doctrine is invoked in a number of other situations involving labor and employment law. Some common examples include: when necessary to satisfy the amounts effecting interstate commerce to establish NLRA jurisdiction,<sup>270</sup> to assert coverage over work under a collective bargaining agreement,<sup>271</sup> to collect unpaid pension fund contributions for work performed by employees at the non-union or alter

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265. *Id.* at 1062.

266. *Id.* at 1061–62; *see also* Metro. Chi., Inc., 13-RC-20098 (Nov. 12, 1999) (same notwithstanding the fact that the PEO had a representative at the worksite).

267. Rome Electrical Systems, Inc., 356 NLRB No. 38 (Nov. 24, 2010) (finding joint employment relationship due to transfer of assets between entities in addition to payroll services); La Gloria Oil & Gas Co., 337 N.L.R.B. 1120 (2002), *enforced without op.*, 71 Fed. Appx. 441 (5th Cir. 2003) (declining to find that company solely offering payroll services was a joint employer).

268. S. Calif. Paint & Allied Trades v. Rodin & Co., 558 F.3d 1028, 1031 (9th Cir. 2009).

269. DAU-SCHMIDT, *supra* note 30 (2009) (discussing double breasted operations).

270. *See, e.g.*, Radio & Television Broad. Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256–57 (1965).

271. *See, e.g.*, CWA v. U.S. W. Direct, 847 F.2d 1475, 1477–78 (10th Cir. 1988).

ego facility,<sup>272</sup> to obtain information about the duty to bargain with the union,<sup>273</sup> or to impose a bargaining obligation on an entity where the employees appear ostensibly to be employed by another employer.<sup>274</sup>

Some examples of single employers include a hospital and a partnership of doctors that contracted with the hospital for office space, secretarial services and where a corporation and its two wholly owned subsidiaries operated adult movie theaters and book stores.<sup>275</sup>

In labor relations, to establish a single employer relationship, the following factors are examined: 1) whether operations are interrelated; 2) whether common management exists; 3) whether the parties have common ownership or financial control; and, 4) whether centralized control of labor relations exists.<sup>276</sup> This is sometimes referred as the four-factor test.<sup>277</sup>

While the totality of the circumstances controls the Board's determination,<sup>278</sup> all four factors are not necessarily equal. In labor cases, the Board often gives more weight to centralized control of labor relations factor.<sup>279</sup> This factor has been described as being "critical" to a finding of single employer status.<sup>280</sup>

Single employer status litigation is not limited to traditional labor law litigation. Outside traditional labor law, such as under Title VII, the single employer doctrine is invoked in the parent/subsidiary context<sup>281</sup> as well as

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272. *See, e.g.*, *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 514-15 (5th Cir. 1982).

273. *See, e.g.*, *Dodger Theatricals Holding, Inc.*, 347 N.L.R.B. 953, 968-69 (2006).

274. HIGGINS, *supra* note 16, at 2242 (discussing single employer doctrine).

275. *Id.* at 2245-56 (citing authorities).

276. *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). *See also* *South Prairie Constr. Co. v. Operating Eng'rs Local 627*, 425 U.S. 800, 802 (1976) (quoting *Radio & Television 4 factor test* with approval).

277. *Paint America Services, Inc.*, 353 NLRB No. 100, at \*1 (Feb. 25, 2009) (using four-factor test language); *accord*, *Carnival Carting v. NLRB*, Nos. 10-3408-ag (L), 10-3410-ag (AXP), 2012 WL 10968 (2d Cir. Jan. 4, 2012).

278. *Dow Chem. Co.*, 326 N.L.R.B. 288, 288 (1988) (employing totality of the circumstances analysis).

279. *See, e.g.*, *Mercy Hosp. of Buffalo*, 336 N.L.R.B. 1282, 1284 (2001); *accord*, *Marvelli v. Chaps Cmty. Health Ctr.*, 193 F. Supp. 2d 636, 653 (E.D.N.Y. 2002); *Dias v. Cmty. Action Project*, No. 07-CV-5163, 2009 WL 595601, at \*3 (E.D.N.Y. Mar. 6, 2009) (same under Title VII); *Almeida v. Athena Health Care Assocs.*, No. 3:07CV517 (PCD), 2009 WL 490066, at \*5 (D. Conn. Feb. 26, 2009).

280. HIGGINS, *supra* note 16, at 2244. However, control of labor relations is not in and of itself determinative. *Id.* at 2244 n.172.

281. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995) (holding that single employer test is appropriate standard under Title VII in determining whether parent companies may be considered employer of subsidiary's employees); *Dias*, 2009 WL 595601 at \*7; *Morrow v. Metro. Transit Auth.*, No. 08 Civ. 6123 (DLC), 2009 U.S. Dist. Lexis 39252, at \*26 (S.D.N.Y. May 8, 2009) (same).

in other situations.<sup>282</sup> As in traditional labor law, the control of labor relations factor is especially important.<sup>283</sup>

Interestingly, the Second Circuit under Title VII views the single and joint employer tests as one test.<sup>284</sup> In effect, however, the Second Circuit was really only examining the single employer test because it was describing the four single employer factors (1. interrelation of operations, 2. centralized control of labor relations, common management, and 4. common ownership or control).<sup>285</sup> The Second Circuit also held that this test is not applicable to governmental employers because it may raise constitutional issues that can alter the regulatory balance established by the government.<sup>286</sup>

In any event, under a single employer theory, “all the employees of the constituent entities are employees of the overarching integrated entity, and all of those employees may be aggregated to determine whether it employs fifteen employees,”<sup>287</sup> which is a threshold determination under Title VII. The policy that the law seeks to protect is one of fairness. It allows for the imposition of liability when two nominally independent entities do not have an arm’s length relationship with one another.<sup>288</sup>

#### F. *Individual Supervisory Liability Theory*

Individuals are not normally considered “employers.” Obviously, they do not have a direct employment relationship with employees. Since they in fact may be considered an employer and held individually liable as an employer, they are treated as a quasi-employer by this commentator.

The issue of liability of individuals as employers may seem counterintuitive at first since individuals, in most cases, are not personally liable for the actions of the corporation and the individuals who may face liability as employers are employees themselves. Like so many areas of the law, the answer to the legal question whether an individual can be held liable as an employer is complex and the real answer is that “it depends.”

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282. *Sanford v. Main St. Baptist Church Manor, Inc.*, No. 10-5323, 2011 WL 6016247 (6th Cir. Dec. 5, 2011).

283. *Morrow*, 2009 U.S. Dist. Lexis 39252, at \*5. This factor includes such tasks as administering job applications and personnel status reports. *Id.*

284. *See, e.g., Gulino v. N.Y.S. Educ. Dep’t.*, 460 F.3d 361, 378 (2d Cir. 2006).

285. *Id.*

286. *Id.* at 375, 378. Unfortunately, the court did not provide any analysis or examples supporting this statement.

287. *Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193, 199 (2d Cir. 2005) (emphasis in original) (Title VII case). *See also* *Dias v. Cmty. Action Project*, No. 07-CV-5163, 2009 WL 595601, at \*3 (E.D.N.Y. Mar. 6, 2009) (same); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995) (same).

288. *See, e.g., Dias*, 2009 WL 595601, at \*3; *Paint America Services, Inc.*, 353 NLRB No. 100, at \*1 (Feb. 25, 2009).

Depends upon what? It depends on the language and the intent of the employment statute at issue.

Title VII provides that the term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees.<sup>289</sup> In *Miller v. Maxwell’s International*, the Ninth Circuit held that a supervisor could not be held responsible as an “agent” under Title VII because the “obvious purpose” of the agent provision was to import the law of respondent superior liability upon the employer.<sup>290</sup>

The court also found support from the fact that by limiting coverage to employers who have fifteen or more employees, Congress desired to shield small employers from the reach of the statute.<sup>291</sup> Therefore, it was inconceivable to the Ninth Circuit that this same Congress intended to subject individuals to personal liability.<sup>292</sup>

The Second Circuit later recognized that although supervisory liability could be found under a strict reading of the term “agent” in the statute, the court refused to read Title VII in such a manner because that would be contrary to the intent of Congress.<sup>293</sup> The court then followed the analysis utilized in *Maxwell*. Though the Supreme Court has not addressed this issue, all twelve circuits have concluded that there is no individual supervisory liability under Title VII.<sup>294</sup> Courts have come to the same conclusion under the Americans with Disabilities<sup>295</sup> Act<sup>296</sup> and the Age

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289. 42 U.S.C. § 2001(b) (2006).

290. 991 F.2d 583, 588 (9th Cir. 1993).

291. *Id.* at 587.

292. *Id.*

293. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–14 (2d Cir. 1995).

294. *See, e.g.*, *Fantini v. Salem State College*, 557 F.3d 22 (1st Cir. 2009); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–17 (2d Cir. 1995); *Dici v. Pennsylvania*, 91 F.3d 542, 551–53 (3d Cir. 1996); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180–82 (4th Cir. 1998); *Amolie v. Orleans Sch. Bd.*, 48 Fed. Appx. 917, 917 (5th Cir. 2002) (per curiam); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405–06 (6th Cir. 1997); *Gastineau v. Fleet Mortgage Corp.*, 137 F.3d 490, 493 (7th Cir. 1998); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 379–81 (8th Cir. 1995); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587–88 (9th Cir. 1993); *Haynes v. Williams*, 88 F.3d 898, 900–01 (10th Cir. 1996); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *see also* TIMOTHY P. GLYNN, ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 33 (2d ed. 2011) (stating that *Miller* has been widely followed).

295. Like Title VII, the ADA defines an employer as: “a person . . . who has 15 or more employees . . . and any agent of such person . . .” 42 U.S.C. § 12111(5)(A) (2006).

296. *See, e.g.*, *Corr v. MTA Long Island Bus.*, No. 98-9417, 1999 WL 980960, at \*2 (2d Cir. Oct. 7, 1999), *aff’d*, 199 F.3d 1321 (2d Cir. 1999); *Koslow v. Pennsylvania*, 302 F.3d 161, 178 (3d Cir. 2002); *Ford v. Frame*, 3 Fed. Appx. 316, 318 (6th Cir. 2001); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 808 n.1 (6th Cir. 1999); *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000); *Silk v. City of Chicago*, 194 F.3d 788, 797 n.5 (7th Cir. 1999); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 744 (10th Cir. 1999); *Pritchard v. S. Co. Servs.*, 102 F.3d 1118, 1119 n.1 (11th Cir. 1996).

Discrimination<sup>297</sup> in Employment Act.<sup>298</sup>

Yet, individuals have been found liable as employers under other employment statutes such as the FMLA,<sup>299</sup> FLSA,<sup>300</sup> and state employment law statutes<sup>301</sup>—at least where they had supervisory authority over the plaintiff.

297. Like Title VII, the ADEA states that the term employer “also means (1) any agent of such a person . . .” 29 U.S.C. § 630(d) (2006).

298. *See, e.g.*, *Cerry v. Toussaint*, 50 Fed. Appx. 476, 477 (2d Cir. 2002); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994); *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 686 (5th Cir. 2001); *Sabouri v. Ohio Dept. of Educ.*, No. 96-4331, 1998 WL 57337, at \*2 (6th Cir. 1998), *aff’d*, 142 F.3d 436 (6th Cir. 1998); *Horwitz v. Bd. of Educ. of Avoca Sch. Dist.* No. 37, 260 F.3d 602, 610, n.2 (7th Cir. 2001); *Smith v. Lomax*, 45 F.3d 402, 404 n.4 (11th Cir. 1995); *Miller*, 991 F.2d at 597-88.

299. Under the FMLA, the definition of an employer includes any person who acts directly or indirectly in the interest of an employer. 29 U.S.C. § 2611(4). *See Dewan v. Universal Granite & Marble, Inc.*, No. 08-C-350, 2009 WL 590499 \*6 (N. D. Ill. Mar. 6, 2009) (holding supervisor individually liable as employer under FMLA); *Pedersen v. Western Petroleum, Inc.*, No. 2:07-CV-997 TS, 2008 WL 977379 \*7 (D. Utah Apr. 9, 2008) (same); *Wilson v. Advocate Health & Hosps. Corp.*, No. 05 C 6408, 2006 WL 1749662 \*2 (N.D. Ill. June 21, 2006) (discussing supervisory liability); *Brewer v. Jefferson-Pilot Standard Life Ins.*, 333 F. Supp. 2d 433, 437 (M.D. N.C. 2004) (same); *Richardson v. CVS Corp.*, 207 F. Supp.2d 733, 741-42 (E.D. Tenn. 2001) (same). *see also Alcazar-Anselmo v. City of Chi.*, No. 07 C 5246, 2008 WL 1805380 \*2 (N.D. Ill. April 18, 2008) (discussing supervisory liability under FMLA and FLSA; the court does not undertake any different type of analysis because public employer is involved). *But see Haybarger v. Lawrence Co. Adult Probation & Parole*, 667 F.3d 408 (3d Cir. 2012) (same, but discussing that a conflict in the circuits exists with respect to the issue of individual liability of supervisors under the FMLA in the public sector).

The issue of individual liability under the FMLA has been “percolating” for over a decade. *Sandra Sperino, Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liability Under The Family And Medical Leave Act*, 71 Mo. L. REV. 71, 71 (2006) (extensively analyzing individual liability under FMLA); *David R. Mellon, Individual Liability As An “Employer” Under The Family And Medical Leave Act*, 22 AM. J. TRIAL ADVOC. 449 (1998) (extensively discussing individual liability under FMLA and comparing FMLA to other employment statutes).

300. *See e.g.*, *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007); *Herman v. RSR Security Svcs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999); *U.S. Dep’t. of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778-779 (6th Cir. 1995); *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009); *Freemon v. Foley*, 911 F. Supp. 326, 331 (N.D. Ill. 1995).

301. *Hill v. Ford Motor Co.*, 277 S.W. 3d 659, 669 (Mo. 2009) (noting that under state law, individuals can face liability as a person acting in the interest of the employer); *Butler v. Hartford Technical Inst.*, 704 A. 2d 222, 227 (Conn. 1997) (finding individual civil liability under Connecticut state law because a criminal statute held employer officers and agents responsible for unpaid wages); *Chung v. New Silver Place Restaurant, Inc.*, 272 F. Supp. 2d 314, 318 (S.D.N.Y. 2003) (holding that under New York law an individual can be liable as employer for unpaid wages if he or she has control over employment). By statute, Illinois, 820 Ill. Comp. Stat. Ann. 115/13 (2008) and Kansas, Kan. Stat. Ann. § 44-323(b), expressly permits officers and agents to be personally liable as employer’s for unpaid wages.

By contrast, the Nevada Supreme Court held that there was no individual liability

The FLSA, for example, defines employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>302</sup> In *Boucher v. Shaw*, the Ninth Circuit held that there cannot be individual liability under the FLSA unless the person in question exercises “control over the nature and structure of the employment relationship, or economic control . . . .”<sup>303</sup> This standard was easily met as two of the three individual defendants had a respective seventy and thirty percent ownership interest and all three defendants had control and custody over the plaintiff’s employment.<sup>304</sup>

*Richardson v. CVS Corp.* is an instructive, well-reasoned FMLA case.<sup>305</sup> The court refused to follow Title VII case law, which held that individual supervisors could not be held liable because of the differing statutory language. The court reasoned that the FMLA definition of an employer, which is the same as under the FLSA (“any person who acts, directly or indirectly, in the interest of an employer”), is broader than the word “agent” as used in Title VII.<sup>306</sup>

In determining whether there can be individual liability as an employer, the court looked to the economic realities of the relationship and considered factors such as whether the individual had an ownership interest, whether the individual controlled day-to-day operations, and whether the individual determined salaries.<sup>307</sup> Notably, the individual

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under Nevada law, which has a wage protection statute that defines employer as including “every person having control or custody of any employment, place of employment or any employee.” NEV. REV. STAT. § 608.011. Despite this seemingly broad definition, the Nevada Supreme Court held that in the absence of clear legislative intent, it was not going to presume that the state legislature intended to equate individual managers with employers. *Boucher v. Shaw*, 196 P.3d 959, 963 (Nev. 2008); *accord*, *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003) (corporate officers and agents not liable under Colorado wage and hour law).

302. Equal Pay Act of 1963, 29 U.S.C. § 203(d) (2006).

303. *Boucher*, 196 P.3d at 960 (Nev. 2008) (quoting *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc)).

304. *Id.* See also *Gray v. Powers*, No. 10-20808, 2012 WL 638497 (5th Cir. 2012) (holding that a member of a limited liability corporation was not an employer under the FLSA applying the economic realities test).

305. 207 F. Supp. 2d 733 (E.D. Tenn. 2001); see also *Evans v. Henderson*, No. 99 C 8332, 2000 WL 1161075 (N.D. Ill. Aug. 16, 2000) (employing a similar analysis in the public sector context).

306. *Richardson*, 207 F. Supp. 2d at 742.

307. *Id.* at 744. Significantly, the court held that these were not the only factors that could be considered. In using the term “economic realities,” it is not entirely clear whether the court was referring to the economic reality test, which is used to examine whether or not an individual is an employee. See *supra* notes 99–108 and accompanying text; see also *Sperino*, *supra* note 299, at 76 (2006) (stating that most courts have interpreted the FMLA to permit individual liability if the person was acting on behalf of the private employer).

While this Article focuses on individual liability of supervisors employed by private employers, it should be noted that there is a conflict in the circuits concerning this issue

defendant who faced personal liability was not a director or officer, but rather a district manager.<sup>308</sup>

## V. CONCLUSION

This Article has reviewed how courts continue to struggle with the definition of an employee under current employment law. Part of this struggle may be due to the fact that there is tension amongst employers who want to control their workers while simultaneously avoiding liability under this nation's labor and employment laws. Part of the confusion may be inherent in the common law system or may be caused by poorly worded statutes. Whatever the cause, categorizing an employee is clearly problematic, and therefore it should come as no surprise that courts are also struggling with the definition of an employer.

Determining employer status often involves difficult issues because there is a large variety of employers, and because the nature of work is continuously changing. This Article explored the employer status of quasi-employers, who, to borrow a phrase from the Supreme Court, are in the borderland between employers and non-employers.<sup>309</sup>

The notion that quasi-employers may be subject to our nation's labor and employment laws is not a unique proposition. In other contexts, third parties are subject to labor and employment regulation even though they do not directly employ the individuals in question. This Article has discussed several examples of this including the regulation of secondary boycotts and the controlling employer policy under OSHA.<sup>310</sup>

As this Article demonstrates, simply because one is not labeled an employer, does not mean that he or she is not in fact an employer. The same is true, of course, with respect to an employee. This Article has documented at least five situations where quasi-employer liability can be found. They are the *Sibley* Interference theory where employer responsibility is found because the employer interferes with the employment of an employee; the related *Spirit* delegation theory where a third party is held responsible as an employer because it has been delegated

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under the FMLA with respect to whether public officials employed by a public employer can be held individually liable as employers. *Rutland v. Pepper*, 404 F.3d 921, 923 n.1 (5th Cir. 2005). This is because the term "public agency" is separately defined. *See Haybarger*, *supra* note 299 (analyzing this issue); *Mitchell v. Chapman*, 343 F.3d 811, 827 (6th Cir. 2003) (discussing this issue); *Sperino*, *supra* note 299, at n.26 (noting conflicting case law with respect to the imposition of personal liability in the public sector). *Compare* 29 U.S.C. § 2611(4)(A), *with* 29 U.S.C. § 2611(4)(B).

308. *Richardson*, 207 F. Supp. 2d at 744. *But see Sperino*, *supra* note 299, at 71–72 (criticizing courts for only undertaking a cursory analysis of this issue).

309. *NLRB v. Hearst Publ's., Inc.*, 322 U.S. 111, 121 (1944).

310. *See supra* notes 186–192 and accompanying text.

an important responsibility that effects the terms and conditions of employees; the joint employer theory where two separate businesses can both be considered the employer; and the related single employer theory where two nominally separate businesses can be considered a single employer. Finally, under certain statutes, supervisors can be personally liable and therefore, they are considered to be a quasi-type of employer.

Quasi-employers are as fully responsible as traditional employers. Therefore, it is important for the law to have a clear definition of who an employer is so both employees and employers know what their rights and responsibilities are. The consequences of not being able to identify the proper employer can, of course, be fatal to any litigation.<sup>311</sup>

In labor and employment law today, the question of who an employer is remains of paramount concern because liability is almost wholly dependent upon employer status.<sup>312</sup> No matter what one's views are with respect to the controversial case law and issues cited herein, uniformity in the law is necessary. The time is ripe for an authoritative distinction among the definitions of employee, quasi-employer, and employer.

Future work environments will almost certainly look very different from those of today. Outlining clear criteria to define employment status is necessary in order to provide future generations with guidelines with which to analyze those environments.<sup>313</sup> It is hoped that this Article will help

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311. In *Dejoie v. Medley, Jr.*, 9 So.2d 826 (La. 2009), for example, the Supreme Court of Louisiana dismissed an employment discrimination case brought under state law against the state because the state was not the plaintiff's employer. See also *Okoi v. El Al Israel Airlines*, Index No. 05-5370 (DRH)(WDW), 2009 U.S. Dist. Lexis 9610 (E.D.N.Y. Feb. 10, 2009) (dismissing a Title VII claim against an airline because it was not the plaintiff's employer); Brishen Rogers, *Toward Third-Party Liability For Wage Theft*, 31 BERKELEY J. EMPL. & LAB. L. 1, 13 (2010) (stating that only employers are liable for improper working condition violations).

With respect to the issue of employee status (as opposed to employer status), if an individual is not an employee they generally do not receive any statutory protection. See, e.g., *Feldmann v N.Y. Life Ins. Co.*, No. 4:09CV2129MLM, 2011 WL 382201 (E.D. Mo, Feb. 3, 2011) (holding that an independent contractor is not protected under Title VII); *Kern v. City of Rochester*, 93 F.3d 38, 45 (2d Cir. 2004) (holding that Title VII is an employment statute applicable only to employees and prospective employees); *Murphy v. ERA Realty*, 674 N.Y.S. 2d 415, 416 (holding similarly under state human rights law). But see Richard Bales & Lindsay Mongenas, *Defining Independent Contractor Protection Under the Rehabilitation Act*, 34 HAMLIN L. REV. 435 (2011) (discussing conflict in the circuits over the issue of whether independent contractors are protected against discrimination on the basis of disability under the Rehabilitation Act). See generally Lofaso, *supra* note 62, at 499 (2010).

312. Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMPL. & LAB. L. 1, 12–15 (2010) (criticizing the limitation of liability under the FLSA which is limited to employers and arguing for broader responsibility for third parties who effectively control the supply of commerce).

313. See Altman, *supra* note 197 (discussing the potential work force of the future). More than a decade ago, the late Professor Clyde Summers indicated that approximately 25–

## 2012] EMPLOYEES, EMPLOYERS AND QUASI-EMPLOYERS 659

bring clarity to the area of uncertainty in the borderland between employers and non-employers and between employees and non-employees.

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30% of the work force is engaged in a form of peripheral employment other than traditional full-time work. Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L. J. 503, 519–20 (1997).