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Is The Trust An Employer?

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Presentation Outline

I. **Introduction** to the Employee/Independent Contractor classification problem

A. The shift from "status" (Master/Servant) to "contract"

1. Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to stop Trying*, 22 Berk. J. Emp. & Lab. L. 295 (2001)

2. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

B. The introduction and eventual survival of statutory employment protections during the New Deal, overcoming *Lochner* era substantive due process challenge.

C. The relevance of contractual characterization of a hiring relationship as "independent contractor" relationship, in light of bargaining power disparities

D. The scale of misclassification problem.

a. Kyla Miller, *The Misclassification Trend: How Independent Contractor Status Could Affect Consumers*, 28 Loy. Consumer L. Rev. 333 (2016)

b. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. Davis Bus. L.J. 111 (2009).

E. Brief identification of some statutory coverage issues most likely to be relevant to SNT scenarios, including federal payroll tax withholding, unemployment insurance, workers' compensation insurance coverage, wage and hour protections, and wage payment and collection protections.

F. The modern workplace and new difficulties in employee classification in the fissured workplace and gig/platform economy. Applicability to home caregivers.

1. DAVID WEIL, THE FISSURED WORKPLACE (2014)
2. Robert Sprague, *Updating Legal Norms for a Precarious Workforce*, 35 ABA J. Lab. & Emp. L. 85 (2020).
3. Kenneth Dau-Schmidt, *The Problem of "Misclassification" or How to Define Who Is An "Employee" Under Protective Legislations in the Information Age* (2019).
4. Griffin Pivateau & Gina Nerger, *The Worker Classification Dilemma: The IRS Test and the Platform Economy*, 53 Texas Tech. L. Rev. 535 (2021).

G. Overview of the three primary approaches to distinguishing between employees and independent contractors: (1) common law control test; (2) economic realities test; and (3) ABC test.

II. **The Common Law Control Test**

A. History and Development. Roots in the doctrine of *respondeat superior*, in the context of imposing tort liability on a principal for injuries caused by the negligence of the agent.

1. Restatement (Second) Agency 220(1)
2. Carlson, *Why the Law Still Can't Tell An Employee, supra*

B. Adoption as the default rule in federal statutory employment protections by U.S. Supreme Court in *Nationwide Mutual v. Darden*, 503 U.S. 318 (1992)

C. Development of the 12 factor (*Darden*) common law test: (1) skill required; (2) source of instrumentalities and tools; (3) location of work; (4) duration of relationship between the parties; (5) whether hiring party has right to assign additional projects to the hired party; (6) extent of hired party's discretion over when and how long to work; (7) method of payment; (8) hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Darden; Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989).

III. <u>The Economic Realities Test</u>

A. Development in the context of the FLSA, with the broadest statutory definition of "employ" = "suffer or permit to work." 29 U.S.C. s. 203(e)(1).

B. Key focus of the inquiry is on "dependence" rather than "control," although there are some overlapping factors.

C. Factors: (1) degree of alleged employer's right to control the manner in which the work is to be performed; (2) alleged employee's opportunity for profit or loss depending upon their managerial skill; (3) alleged employee's investment in equipment or materials required for the task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) degree of permanence of the working relationship; and (6) whether service rendered is an integral part of the alleged employer's business. *See Donovan v. DialAmerica Mktg*., 757 F.2d 1376 (3d Cir. 1985); *Sec. of Labor v. Lauritzen*, 835 F.2d 1529 (7^{th} Cir. 1987).

D. Brief note on the "Hybrid" ("relative nature of the work") Test – a test that "encompasses both the 'right to control' and the 'economic realities' test. *See,* *e.g., D'Annunzio v. Prudential Ins. Co*., 192 N.J. 110 (2007); *Franz v. Raymond Eisenhardt & Sons*, 732 F. Supp. 521 (D.N.J. 1990).

IV. **<u>The ABC Test</u>**

A. Thus far, only adopted (in whole or partially, in some form) at the state level, and not at the federal level; efforts to advance legislation at the federal level have not yet been successful.

B. The leading type of reform aimed at the misclassification issue in recent years.

C. Cataloguing states' adoption of the ABC test, whether in whole or partially.

1. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53 (2015)
2. John Pearce II & Jonathan Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on From a Common Law Standard*, 14 Hastings Bus. L.J. 1 (2018).
3. Jon Shimabukuro, Cong. Research Service, *Worker Classification: Employee Status Under the NLRA, the FLSA, and the ABC Test* (2021).
4. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 William & Mary Bus. L. Rev. 733 (2020).
5. Comprehensive adoptions in Massachusetts, New Jersey, California, and Oregon.

D. Operation of the ABC Test

1. Origin – Maine Employment Security Law, *see Pearce & Silva, The Future of Independent Contractors, supra*.
2. Name Origin – Mass. Gen. Laws. Ann. Ch. 149, s.148B
3. Application – Hargrove v. Sleepy's, LLC, 220 N.J. 289 (N.J. 2015); Eric Markovits, *Easy As ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, Cardozo L. Rev. de novo (2020).
4. Three Components of ABC Test: (A) purported employer neither exercised control over the work, nor had the *ability* to exercise control in terms of completion of work; (B) services provided were either outside the usual course of the business or performed outside of the all the places of business of the enterprise; and (C) enterprise that exists and can continue to exist independently of and apart from the particular service relationship. Must be stable and lasting, such that it will survive the termination of the challenged relationship.
5. Operation of the presumption and placement of burden of proof on the employer.

V. **Application to SNT Context**: Considering specific statutory employment protections most likely to be relevant in SNT contexts.

A. These are context specific determinations, such that individual could be "employee" for some statutory protections, but "independent contractor" for others. Highly individualized determinations driven by facts of individual cases.

B. Note the criticism of this resulting lack of predictability by Judge Easterbrook in concurrence in FLSA case, *Sec. of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987). "People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed."

C. Payroll taxes and Withholding

1. FICA – Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq.
2. FUTA – Federal Unemployment Tax Act, 26 U.S.C. 3301, et seq.
3. Common law control test under *Darden* default; I.R.C., 26 U.S.C. s. 3121(d) definition of "employee"
4. IRS Test – 20 factor test in making determination. See 26 C.F.R. s. 31.3121(d)-1, 31.3306(i)-1, 31.3401(c)-1.

D. State Unemployment Insurance coverage

1. Several states have adopted ABC test in context of unemployment insurance coverage. *Pearce & Silva, The Future of Independent Contractors, supra*; Deknatel & Hoff-Downing, *ABC on the Books, supra*

E. Workers' Compensation

1. ABC Test will apply in those states where more comprehensive adoption of ABC test. *Id.*
2. Note most states (38) with workers' compensation coverage requirements for even very small employers, including as few as only 1 employee. States' early legislative responses to 1972 National Commission on State Workmen's Compensation Laws.

3. Workers' compensation is one area where, post-injury, the hiring entity will often *prefer* to be the employer of the hired individual ("employee"), because that conclusion triggers application of the workers' compensation exclusivity bar; no tort claim available to injured worker absent application of the "intentional tort" exception, and workers' compensation recovery is limited to medical expenses and statutorily-defined impairment compensation or income replacement (often 2/3 of pre-injury compensation, subject to statutory caps). Trade-off is no need to prove negligence, quick recovery resolved administratively, avoids litigation.

F. Federal Wage and Hour Protections – FLSA

1. Application of "Economic Realities" test, given broadest "suffer or permit to work" statutory language; uncertainty in application and misclassification abuse; Department of Labor enforcement.

G. State Wage and Hour Protections

H. State Wage Payment and Collection Laws

VI. <u>Who Is the Worker's "Employer?"</u>

A. Consider possible application of "joint employer" rules.

1. This can affect application of statutory protections by aggregation of the total number of employees; i.e., the employee-counting issue

2. Also can affect which parties are liable for violation of the employee statutory protection, defeating attempts at outsourcing employment liability. See, e.g., *Becerra v. Expert Janitorial*, 332 P.3d 415 (Wash.

2014) (state wage and hour); *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003) (federal wage and hour).

B. SNT Context – Is trustee the "employer" for purposes of statutory coverage, even where the trustee outsources employment management?

C. *Risk Management Strategies Inc. v. Texas Workforce Comm*., 464 S.W.3d 864 (Ct. App. Tex. 2015).

1. SNT specific context involving outsourcing of employment services.
2. Facts: RMS clients were financial institutions appointed as trustees of several SNTs. Beneficiaries of the trusts often need extensive in-home care, and caregiver is often a family member. Trustees outsource employment management of caregivers through "Client Services Agreement," whereby RMS agrees to "provide and perform . . . for and on behalf of the Trustee . . . employment and related services" for the individuals engaged in caring for the trust's beneficiary. This includes paying wages, collecting, reporting and payment of payroll taxes, and payment of unemployment insurance. The agreement provided that the parties agree that RMS would "do all acts necessary to employ or contract with individuals who will be the employees or independent contractors of RMS and that the Trustees shall not in any manner be deemed to be the employer of such persons."
3. RMS argued that, by contract, all the control over the caregivers was vested in RMS, and not in the SNT trustees.

4. Texas Workforce Commission determination that trustees were employers, not RMS; Commission's concern about the practice of "payrolling"
5. Judicial review and specific limitations in Texas; Texas Court of Appeals determination at pleading stage re: *ultra vires* challenge to Commission's action.

VII. <u>Related Issue for Caregivers – Federal FLSA Exemption</u>

A. History of FLSA exemption for caregivers

1. 1974 FLSA extended to cover "domestic service"
2. Exemption for domestic service employment – **companionship** services for individuals who (because of age or infirmity) are unable to care for themselves (Min. Wage and OT exemption); 29 U.S.C. s. 213(a)(15). Under current DOL regulations, this exemption does not include performance of medical tasks which typically require training and are performed by medical personnel, such as registered nurses, LPNs, or CNAs. 29 C.F.R. s. 552.6
3. Exemption for domestic service in household who **resides in** household (OT exemption only); 29 U.S.C. s. 213(b)(21); 29 C.F.R. 552.102
4. 2013 – DOL revision to regulation added important limitations on these exemptions.
    1. Companionship exemption as applied to "provision of **care**" (dressing, grooming, feeding, bathing, toileting) could not exceed 20% of hours worked. 2013 regulation placed focus on protection and fellowship.

2. Companionship and live-in domestic service by **third party employers** not exempt, "even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption." 29 C.F.R. s. 552.109. *See Home Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) (upholding 2013 regulation as applied to third-party employers, applying *Chevron* deference).

B. Notice of Proposed Rulemaking, Dept. of Labor, WHD, *Application of the Fair Labor Standards Act to Domestic Service*, 29 C.F.R. s.552 (July 2, 2025).

1. Intent to return to broader exemption for companionship and in-home caregivers. Includes: (1) reversal of limitation on third-party employer's ability to use exemption; (2) reversal of "companionship" limitations relating to 20% limit for "care," to fully include "care" along with "fellowship" and "protection" as covered by the exemption. Proposal would rescind 2013 regulation in its entirety and return to the 1975 regulations regarding domestic services.
2. Reversal of *Chevron* deference in *Loper Bright Enterp. v. Raimondo*, 603 U.S. 369 (2024), as basis for revisiting regulation. "The Department has thus far taken the position in litigation that the 2013 rule is still valid despite the 2024 Loper Bright decision, but is now taking a fresh look at arguments to the contrary. . . . In sum, the Department seeks to determine

whether, with respect to third party employers, its original interpretation of the section 13(a)(15) and 13(b)(21) exemptions is the better reading of the FLSA's statutory text."

C. Commentary: Joshua Vaughn, et al, Littler ASAP, *DOL Proposes Rule to Reinstate Companionship and Live-In Exemptions from Minimum Wage and Overtime for Third-Party Employers*, available at: https://www.littler.com/news-analysis/asap/dol-proposes-rule-reinstate-companionship-live-exemptions-minimum-wage-and

VIII. Related Issue for Caregivers – State Domestic Workers Bill of Rights Legislation

A. Domestic Worker Bill of Rights (DWBR)

1. See generally National Domestic Workers Alliance, available at: https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/

2. California example. Kevin Rehwald, *Rights for Caregivers*, 42 L.A. Lawyer 26 (2019). Summary of key provisions.

3. Illinois example. See Cesar Rosado Marzan, *Personal and Political: How the Illinois Domestic Workers' Bill of Rights Connected Lives*, 57 U.C. Davis L. Rev. 3033 (2024). 820 ILCS 182/1, 182/5, 182/10, 182/90, 182/99. Summary of key provisions.