

Is the Trust an Employer?

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Employee or I/C?

- Control (common law test)
- Economic Realities (dependence)
- Hybrid (either control OR dependence)
- ABC Test (trend in some states)

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Control Test

- Origins in CL Agency – *respondeat superior* doctrine; should that extend to employment law protections?
- *Darden* (ERISA) – 12 factors to consider in determining control
- Default for federal statutes w/ unhelpful or circular definitions of “employee,” “employer,” or “employ”
- Many state WC statutes

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Economic Realities

- Key is economic dependence
- Federal statutes where Congress indicates an intent to cover more broadly than the CL test
- FLSA – employ = “to suffer or permit to work”
- FMLA – incorporates FLSA definition
- Six factor test, but 2021 (Trump) DOL Rule revised to focus on 2 “core” factors
- 2024 (Biden) DOL Rule rev’d that focus, but current (Trump) DOL is not enforcing & considering rescission

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Economic Realities

- ① D’s control over worker
- ② Worker’s opportunity for profit or loss
3. Worker’s investment in equipment/materials
4. Whether the work requires special skill
5. Degree of permanence of the relationship
6. Whether the work is an integral part of D’s business
 - * Key Inquiry: Economic dependence; or “degree of independent business org. and operation”

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Economic Realities

Criticism:

“It is comforting to know that ‘economic reality’ is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But ‘reality’ encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why?”

- Judge Frank Easterbrook

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Economic Realities

“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 . . .”

- Judge Frank Easterbrook

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Hybrid

- Results in somewhat broader coverage
- Either control OR dependence
- Some courts have applied to:
 - ADA – disability
 - ADEA – age
 - Several different state statutes

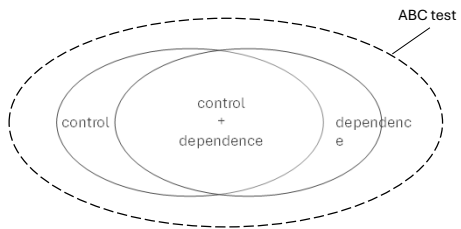
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ABC Test

- Trend only in some states, not federal (...so far)
- Rebuttable presumption that worker is “employee,” unless D carries its burden to show all 3:
 - (A) Absence of D’s control
 - (B) Work performed outside D’s usual course of business or outside all D’s places of business
 - (C) Worker’s enterprise can exist independently; would survive in the absence of the relationship with D

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Boundaries of Protection



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Examples From Other Contexts

- Beef boning workers – *Rutherford* (FLSA)
- Mattress delivery workers – *Hargrove* (NJ state W&H)
- Fed Ex home delivery drivers (NLRA, FLSA)
- Uber, Lyft, platform workers (CA state W&H)
- Commercial cleaners – *Mujo* (CT state W&H)
- Pickle harvesters – *Lauritzen* (FLSA)
- Exotic dancers – *Verma* (FLSA, PA state W&H)

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SNT Context

Federal payroll taxes & withholding

- FICA – 26 U.S.C. 3101
- FUTA – 26 U.S.C. 3301
- IRC – 26 U.S.C. 3121(d) definition “employee”
- *Darden* default rule = **Control Test**
- IRS 20 factor test for control
- New IRS emphasis on **3 categories**: behavioral control, financial control, and relationship of the parties

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SNT Context

State Unemployment Insurance

- About half of states have adopted some form of the ABC test in the context of unemployment insurance
- More common to see ABC test here than for other state employment laws

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SNT Context

State Workers' Compensation

- States with comprehensive adoption of ABC or adoption of ABC in WC statute (e.g., MA, NJ, CA, OR)
- Most states no longer exempt from WC insurance obligation based on # of employees
- But will worker prefer I/C classification (post-injury), due to WC exclusive remedy tort bar?

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SNT Context

Federal W&H - FLSA

- **Economic Realities** test
- Watch for DOL regulations for shifting emphasis on specific factors

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SNT Context

State W&H and Wage Payment Laws

- States with comprehensive adoption of ABC or specific adoption for W&H laws
- Trend is some states moving to ABC test; though other states have weakened their existing ABC test
- Many other states sticking with Economic Realities test

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Who is the Employer?

Consider possible application of “joint employer” rules. This mostly comes up in two ways:

1. Counting employees across entities for purposes of statutory coverage triggers
2. Determinations that multiple “employers” may be liable for violations

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Who is the Employer? SNT Context

Is the trustee an “employer” for purposes of statutory coverage, even where the trustee attempts to outsource employment & payroll management and control to a separate service provider?

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

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**Related Issue:
FLSA Exemptions**

Two relevant FLSA exemptions:

213(a)(15) – “employed in domestic service employment to provide **companionship services** for individuals who (because of age or infirmity) are unable to care for themselves”

213(b)(21) – “employed in domestic service in a household and who **resides in** such household”

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**Related Issue:
FLSA Exemptions**

1974 – FLSA amended to cover “domestic service,” but with exemptions for companionship services and live-in domestic services

2013 – DOL regulations revised in two critical ways:

(1) no companionship exemption if “provision of care” (dressing, grooming, feeding, bathing, etc.) exceeds 20% of hours worked; focus is meant to be on protection and fellowship; and

(2) no companionship or live-in domestic service exemption can be claimed by third-party employers, even if the employee is jointly employed by the individual or member of the family or household using the services

2025 – NPRM to reverse the two restrictions implemented by 2013 Rule

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**RELATED ISSUE:
State domestic workers bill of
rights**

- National Domestic Workers Alliance – summary of proposed legislative reforms available at:

<https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/national-domestic-workers-bill-of-rights/>

- California, Illinois, and other examples

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