

WHEN IS THE TRUST A (JOINT) EMPLOYER?

Jason R. Bent
Director, Institute for Law and the Workplace

Chicago-Kent College of Law | ILLINOIS TECH

1

EMPLOYEE OR I/C?

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

2

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

3

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
- New DOL NPRM for FLSA & FMLA - a five-factor test with greater weight on two “core” factors (not yet final).

4

ECONOMIC REALITIES UNDER DOL's NPRM

1. Nature & degree of control over worker
2. Worker's opportunity for profit or loss
3. Amount of skill required for the work
4. Degree of permanence of the relationship
5. Whether the work is part of an integrated unit of production

5

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

6

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

7

HYBRID

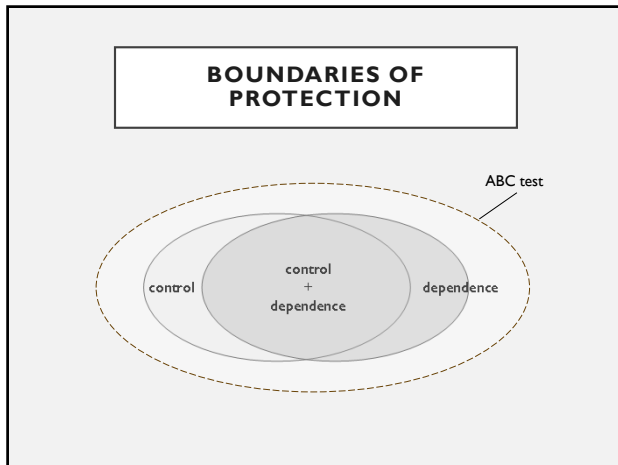
- Results in somewhat broader coverage
- Either control OR dependence
- Some courts have applied to:
 - ADA – disability
 - ADEA – age
 - Several different state statutes

8

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

9



10

**EMP'EE v. I/C
IN 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)

11

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

12

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 applied here than for other state employment laws

13

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?

14

SNT CONTEXT

Federal W&H - FLSA

- **Economic Realities** test
- Watch for changes in DOL regulations shifting emphasis on factors, depending on political control of the executive branch

15

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/modified existing ABC test
- Many other states sticking with Economic Realities test for W&H

16

WHO IS THE EMPLOYER?

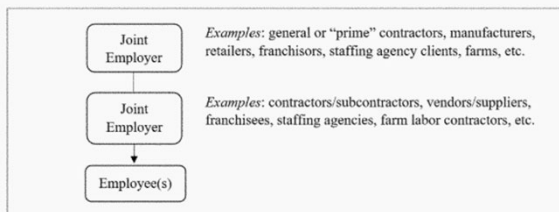
Consider possible application of “joint employer” rules. This mostly comes up in two ways:

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

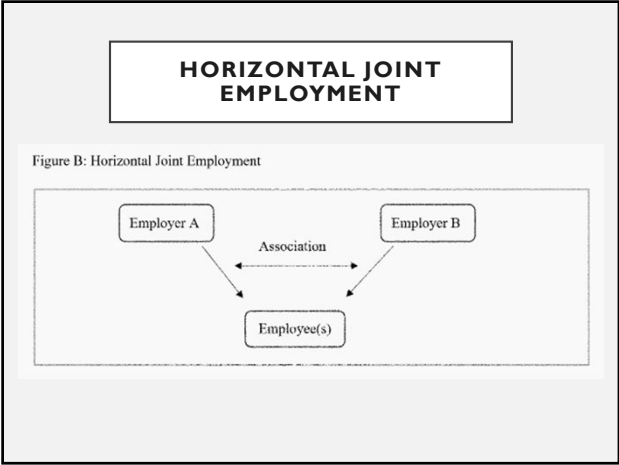
17

VERTICAL JOINT EMPLOYMENT

Figure A: Vertical Joint Employment



18



19

**JOINT EMPLOYMENT
UNDER DOL's NPRM**

Four factors, none dispositive. Whether the person:

1. Hires or fires the employee
2. Supervises and controls work schedule or employment conditions to substantial degree
3. Determines the employee's rate and method of pay
4. Maintains employee's employment records

Reserved control is relevant, but actual exercise of control is more relevant than such ability, power, or right.

20

**JOINT EMPLOYMENT
UNDER NLRB's FINAL RULE**

Only if "substantial direct and immediate control" over at least 1 of 8 essential terms or conditions:

1. Wages	5. Discharge
2. Benefits	6. Discipline
3. Hours of Work	7. Supervision
4. Hiring	8. Direction

21

**JOINT EMPLOYMENT
UNDER NLRB's FINAL RULE**

Will not be a joint employer if control over one of these eight is "sporadic, isolated, or de minimis"

Indirect control or reserved control is "probative" of joint employment, "but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control" over an essential term and condition

22

**JOINT EMPLOYMENT
STATE LAW VARIATION**

Example: IL Minimum Wage Law Regs

Five factors, none dispositive:

1. Work is to the benefit of alleged joint empr
2. Work is integral part of alleged joint empr's business
3. Direct or indirect control over terms or conditions, including schedule and quality of work
4. Owns or leases the premises or provides tools or materials used
5. Direct or indirect control over other empr's operations through K, joint mgmt, ownership interest, or economic dependence

23

**IL MIN. WAGE REGS
EXAMPLE**

Customer contacted Home Care Agency about receiving home care services. HCA met with Customer and determined what services were needed to meet Customer's needs. HCA, along with Customer, determined the tasks to be performed for Customer and the hours per week required to perform those tasks. HCA set qualifications, recruited, and hired Home Care Worker. Customer and Customer's wife supervise Home Care Worker on a day-to-day basis, can modify the tasks that Home Care Worker performs, and can modify Home Care Worker's work schedule. Customer or family members of Customer can report issues to HCA and HCA intervenes if a problem arises, such as arranging for another home care worker should Home Care Worker become unavailable. HCA pays the home care worker directly, keeps records of hours worked, and determines the hourly rate of pay for the Home Care Worker. Customer is invoiced by HCA for the services rendered.

24

IL MIN. WAGE REGS EXAMPLE

In this example, a joint employer relationship is formed between HCA, Customer, and Customer's wife. Here, Home Care Worker's wages are paid by HCA and HCA controls the rate of pay and the method of payment. Customer is invoiced by HCA. HCA, Customer, and Customer's wife exercise considerable control over the structure and conditions of Home Care Worker's employment by determining the hours of work and what tasks are to be performed. Customer's wife can raise issues with Home Care Worker's performance with HCA. HCA intervenes in issues between Home Care Worker and Customer and/or Customer's wife.

25

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)

26

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"

27

**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, expanding the domestic service exemption (still no final rule)

28

**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

29