21ST CENTURY EMPLOYERS: FRANCHISORS, SUBCONTRACTORS, TEMPORARY AGENCIES, JOINT EMPLOYERS AND OTHER ITERATIONS OF THE CONTINGENT WORKFORCE

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I. Introduction

The changing climate of joint employer determination has implications throughout employment law. The recent aggressive position taken by both the National Labor Relations Board and the Department of Labor has the legal world buzzing with anxiety. This presentation and paper aims to address the history and current nature of joint employer liability.

II. Current State of the Law

A. Overview

Worker classification is a quandary that is not exclusive to the last decade. The roots of independent contractor classification issues lie in the court cases flowing from the social programs that had their advent during the 1930s. “Congress adopted the employee/independent contractor distinction to define the coverage of New Deal-era statutes designed to protect workers.” The “hardships” and “insecurities of modern life” cited as justification for these legislative pushes have evolved quickly since that time, but the relevant classification schemes that “sort” workers have been slow to change. As a result, such frameworks can now appear antiquated and stodgy. For example, a 2006 report authored by the U.S. Government Accountability Office (“GAO”), concluded that “the tests used to determine whether a worker is an independent contractor or an employee are complex, subjective and differ from law to law.”

More recent commentary on the issue indicates that, rather than moving towards uniformity, the uncertainty regarding independent contractor status appears to be deepening. A 2009 review of the factors used by the courts and by various state and federal agencies revealed that, collectively, far more than 48 factors were being used by different decision-making bodies in determining independent contractor status—and, in the years since, dozens of additional factors have been considered. Although some commentators have called on legislatures to standardize the test for independent contractor status, it is highly unlikely that state legislative bodies and Congress will coordinate among themselves to pass a unified bill with a common definition of an independent contractor. As a result, there is no bright-line rule for determining whether a worker is properly

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1 “[T]he first significant and authoritative statement addressing the problem of worker status, contained in the Restatement (First) of Agency of 1933, distinguished ‘servants’ from ‘independent contractors’ for purposes of respondeat superior liability.” 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. OF EMP. AND LABOR LAW 295, 315 (2001) (quoting Restatement (First) of the Law of Agency, § 220 cmt. c (1933)).

2 See, e.g., U.S. v. Silk, 331 U.S. 704 (1947) (“The problem of differentiating between [a] employee and an independent contractor has given difficulty through the years before social legislation multiplied its importance.”).

3 Cohen, at 22.


classified as an independent contractor. Even at the federal level, regulatory agencies do not utilize identical criteria in assessing classification.

B. Federal Law and United States Supreme Court Precedent

As stated above, there is no federal law that creates a presumption of “employee” status. Much of the federal enforcement efforts pursuant to independent contractor status take place under the auspices of the Fair Labor Standards Act6 (“FLSA”), as it mandates minimum wage and overtime provisions for workers classified as “employees.” However, because one of the ills that the FLSA sought to cure was child labor, its definition of who qualifies is an “employee” is quite broad, which has produced significant problems in the modern context:

“[E]mployee” was defined rather broadly . . . to ensure adequate coverage against child labor violations and employee exploitation. Standard work arrangements were the norm in many industrial nations for much of the twentieth century and were the basis of the framework within which labor law, collective bargaining and social security systems developed. When the laws were written that established most of the worker protections now disputed, the traditional employer-employee model was nearly universal. It was only later, as independent contractors grew in significance, that the distinction became an issue.7

Prior to the creation of the U.S. social welfare networks in the early 20th century, the issue of employee classification called for application of the common law “control test.” As its name implies, this traditional approach looks to the level of control that an employer exercises over a worker—the more control exercised, the more likely that a worker will be considered an “employee” under the law.8 However, the common law approach was not particularly well-tailored to address fine distinctions. The issue finally reached a head in the 1940s, when the U.S Treasury Department “promulgated regulations that adopted the common law control test” in administering the Social Security Act9 (“SSA”), but federal courts addressing similar questions of classification were utilizing different, conflicting legal standards.10

In an attempt to alleviate this ambiguity, the U.S. Supreme Court rulings in United States v. Silk11 and Bartels v. Birmingham12 adopted what is known as the “economic realities test” to define

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7  Cohen, at 23.
8  Id. at 22-23.
9  42 U.S.C. §§ 301, et seq.
10  Cohen, at 23.
employer-employee relationships under the SSA. In the plainest terms, the Court stated that “the relationship of employer-employee . . . [is] not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or worker.”\textsuperscript{13} Rather, “employees are those who as a matter of economic reality are dependent upon the business to which they render service.”\textsuperscript{14}

The Court enumerated a number of factors that are particularly relevant to this inquiry, including the: (1) alleged employer’s degree of control over performance of work; (2) alleged employer’s opportunities for loss and profit; (3) alleged employer’s investment in facilities & equipment; (4) permanency of the professional relationship; and (5) level of skill required to render the service in question.\textsuperscript{15} The Court stressed that “no one [factor] is controlling nor is the list complete.”\textsuperscript{16}

The common law control test has enjoyed something of a renaissance in recent years, with the Court’s ruling in \textit{Nationwide Mutual Ins. Co., et al. v. Darden},\textsuperscript{17} holding that the common law test should continue to predominate in the context of the Employee Retirement Income Security Act of 1974\textsuperscript{18} (“ERISA”):

\begin{quote}
[W]e adopt a common-law test for determining who qualifies as an “employee” under ERISA, a test we most recently summarized [as follows]: “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the 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 the employee benefits; and (12) the tax treatment of the hired party.”\textsuperscript{19}
\end{quote}

Consequently, these two competing federal standards continue to exist essentially parallel to one another. Currently, the common law control test is utilized to determine employer-employee relationships with respect to the Federal Insurance Contributions Act (“FICA”), the Federal

\textsuperscript{13} Id. at 130.
\textsuperscript{14} Id.
\textsuperscript{15} Silk, 331 U.S. at 716.
\textsuperscript{16} Id.
\textsuperscript{18} 29 U.S.C. §§ 1001, et seq.
\textsuperscript{19} Darden, 503 U.S. at 323-24 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (numbering added for clarity)).
Unemployment Tax Act, ERISA, the National Labor Relations Act ("NLRA"), and the Immigration Reform and Control Act. The U.S. Internal Revenue Service ("IRS") also purports to use a version of the common law control test, which we will discuss further below. The economic realities tests governs classification determinations pursuant to the FLSA, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. Under either of these federal approaches, contractual titles and subjective expectations of either party play little role in determining employee status under the various federal statutes.

Attempts to pass more comprehensive—and uniform—legislation have not been successful in the U.S. Congress. Bills introduced in both the U.S. Senate and the U.S. House of Representatives have failed to garner sufficient support for serious consideration. Thus, federal agencies have been playing an expanding role in defining the contours of independent contractor status.

C. Federal Agency Enforcement

In addition to the basic tests provided above, numerous federal employment agencies have issued guidance documents that supplement the economic realities and common law control tests:

1. Department of Labor ("DOL")

The Wage and Hour Division ("WHD") of the DOL has taken a particular interest in independent contractor status in recent years. For the last five years the WHD has been creating "memorandums of understanding" ("MOUs") with numerous state labor departments in an effort to crack down on worker misclassification. Specifically, the MOUs authorize "information sharing and coordinated enforcement" between various state and federal agencies, including the Employee Benefits Security Administration, the Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission.

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21 See e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) ("[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.").

the Office of Federal Contract Compliance, and the Office of the U.S. Solicitor. Currently, the WHD has entered into MOUs with 28 states (including California, Colorado, Florida, Illinois, Massachusetts, New York, Texas, and Washington), as well as the IRS. The program is reported to have netted $74 million in back wages from these enforcement efforts.

In addition to these enforcement efforts, on July 15, 2015, Administrator David Weil of the WHD promulgated Administrator’s Interpretation No. 2015-1 (“Memo”), which addressed the issue of worker misclassification in the context of the FLSA. Specifically, the Interpretation is an effort to re-emphasize the primacy of the “suffer or permit” definition of employment that exists under the FLSA—a definition that “provide[s] a broader scope of employment than the common law control test.” While the Memo does not derogate the economic realities test that traditionally has controlled such FLSA determinations, it makes clear that the WHD intends that the definition of an “employee” under FLSA be viewed through the lens of the “suffer or permit” standard:

A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of “employ” under the Act, most workers are employees under the FLSA. The application of the economic realities factors must be consistent with the broad “suffer or permit to work” standard of the FLSA.

* * *

The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself. If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor.

To be clear, the Memo does not supplant the economic realities test, nor does it explicitly adopt the “suffer or permit” standard pursuant to the FLSA. In an interview shortly after the promulgation of the Memo, U.S. Labor Secretary Tom Perez confirmed that “[t]he guidance is not a dissemination of new policy. It’s a statement of existing policy . . . .” But while the Memo

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26 Id.

does not announce any new enforcement policies, *per se*, it certainly evinces a stricter stance towards classification. Dr. Weil has stated that he hopes that the guidance will help to encourage “proactive compliance” from companies. However, there is also an undercurrent in this new guidance that hints at an intention to step-up classification enforcement in the gig economy. Specifically, Dr. Weil has been quoted as stating that it is not necessary to single-out gig economy companies for special classification treatment: “The discussion of the gig economy is often couched as if it is the future of work . . . . The gig economy is certainly an emerging issue . . . but it is not the future of work. It is part of what is evolving.”

The AI also specifically addresses joint employment issues. It begins by distinguishing two common joint employment scenarios:

- “Horizontal” joint employment focuses on separate but related companies and exists when the employee has an employment relationship with two or more employers, and those employers are sufficiently related (e.g., separate restaurants with economic ties or common managers).

- “Vertical” joint employment centers on the economic realities of the relationship between the employee and the potential joint employer and exists when the employee has an employment relationship with one employer (such a staffing agency or subcontractor), but economic realities show that he or she is economically dependent upon another entity.

  a. **Horizontal Joint Employers**

The discussion on horizontal joint employment attempts to guide employers on what type of related companies may be considered joint employers for purposes of the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The AI focuses on the existing regulations which find joint employment among companies where:

- Arrangements exist among employers to share the employee’s services;

- Where one employer acts (directly or indirectly) in the interest of another employer with respect to the employee; or

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28 See, e.g., Nathan Bach, “Labor Department: Misclassification of Employees as Independent Contractors,” THE NATIONAL LAW REVIEW, (January 12, 2016), available at http://www.natlawreview.com/article/labor-department-misclassification-employees-independent-contractors (“The Administrator’s Interpretation reflects the [DOL]’s increasing trend toward classifying workers as employees. Indeed, it suggests that most workers are employees [for the purposes of the FLSA].”).


Where the employers are associated “with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.”31

Expanding on the factors, the AI lists nine factors describing the indicia of interrelationships which may indicate horizontal joint employment including overlapping officers and directors, joint control over human resources and labor relations function and joint supervision. Further, the AI recognizes that clearly separate entities with no connection (i.e. a high school and a standardized testing prep company employing the same teacher) will not be considered joint employers.

b. **Vertical Joint Employers**

The AI notes that before engaging in the joint employment analysis, it is important to ask whether the intermediary employer (e.g., the subcontractor or labor provider) is actually an employee of the putative joint employer. If so, that ends the analysis, and all of the intermediary’s workers will also be employees of the higher-tier contractor/joint employer. Once it has been determined that the intermediary is not an employee (as would often be the case with corporate entities providing labor or performing subcontracting work), Wage and Hour would then engage in the vertical joint employment analysis.

The AI list seven factors to determine whether the requisite economic dependency exists for vertical joint employment purposes. The seven factors are:

- Whether the potential joint employer directs, controls or supervises the work performed;
- Whether the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control (even if indirect) indicates that the employee is economically dependent on the potential joint employer;
- Whether the potential joint employer had an indefinite, permanent, full-time, or long-term relationship with the subject employee(s);
- Whether the joint employee’s work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training;
- Whether the employee’s work is an integral part of the potential joint employer’s business;
- Where the work is performed on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer; and
- Whether common HR or labor relations functions exist.

31 29 C.F.R. 791.2(b)
Courts may look to the AI to evaluate joint employment in the FLSA and other contexts. However, courts are not bound to analysis as it is guidance and not a law or regulation. In fact, the AI on its own accord recognizes that some circuit courts including the First and Third Circuits do not agree with the broad FLSA economic realities test.

Some courts, however, apply factors that address only or primarily the potential joint employer’s control (power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records).32

In In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig., the Third Circuit held that to determine whether a joint employment relationship exists between a parent company and its subsidiary’s employees, courts should consider the parent company’s:

- Authority to hire and fire the relevant employees;
- Authority to issue work rules and assignments;
- Authority to set conditions of employment, including, compensation, benefits, and schedules;
- Involvement in day-to-day supervision of employees; and
- Actual control over employee records, such as payroll, insurance, and tax records.33

In Bonnette v. California Health and Welfare Agency, the Ninth Circuit adopted a totality of the circumstances test that focuses on the economic realities of the relationship for determining joint employer status.34 Under Bonnette, the analysis focuses on four factors, including whether the putative joint employer:

- Had the power to hire and fire the employees.
- Supervised and controlled employee work schedules or conditions of employment.
- Determined the rate and method of payment.
- Maintained employment records.35

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33 Id. at 469.

34 704 F.2d 1465, 1470 (9th Cir. 1981)

35 Id.
Like the tests in the Second and Third Circuits, these factors provide a framework for the joint employment analysis, but should not be blindly applied.36

c. Legal and Practical Concerns with AI

The AI raises some issues and questions. First, the AI on its own accord recognizes that some circuit courts including the First and Third circuits do not agree with the broad FLSA economic realities test. In addition, the cases on which the AI rely are either factually dissimilar to most workplaces or do not particularly provide guidance on complex employment relationships facing most employers.

Practically, the guidance does not update the existing standards nor shed much light on how modern workplaces may be considered for joint employment purposes. Several questions remain: Are staffing companies who merely supply workers to companies’ joint employers? Are companies at risk of joint employment liability if they hire employee to provide discrete tasks on a periodic bases? What is the precise amount of supervision allowed before joint employment attaches?

These open questions and others make it important that employers continue to look at their corporate and contractual relationships as they relate to their staff. Wage and Hour investigators will be armed with the AI and looking to enlarge their cases by bringing more employers into the fold. Not only could this result in unexpected FLSA liability but also being responsible for overtime related to work that an employer did not control.

2. Internal Revenue Service (“IRS”)

When it comes to questions of income tax determinations, the IRS operates in a manner very similar to the common law control test in defining employee-employer relationships:

> Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.37

The particular facts in each case will dictate whether the relationship is one of employee or contactor.38 Traditionally, the IRS’ test for determining employment relationships has been referred to as the “20-factor test.” However, subsequent revisions have truncated the applicable

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36 Id.

37 26 C.F.R. § 31.3401(c)-1(b).

38 See, e.g., 26 C.F.R. § 31.3401(c)-1(d) (“Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.”).
information that is considered for the purposes of establishing employment status. Instead of a list of twenty factors, the IRS sets forth three “primary categories of evidence,” including: (1) behavioral control; (2) financial control; and (3) the type of relationship between the parties.\textsuperscript{39} Those three categories are then further broken down into individual areas of concern:

\textit{Behavioral Control}

\begin{itemize}
  \item \textbf{Type of instructions given:} An employee is generally subject to the business’s instructions about when, where, and how to work.
  \item \textbf{Degree of instruction:} More detailed instructions indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
  \item \textbf{Evaluation system:} If an evaluation system measures the details of how the work is performed, then these factors would point to an employee.
  \item \textbf{Training:} If the business provides the worker with training on how to do the job, this indicates that the business wants the job done in a particular way. This is strong evidence that the worker is an employee. Periodic or on-going training about procedures and methods is even stronger evidence of an employer-employee relationship. However, independent contractors ordinarily use their own methods.\textsuperscript{40}
\end{itemize}

\textit{Financial Control}

\begin{itemize}
  \item \textbf{Significant investment:} An independent contractor often has a significant investment in the equipment he or she uses in working for someone else.
  \item \textbf{Unreimbursed expenses:} Independent contractors are more likely to have unreimbursed expenses than are employees.
  \item \textbf{Opportunity for profit or loss:} Having the possibility of incurring a loss indicates that the worker is an independent contractor.
  \item \textbf{Services available on the market:} An independent contractor is generally free to seek out business opportunities.
\end{itemize}


\textsuperscript{40} U.S. INTERNAL REVENUE SERVICE, “Behavioral Control,” November 2, 2015, available at https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Behavioral-Control (“Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work.”).
• **Method of payment**: An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job.\(^{41}\)

**Type of Relationship**

• **Written contract**: Although a contract may state that the worker is an employee or an independent contractor, this is not sufficient to determine the worker’s status. How the parties work together determines whether the worker is an employee or an independent contractor.

• **Employee benefits**: Employee benefits include things like insurance, pension plans, paid vacation, sick days, and disability insurance. Businesses generally do not grant these benefits to independent contractors.

• **Permanency of the relationship**: If you hire a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

• **Services provided as key activity of the business**: If a worker provides services that are a key aspect of the business, it is more likely that the business will have the right to direct and control his or her activities. This would indicate an employer-employee relationship.\(^{42}\)

As the IRS states in its guidance, no one category or factor is dispositive in this analysis.\(^{43}\)

Beyond the MOU that it entered into with the DOL in September 2011, the IRS’ efforts to step-up enforcement of alleged misclassification actually predates the DOL’s current push. In November 2007, the IRS began sharing information and enforcement protocols with dozens of state agencies

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\(^{42}\) U.S. INTERNAL REVENUE SERVICE, “Type of Relationship,” November 9, 2015, available at https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Type-of-Relationship (“Type of relationship refers to facts that show how the worker and business perceive their relationship to each other.”). Here, in contrast to the “economic realities” test embraced by federal courts enforcing the FLSA, the IRS test does consider some subjective factors in determining employment status. However, “[t]he IRS is not required to follow a contract stating that the worker is an independent contractor . . . . How the parties work together determines whether the worker is an employee or an independent contractor.” Id.

\(^{43}\) See, e.g., supra at n.39 (“There is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another . . . . The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used[.]”).
through the Questionable Employment Tax Practices (“QTEP”) program. Beginning in September 2011, the IRS also began the Voluntary Classification Settlement Program (“VCSP”), which was further updated in 2012 and 2014. Specifically, VCSP offers a kind of classification amnesty by allowing employers to voluntarily reclassify independent contractors as employees. However, voluntary participation has been anemic, likely as a result of misgivings that such reclassification might be used to establish an admission of past wrongdoing.


The EEOC has not been as prominent an agency actor in recent years as the DOL and the IRS with respect to independent contractor misclassification. However, on December 22, 2000, the EEOC did issue a guidance document discussing the contours of employee status under the ADA with respect to “contingent workers” working for temporary agencies and staffing firms.

Because “[i]n most circumstances, an individual is only protected if s/he was an ‘employee’ at the time of the alleged discrimination,” the EEOC has set forth its own list of relevant factors to be considered in defining who is an employee, including: (1) employer’s right of control; (2) the level of skill required for the position; (3) whether the employer provides equipment and materials; (4) where the work is performed; (5) the length of the professional relationship; (6) whether the employer can assign additional projects to the worker; (7) whether the employer controls the hours of work; (8) how the worker is paid; (9) whether the worker may hire assistants; (10) whether the work performed is part of the employer’s regular business; (11) whether the employer is actually in business; (12) whether the employee is engaged in his or her own distinct occupation; (13) whether the employer provides benefits to the worker; (14) whether the employer has the right to discharge the worker; and (15) whether the employer and worker believe that they have formed an employer-employee relationship.

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46 See, e.g., U.S. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, “TIGTA: Better Work Identification Data Are Needed For the Voluntary Classification Settlement Program,” (September 24, 2014), available at https://www.treasury.gov/tigta/press/press_tigta-2014-22.htm; see also, e.g., Lisa Petkun, Richard Reibstein, and Andrew Rudolph, “IRS Confirms Valid Use of Independent Contractors,” INDEPENDENT CONTRACTOR COMPLIANCE BLOG, (February 28, 2012), available at https://independentcontractorcompliance.com/2012/02/28/irs-confirms-valid-use-of-independent-contractors/ (“Although VCSP can be helpful with respect to federal taxes, there are many issues not covered by VCSP . . . that may be complicated by the company’s entry into the VCSP program, potentially leaving the business in jeopardy for misclassification liability regarding those matters.”).

As with other federal approaches, the EEOC emphasizes that this list of factors is non-exhaustive.\textsuperscript{48}

4. National Labor Relations Board (“NLRB”)

In August 2015, the National Labor Relations Board (NLRB) expanded the meaning of “control” for purposes of the National Labor Relations Act (NLRA), holding that indirect control was enough to trigger joint employment.\textsuperscript{49}

In \textit{Browning-Ferris}, the NLRB held that two or more employers are joint employers if they (1) maintain a common-law employment relationship with the employees in question; and (2) possess sufficient control over those employees’ essential terms and conditions of employment to permit meaningful collective bargaining. Importantly, the Board will no longer require that a joint employer exercise authority over the terms and conditions of employment; it is enough that reserved authority to control exists. Further, the Board will not mandate that a joint employer exercise direct and immediate control. Instead, “[i]f otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.”

Additionally, the NLRB has recently taken the position that McDonald’s Corporation could be held jointly liable with franchise operators who were accused of firing, threatening or penalizing workers who participated in nationwide strikes demanding a $15-an-hour minimum wage. The agency then issued a consolidated complaint against McDonald's and about 30 franchisees in six cities, alleging unfair labor practices.\textsuperscript{50} The combined actions allege 181 violations of the National Labor Relations Act at 30 different restaurant locations, according to the decision.\textsuperscript{51}

The board rejected McDonald’s argument that Administrative Law Judge Lauren Esposito abused her discretion in finding that the motive behind a campaign by workers and unions who filed unfair labor practices charges against the company and its franchises isn’t relevant to the question of whether McDonald’s is a joint employer.\textsuperscript{52}

In response to the NLRB’s decision in BFI and its classification of McDonald’s as a joint employer, MI, WI, TX, LA, TN have all enacted laws to clarify that unless the franchise agreement specifically states otherwise—a franchisee is considered the sole employer of workers to whom it

\textsuperscript{48} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, “EEOC Compliance Manual, Section 2: Threshold Issues,” (August 6, 2009), available at \url{http://www.eeoc.gov/policy/docs/threshold.html#2-II-B-1} (“[T]he determination must be based on all of the circumstances between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.”).

\textsuperscript{49} \textit{See Browning-Ferris Indus.}, 362 NLRB No. 186 (Aug. 27, 2015).

\textsuperscript{50} Kelly Knaub, NLRB Nixes McDonald’s Appeal Bid In Joint-Employer Case, Law360 (Mar. 18, 2016), http://www.law360.com/articles/773478/nlrb-nixes-mcdonald-s-appeal-bid-in-joint-employer-case

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}
pays wages or provides a benefit plan. The outcome of this case will have a substantial impact on joint employer determinations.

D. State & Municipal Legislation

While the above section demonstrates that federal authorities have a variety of approaches to employee classification, state legislative schemes are even more varied, reflecting individual jurisdictional concerns. In fact, one commentator has gone so far as to say that “[a]s varied as the tests are under federal law, some state laws are even more complex and far more varied – a veritable crazy quilt of state laws.” As one might expect, these state laws are not uniform in either the kinds of regulations that they impose, or the overall effect that they have (or might have) upon the gig economy. As a general proposition, most of the laws seek to clarify who actually qualifies as an independent contractor, albeit in a variety of ways.

1. General Classification Regimes

- **Indiana Senate Bill 20** (“SB 20”) took legal effect on March 23, 2016. It provides that “[u]nless federal or state law provides otherwise, a [county, municipality, or township] may establish, mandate, or otherwise require an employer to provide an employee who is employed with the jurisdiction of the unit: (1) a benefit; (2) a term of unemployment; (3) a working condition; or (4) an attendance, scheduling, or leave policy; that exceeds the requirements of federal or state law, rules, or regulations.” While SB 20 does not prescribe a specific classification scheme, *per se*, it certainly addresses the issue of employee classification.

- **Nevada Senate Bill 224** (“SB 224”), which became law on June 2, 2015, established “a conclusive presumption that a person is an independent contractor if certain conditions are met,” for the purposes of state minimum wage requirements. Specifically, a worker must meet three of the following criteria: (1) the worker “has control and discretion over the means and manner of the performance of any work” and “the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract;” (2) the worker “has control over the time the work is performed;” (3) the worker “is not required to work exclusively for one principal” (unless required by law or limited period contract); (4) the worker “is free to hire employees to assist with the work;” and/or (5) the worker “contributes a substantial investment of capital in the business of the person” (such as leasing equipment or work space, or obtains permission to access a work space).

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54 See, e.g., Reibstein, supra at n.46.

• **Tennessee’s Senate Bill 171** ("SB 171") became law on April 30, 2015, and established a seven-factor test for determining independent contractor status for the purposes of employer-obtained insurance premiums. In evaluating a “work relationship” to determine whether an individual is an independent contractor, the law establishes that the following factors shall be considered: (1) the right to control the conduct of their work; (2) the right of termination; (3) the method of payment; (4) the freedom to select and hire helpers; (5) who furnishes tools and equipment; (6) whether working hours are self-scheduled; (7) whether the alleged employee has the freedom to offer services to other entities. Specifically, the law set forth that “[a] premium shall not be charged by an insurance company for any individual determined to be an independent contractor . . . .”

Both Nevada SB 224 and Tennessee SB 171 are generally viewed as favorable to the gig economy and its contingent workers. The legislation sets forth multi-factor tests that provide notice and allow companies and workers to structure their professional relationships, accordingly. Both laws also constitute a deviation from traditional approaches to the question of classification, such as the common law or economic realities tests discussed above. Similar laws have been introduced in Arizona, Illinois, Massachusetts, New Hampshire, Vermont, and Washington.

2. **Transportation Network Company (TNC) - Specific Legislation**

The following five states are examples of jurisdictions that have enacted laws that are drawn to clarify classification within a particular industry—in this case, transportation network companies (TNCs), such as Uber and Lyft. Generally speaking, these types of laws make independent contractor status easier, or at least more straightforward, to obtain.

• **Arkansas Senate Bill 800** (“SB 800”) became law on April 4, 2015, and inserted the Transportation Network Company Services Act into the Arkansas Code. In addition to

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59 See, e.g., Arkansas Senate Bill 800, “An Act to ensure the safety, reliability, and cost-effectiveness of transportation network company services; to preserve and enhance access to transportation options for the state’s
establishing a general regulatory framework for TNCs and TNC drivers, it directly addresses worker classification. However, SB 800 takes a slightly different approach by utilizing restrictive language that places the onus of preserving independent contractor status upon the TNCs, themselves. Specifically, in order for its drivers to qualify as independent contractors under Arkansas law, SB 800 mandates that TNCs must not: (1) prescribe specific hours during which a TNC driver must be available to work; (2) restrict a TNC driver’s ability to work for another different TNC; (3) place any restrictions upon the territory in which a TNC driver may operate; or (4) restrict a TNC driver’s ability to work in any other occupation. Additionally, the TNC and its driver must agree—in writing—that the driver is an independent contractor. Compliant TNCs are not required to provide workers’ compensation coverage to such drivers in Arkansas.60

• **Indiana House Bill 1278** ("HB 1278") became law on May 5, 2015, and it creates a regulatory framework with respect to TNCs and requires such companies to register with the Indiana Department of State Revenue and obtain a permit. And while it allows TNCs and TNC drivers to create written contracts to the contrary, HB 1278 states that “a TNC driver that connects to a TNC’s digital network is an independent contractor.”61 Furthermore, the TNC is not considered to “control, direct, or manage” a TNC driver, and the TNC is not considered to “own, control, operate, or manage a personal vehicle used by a TNC driver . . . .”62 The statute also establishes that TNCs and TNC drivers are not considered common carriers, contract carriers, or motor carriers.63

• **North Carolina Senate Bill 541** ("SB 541") took legal effect on September 4, 2015, and it, also, created a regulatory framework to govern TNC operations.64 Furthermore, the law also states that “[a] rebuttable presumption exists that a TNC driver is an independent contractor and not an employee. The presumption may be rebutted by application of the common law test for determining employment status.”65

• **Mississippi House Bill 1381** ("HB 1381") passed both the Mississippi House of Representatives and the Senate as of March 24, 2016, although it will not take legal effect until July 1, 2016 (assuming that it is duly signed into law). HB 1381 establishes a

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60 ARKANSAS CODE ANN. §§ 23-13-719(a), et seq.
63 INDIANA CODE 8-2.1-19.1-2(1), et seq.
65 NORTH CAROLINA GENERAL STATUTES § 20-280.8.
presumption that TNC drivers operate as independent contractors, so long as TNCs abide by the following restrictions: (1) TNCs must not “prescribe specific hours during which a . . . driver must be logged into the [TNC]’s digital platform;” (2) TNCs may not impose “restrictions on the . . . driver’s ability to utilize digital platforms from other [TNCs];” (3) TNCs may not “assign a . . . driver a particular territory in which to operate;” (4) TNCs may not “restrict a . . . driver from engaging in any other occupation or business;” and (5) the parties must agree—in writing—that the driver is an independent contractor.66

• Utah Senate Bill 201 (“SB 201”) was signed into law on March 18, 2016, and represents one of the more straightforward approaches to independent contractor classification in the TNC context. In addition to providing a general regulatory framework,67 the law provides that “[a] transportation network driver is an independent contractor of a [TNC]; and not an employee of a [TNC].”68 This law is, obviously, very supportive of the employee classification regimes used by gig economy companies, leaving little ambiguity regarding the status of Utah’s TNC drivers.

What is immediately clear when examining these regimes side-by-side, is that—even in the context of laws that tend to be supportive of independent contractors—the specific requirements to maintain that status vary significantly. Arkansas SB 800 requires a written contract specifying independent contractor status, and sets forth a fairly stringent list of restrictions on TNC behavior. Mississippi HB 1381 sets forth very similar requirements. Utah SB 201, by stark contrast, makes the independent contractor status of TNC driver a simple matter of law. Similarly, North Carolina SB 541 creates a presumption that TNC drivers are operating as independent contractors, without the need to demonstrate that TNC activities are in compliance with state law.

Although the state frameworks discussed above have all adopted different approaches to independent contractor designation in the context of TNC drivers, all five statutes arguably also are beneficial to gig economy work. Regulatory frameworks that favor predictability and uniformity of classification benefits gig economy companies and workers by creating legal confidence and reducing the overall economic risk in forming contractor relationships. Similar TNC-specific legislation has been introduced—although not passed—in various other states, including Alabama, Florida, Michigan, Missouri, New Hampshire, and West Virginia.69


67 SB 201 also calls for the creation of the “Transportation Network Vehicle Recovery Fund”—an “expendable special revenue fund” drawn from TNCs themselves and used to cover the costs of administration. See, e.g., Utah Code Annotated §§ 13-51-201(1), et seq. Although the fund is set to be repealed on July 1, 2018. Id. at § 631-1-213.


A few jurisdictions have taken the rather extreme step of banning certain gig economy providers from operating, outright. The City of Philadelphia—and more specifically the Philadelphia Parking Authority—has issued a ban on ridesharing companies (i.e., TNCs), which has sparked a rather public feud and precipitated a legislative push to legalize TNCs statewide.70

3. Legislation Curtailing Independent Contractor Status

Conversely, many state legislatures have advanced initiatives seeking to curtail the availability of independent contractor status. In many cases, such laws are restricted to certain industries that have a recurrent issue with misclassification, such as the construction industry (Delaware, Kentucky, Maine, Minnesota, New Jersey, New York, and Pennsylvania),71 the landscaping industry (Maryland),72 the commercial goods transportation industry (New York),73 and so-called “staffing companies” (California).74 Other legislation introduced at the state level has sought to


72 See, e.g., MARYLAND ANN. CODE §§ 3-901, et seq. (“Workplace Fraud”).

73 See, e.g., NEW YORK LAB. LAW §§ 862, et seq. (“The New York State Commercial Goods Transportation Industry Fair Play Act”).

74 See, e.g., California Assembly Bill 1897, “An act to add Section 2810.3 to the Labor Code, relating to private employment,” (September 28, 2014), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB1897; see also California Lab. Code §§ 2810.3(a), et seq.
impose additional requirements on independent contractors, or create a general presumption that workers are employees under state law (unless specific conditions are met), such as Massachusetts and Rhode Island. Still other jurisdictions have proposed more stringent definitions of independent contractor status, which will have the effect of narrowing contractor status. These paradigms will have an inevitable effect upon the industry, particularly those pieces of legislation that restrict the availability of independent contractor status.

4. “ABC” Tests

Another common approach to the issue of misclassification and independent contractor status is the adoption of three-prong tests that are commonly referred to as “ABC” tests. The New Jersey Supreme Court recently held in *Hargrove v. Sleepy’s, LLC*, that the New Jersey version of the ABC test was the proper means to determine independent contractor status for the purpose of wage and hour claims. The claims in *Hargrove* related to misclassification claims by mattress delivery drivers. Under New Jersey’s ABC test:

> [A]n individual is an employee unless the employer can make certain showings regarding the individual employee . . . (A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) such individual is customarily engaged in an independently established trade, occupation, profession or business.

The New Jersey Supreme Court was asked to consider this issue by the U.S. Court of Appeals for the Third Circuit, which was reviewing the worker-plaintiffs’ original appeal in their case from the federal district court’s original denial of their claims. Following the state Court’s decision, the

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Third Circuit found that the disputed test controlled under New Jersey law, and remanded for consistent proceedings. The federal district court has not yet ruled on remand.

Other state jurisdictions, such as Illinois, have adopted similar ABC regimes.80

5. **Collective Bargaining Legislation**

There has been significant pushback in recent years against perceived imbalances of power between employers and employees.81 That turmoil is beginning to bleed over into the gig economy, with organized labor seizing upon the current moment in an attempt to counter inequities that they equate with the rising use of independent contractor classification in the U.S. workforce. As a result of lobbying from the Teamsters Union and the App-Based Drivers Association, on December 14, 2015, the City of Seattle amended its municipal code to specifically authorize TNC drivers to unionize and bargain collectively.82

The ordinance is novel and, potentially, unique. As a general proposition, the National Labor Relations Act83 (“NLRA”) textually exempts “any individual having the status of an independent contractor,” from the NLRA definition of “employee,” and, consequently, coverage of the law’s collective bargaining rights protections.84 On March 3, 2016, the U.S. Chamber of Commerce sued the City of Seattle over the ordinance,85 claiming that the city was in violation of the NLRA and U.S. anti-trust laws (i.e., the Sherman Anti-Trust Act86):

> Absent judicial intervention, the City of Seattle and thousands of other municipalities would be free to adopt their own disparate regulatory regimes, which would balkanize the market for independent-contractor services and inhibit the free flow of commerce among private service providers around the Nation.

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80 820 ILLINOIS COMPILED STATUTES 185/1, et seq. (“Employee Classification Act”).


83 29 U.S.C. §§ 151, et seq. (“It is declared the policy of the United States to . . . [encourage] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”).

84 29 U.S.C. § 152(3).


The City of Seattle’s Ordinance would restrict the market freedom relied upon by all for-hire drivers who are part of independent-contractor arrangements. . . . Under the guise of regulating public safety, the Ordinance at issue would, for the first time anywhere in the United States, insert a third-party labor union into the relationship between independent contractors and companies and require agreements that would fix wages and prices in violation of the nation’s antitrust and labor laws. Indeed, the Ordinance explicitly requires for-hire drivers and their partners to reach anticompetitive agreements by engaging in collective bargaining that federal law does not permit.87

The litigation is ongoing and could have significant import for TNCs operating in Seattle.

The example set by the Seattle City Council has already inspired a least one piece of copycat legislation in California.88 California Assembly Bill 1727 (“AB 1727”), also known as “The California 1099 Self-Organizing Act,” seeks to “establish for eligible groups of independent contractors the right to organize and negotiate with hosting platforms.”89 Although the law could technically apply to a variety of groups that utilize a “hosting platform,” which AB 1727 defines as “facilities for connecting people or entities seeking to hire people for work with people seeking to perform work, using any medium of facilitation.”90 In practice, this definition means that AB 1727 is aimed almost exclusively at affecting the gig economy.91

In public response to these initiatives, TNCs have been retorting against the notion that granting TNC drivers collective bargaining rights will ensure better conditions and profitability. A Lyft representative stated that: “We continue to share concerns raised . . . that the ordinance threatens the privacy of drivers, conflicts with longstanding federal labor and antitrust law, and may undermine the flexibility that makes Lyft so attractive both to drivers and passengers.”92 For its part, Uber has asserted that TNC drivers’ schedules and obligations are too variable to even permit such collective bargaining: “Drivers say that with flexible and independent work with Uber,


90  Id.


50 percent of them drive fewer than 10 hours a week, 70 percent have full-time or part-time work outside of Uber, and 65 percent choose to vary the hours they drive 25 percent week-to-week.”

III. **Practical Tips**

Given the expanded risk related to independent contractor and joint employer status issues, employers should consider whether they have any risk given their current business models. If such risks exist, employers should consider how they might restructure those relationships to minimize those risks. If business contracts include any clauses that might suggest potential (even if unexercised) control over terms and conditions of employment, consider whether they are necessary from a business perspective. Consider whether business projects require continued control over the details of work performed by a supplier’s employees. Take steps to ensure suppliers are well managed, and identify and remove problematic contractors before poor management leads to liability and/or organizing campaigns. Also consider insourcing if business objectives require continued control over details of work.

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93 *Id.*