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The Status of Workers as Employees or Independent Contractors

by

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THE STATUS OF WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS

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[T]he problem of differentiating between an employee and an independent contractor, or between an agent and an independent contractor, has given difficulty through the years before social legislation multiplied its importance. When the matter arose. . .we pointed out that the legal standards to fix responsibility for acts of servants, employees, or agents had not been reduced to such certainty that it could be said there was some simple, uniform and easily applicable test. . .[1]

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I. INTRODUCTION

Employers, whether agricultural or non-agricultural, continually struggle with the question of whether their workers are classified as independent contractors or employees. Employers, under pressure to improve financial performance, often look to the work force as the first place where steps can be taken to lower costs. One way employers can adjust the size of their work force and the associated costs is to convert some positions from full-time employment to a part-time independent contractor relationship.

Other incentives for using independent contractors, rather than employees, focus on the administrative and cost burdens of having employees. These incentives include eliminating the paperwork and record-keeping responsibilities asso-

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1. United States v. Silk, 331 U.S. 704, 713 (1947) (quoting National Labor Relations Act, 29 U.S.C. § 151 (1946)).

ciated with employees. Expenses associated with employee benefit plans can likewise be eliminated for independent contractors who do not qualify for such benefits. Employer-employee related matters, such as performance evaluations, discipline, wrongful-discharge litigation, unemployment claims, and workers' compensation claims, can be avoided by using independent contractors. Employee wage-related taxes, which employers are obligated to pay, are eliminated for independent contractors. Employers of independent contractors are also relieved of wage and hour requirements, including the obligation to pay overtime rates of pay. An employer's vicarious liability for the negligent acts of workers also can be affected by the answer to this classification question.

Not all aspects of an employer-independent contractor relationship, however, are beneficial to the employer. By virtue of the relationship between employers and independent contractors, employers lose a degree of control over work done and the manner in which it is done. If an independent contractor is privy to confidential information, an employer's lack of control or lack of foresight to address confidentiality in the employment agreement may prove to be a troublesome point, particularly in the case of an independent contractor who works for several different employers in the same business or commercial area. Independent contractors who are injured while performing work for an employer are not covered by workers' compensation and, therefore, are free to pursue traditional tort remedies to recover personal injury damages from responsible parties, including employers, because they have not given up their common law right to sue for the injuries they suffer.[2]

Despite these risks, the lure of significant savings as a result of classifying workers as independent contractors, rather than as employees, has attracted the interest of many employers.

In this article, the rules for classifying employees and independent contractors will be examined for the purpose of explaining the prevailing rules and the significant factors that play a part in the application of the rules. Among the statutes examined are the Internal Revenue Code[3], the Fair Labor Standards Act[4], the Immigration Reform and Control Act[5], the National Labor Relations Act[6], and state workers' compensation laws.

II. COMMON LAW RULES

At common law, the prevailing distinction between an employer and those workers who provided a service to the employer was couched in terms of master-servant and principal-agent relationships. The terms "master" and "servant," were used to indicate a relationship from which arose both liability of an employer for the physical harm caused to third persons by the tort of an employee and the special duties and responsibilities of an employer to the employee.[7] In defining the terms "master" and "servant" the central distinction focused on the right of a master to control the worker's physical performance of

2. J.E. GRENIG, WORKERS' COMPENSATION HANDBOOK 102 (1987).
3. 26 U.S.C. §§ 3101-28 (1994).
4. 29 U.S.C. §§ 201-19 (1994).
5. 8 U.S.C. §§ 1324 -1324c (1994).
6. 29 U.S.C. §§ 151-69 (1994).
7. RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (1958).

a desired service. If the master retained the right to control the physical conduct of the worker while performing assigned duties, the worker was classified as a servant.[8] The absence of the master's right to control resulted in classifying the worker as an independent contractor. In determining whether a worker is a servant or an independent contractor, several factors are considered, such as the following:

> 1. The extent of control which, by the agreement, the master may exercise over the details of the work;
> 2. Whether the one employed is engaged in a distinct occupation or business;
> 3. The kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> 4. The skill required in the particular occupation;
> 5. Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
> 6. The length of time for which the person is employed;
> 7. The method of payment, whether by the time or by the job;
> 8. Whether the work is a part of the regular business of the employer;
> 9. Whether the parties believe they are creating the relation of master and servant;
> 10. Whether the principal is in business.[9]

Under the common law rules of agency, an agent could be classified as a servant or a non-servant. Agents classified as servants came to be known as employees, while agents classified as non-servants came to be known as independent contractors.[10] The principal distinction described by these classifications is a master's responsibility to third persons for the physical conduct of the servant.[11]

III. WITHHOLDING EMPLOYMENT TAXES UNDER THE INTERNAL REVENUE CODE

Under the current Internal Revenue Code and regulations,[12] the relationship of employer and employee is generally considered to:

> [e]xist when the person or persons for whom the 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.[13]

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8. *Id.* § 2(1).
9. *Id.* § 220(2).
10. *Id.* § 2 cmt. c.
11. *Id.*
12. I.R.C. § 3121(d); Treas. Reg. § 31.3121(d); I.R.C. § 3306(i); Treas. Reg. § 31.3306(i)-1 and I.R.C. § 3401(c); Treas. Reg.§ 31.3401(c)-1.
13. Rev. Rul. 87-41, 1987-1 C.B. 296, 298.

An employee is a person who is subject to the will and control of an employer, not only as to what is done, but also how it is done. "It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so."[14] If an employer-employee relationship exists, the designation or description given to the relationship by the parties is of no consequence.[15] Therefore, if an employer-employee relationship exists, terms such as partner, co-adventurer, agent, independent contractor, or the like will not be controlling of the classification.

For purposes of the Federal Insurance Contributions Act[16] and an employer's obligation to withhold such taxes, the Internal Revenue Code defines employment as any service performed by an employee for the person employing the employee.[17] In addition, the Code excepts from the definition of employment:

> [s]ervice performed by an individual under an arrangement with the owner or tenant of land pursuant to which (1) such individual undertakes to produce agricultural or horticultural commodities on that land, (2) the commodities produced by the individual, or the proceeds therefrom, are to be divided between the individual and the owner or tenant of the land, and (3) the amount of the individual's share depends on the amount of the commodities produced.[18]

Such farm arrangements are often described by terms such as "sharecropper," "cropper," or "tenant."[19] Under this provision, an excepted worker is considered to be self-employed and not an "employee" for purposes of old age and survivors insurance coverage.[20] The reference to one who undertakes to produce agricultural or horticultural commodities demonstrates that [to be considered self-employed] an individual must be the operator of a farm.[21] A typical share farmer has responsibility for a wide range of farming activities, from participating in the initial planning of the operation incurring out-of-pocket business-related expenses.[22] Other workers who may be hired to perform only specific tasks, and who do not incur business expenses, are not operators of farms merely because

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14. *Id.*
15. *Id.*
16. 26 U.S.C. § 3101(1994).
17. *Id.* § 3121(b).
18. *Id.* § 3121(b)(16).
19. Rev. Rul. 85-85, 1985-1 C.B. 332.
20. *Id.* (in which the IRS indicated it would not follow the district court decision in Sachs v. United States., 422 F. Supp. 1092 (N.D. Ohio 1976)). *Sachs* involved the issue of whether migrant workers, who were hired to cultivate and harvest cucumbers under the direction of a farmer who directed their daily activities and paid the migrant workers a share of the gross receipts of the harvest, were employees of the farmer. The district court found that the workers were not subject to FICA withholding because they participated in a risk-sharing arrangement with the farmer. In addressing this case, the Service noted that the court ignored the requirement of § 3121(b)(16)(A) that the individual undertake to produce a product. For purposes of determining whether a worker has responsibility for an activity, a worker's participation in the decision-making process, for example, with regard to the type of crops to be grown and the location of areas to be planted, is the most important element to consider.
21. *Id.*
22. *Id.* at 333.

they perform certain tasks relating to the cultivation and harvest of agricultural crops.[23]

As an aid to determining whether an individual is an employee under common law rules, the Service lists twenty factors or elements that can be used as guidelines for determining whether sufficient control is present in an employment situation to establish an employer-employee relationship.[24] Among the twenty factors, the degree of importance of each factor varies according to the occupation performed and the factual context in which the services are performed.[25] These factors are described as follows:

> 1. *Instructions.* Control is present if the person or persons for whom the services are performed has the right to require compliance with instructions.
> 2. *Training.* Training a worker through various means indicates that the person for whom the services are provided wants the services to be provided in a particular method or manner.
> 3. *Integration.* Integration of the workers services into the business operations of the person for whom the services are performed generally shows that the worker is subject to direction and control. If the success or continuation of a business depends upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
> 4. *Rendering services personally.* If services must be performed personally, it is presumed that the person for whom the services are to be performed is interested in the methods used to accomplish the results.
> 5. *Hiring, supervising, and paying assistants.* If the person for whom the work is performed hires, supervises, and pays assistants to work with the person who provides the service, this factor generally indicates control over the workers on the job. If the person performing the work hires, supervises, and pays the assistants, that factor is indicative of an independent contractor relationship.
> 6. *Continuing relationship.* A continuing relationship, even one that occurs at frequent yet regular intervals, is indicative of an employer-employee relationship.
> 7. *Set hours of work.* The establishment of set hours of work by the person or persons for whom the services are provided is a factor indicating control.
> 8. *Full time required.* A worker who must devote substantially full time to providing services to another person is impliedly under the control of the person for whom the services are provided, particularly in regard to opportunities to provide services to other persons.
> 9. *Doing work on the employer's premises.* Work that is performed on the premises of the person for whom the services are performed is generally under the control of that person. However, this fact alone is not indicative of the status of an employee.

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23. *Id.*
24. Rev. Rul. 87-41, 1987-1 C.B. 296.
25. *Id.*

10. *Order of sequence set.* A person who establishes the order or sequence in which work is to be done generally has the authority to control the person providing the service.
11. *Oral or written reports.* Requirements imposed on workers to provide regular or written reports to the person for whom the work is provided is indicative of a degree of control over the worker.
12. *Payment by the hour, week, month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that the method of payment is not just a convenient way to pay a lump sum agreed upon as the cost of a job.
13. *Payment of business and or travel expenses.* Payment of these expenses is generally indicative of an employer-employee relationship.
14. *Furnishing tools and materials.* Supplying significant tools, materials, and other equipment to the worker, tends to show the existence of an employer-employee relationship.
15. *Significant investment.* A worker's significant investment in the facilities used to perform the services is indicative of an independent contractor relationship.
16. *Realization of profit and loss.* A worker who can realize a profit or suffer a loss as a result of the worker's actions is generally an independent contractor. However, the risk that a worker will not receive payment for services provided is a risk that is common to employees and independent contractors.
17. *Working for more than one firm.* Performing more than de minimis services for a multitude of unrelated persons at the same time is generally indicative of an independent contractor.
18. *Making services available to the public.* Making services available to the general public on a regular and consistent basis is indicative of an independent contractor.
19. *Right to discharge.* Having the right to discharge a worker is indicative of the right of an employer.
20. *Right to terminate.* If a worker has the right to end his or her relationship, with the person to whom the work is provided, at any time and without incurring liability, that factor is indicative of an employer-employee relationship.[26]

These points are illustrated in *Winstead v. United States*[27], in which the court considered whether a landowner was required to withhold Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes on amounts advanced to tenant farmers in the form of hourly wage payments made directly to day laborers employed by tenant farmers, with the payments later being deducted from the tenant farmer's share of the farming proceeds.[28]

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26. *Id.* at 298-99.
27. 863 F. Supp. 264 (M.D.N.C. 1994).
28. *Id.* at 265. (The court described Winstead's relationship with the tenant farmers as a sharecropper arrangement. Under this arrangement, Winstead provided tenant farmers with a house, land to farm, and equipment. Winstead and tenant farmers split the cost of fertilizer, but tenant farmers were responsible for working the land and being financially accountable for hired help. Winstead would advance the tenants money to cover ordinary expenses. Following the sale of the

Winstead argued that he was not the employer of the day laborers and should not be required to withhold the employer's share of FICA or FUTA tax.[29] Likewise, as he was not the employer of the day laborers, he should not have been penalized for failing to withhold the workers' portions of the FICA tax.[30] Winstead based his position on the provisions of § 3121(b)(16) as described above.[31]

The court noted that the exception would be more applicable to Winstead's relationship with the tenant farmers, than Winstead's relationship with the day laborers.[32] Day laborers received an hourly wage, while the proceeds of the crop were split between Winstead and the tenant farmers.[33] Therefore, the third requirement of the test was not met because day laborer wages were not dependent on the amount of commodity produced. Winstead had control over the day laborer's pay and thus easily could have withheld the employer's and employee's share.[34]

IV. FAIR LABOR STANDARDS ACT OF 1938[35]

The Fair Labor Standards Act, as amended, governs minimum wages, overtime pay, employer record-keeping, and child labor issues.[36] It is enforced by the United States Department of Labor's Wage and Hour division. In determining whether an individual is an employee or an independent contractor under the Act, federal courts and the United States Department of Labor apply what has been called the "Economic Reality" test.[37] Under this test the following factors are applied:

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tobacco, the proceeds were split evenly between Winstead and the tenants. Before paying the tenants, however, Winstead would deduct the amount of money advanced on the tenants' behalf for expenses, including money paid to day laborers. This action arose because no employment or unemployment taxes were withheld from the day laborers' pay).

29. *Id.* at 266.

30. *Id.*

31 *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 267. *See also*, Otte v. United States, 419 U.S. 43, 53 (1974). In *Otte*, the Court noted that the term "employer" should not be given a narrower construction for purposes of Social Security tax withholding than for employment tax withholding purposes. *Id.*

35. 29 U.S.C. §§ 201-19 (1994).

36. According to the Supreme Court,

> [T]he Fair Labor Standards Act was passed by Congress to lessen, so far as deemed practicable, the distribution of goods produced under subnormal working conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from the production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maximum hour provisions and the requirement that records of employees services be kept by the employer.

Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947), *Walling v. Rutherford Food Corp.*, 156 F.2d 513 (1946), *cert. granted, Rutherford Food Corp. v. Walling*, 329 U.S. 704 (1946), *rehearing denied, Rutherford Food Corp. v. McComb*, 332 U.S. 785 (1946).

37. The source of the "economic reality" test is often cited as United States v. Silk, 331 U.S. 704 (1947). In *Silk*, an employer sought to recover sums paid to the Commissioner of Internal

1. The degree to which the worker has the right to control the results to be accomplished (What shall be done?) and the manner in which the work is to be performed (How shall it be done?);
2. The degree to which the employer determines the worker's opportunity for profit and loss;
3. The degree of skill, training, and independent initiative required to perform the work;
4. The permanency, exclusivity, or duration of the working relationship;
5. The extent to which the work is an integral part of the employer's business; and
6. The extent of the worker's investment in equipment or materials required for his or her task.[38]

Among the six specific factors and other additional factors, such as, parties intent or terms of the contract, no single factor is considered to be controlling.[39] Courts generally turn their attention to the totality of the circumstances of the work relationship to determine a specific worker's status.[40] In analyzing the factors, the central question to be answered is whether under the facts and circumstances of the total situation, including the risk undertaken, the control exercised, and the opportunity for profit from sound management, the economic reality is that the workers can be characterized as independent contractors rather than workers.[41]

Fair Labor Standards Act Cases

In *Real v. Driscoll Strawberry Associates, Inc.*,[42] the plaintiff-workers were Mexican-Americans who spoke little or no English, but each signed a seventeen page legal agreement written in English, designating himself as a sub licensee and independent contractor of Donald J. Driscoll, doing business as Driscoll Berry

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Revenue as employment taxes on employers under the Social Security Act. Silk was in the coal business and had two types of workers, those who were engaged in unloading railway coal cars and those who made retail deliveries of coal in trucks which they owned and controlled. Each unloader supplied his own tools and was paid an agreed price per ton to unload coal from railroad cars. Silk owned no trucks to deliver coal, but contracted with other workers who owned their own trucks to deliver the coal at a uniform price per ton. Silk provided no instructions to the delivery workers as to how they were to do their job, but merely gave each driver a ticket telling him where to deliver the coal and whether to collect the cost at time of delivery. Truck drivers were free to come and go as they pleased and often performed hauling services for others whenever they pleased. In performing their services, the truck drivers paid all the expenses of operating their trucks and any extra help they hired to do their job, and no records were kept of the time they spent in performing this job. *Id.* at 705-707.

38. United States v. Silk, 331 U.S. at 716.
39. *Id.*
40. *Id.* at 719.
41. *Id.; see also* Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28 (1961).
42. Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979).

Farms.[43] The agreement specified that Driscoll had assumed no right of supervision or control over the growing of the strawberry crop other than control over the result of the work and not over the means by which the results were to be accomplished.[44] Despite the language of the agreement, the following facts were considered pertinent by the court in its decision to overturn the trial court's grant of Driscoll's motion for summary judgment on the grounds that genuine issues of material fact existed as to whether the growers and pickers were employees of Driscoll or others with whom he contracted:

1. Driscoll could fire a grower at any time.
2. The growers' opportunity for profit or loss depended more on Driscoll's skills in developing different varieties of strawberries, analyzing soil and pest conditions, and marketing the strawberries correctly, than it did upon the growers' own judgment in weeding, dusting, pruning, and picking the berries.
3. The growers' investment in light equipment was minimal in comparison with the total investment by Driscoll in heavy machinery and growing supplies.
4. The growers had no special technical knowledge or skill; rather their efforts consisted primarily of physical labor.
5. The growers were an integral part of the Driscoll's strawberry growing operation rather than part of an independently viable enterprise.[45]

In *Donovan v. Gillmor,*[46] the defendants owned or rented all of the land, machinery, and equipment used to plant cucumbers and made all of the important decisions concerning when to plow, when to plant, and when to apply fertilizer, all of which occurs before the migrant workers arrive.[47] Migrant workers stay at a camp owned by the defendant, and their cost is absorbed by the defendant.[48] The migrants provide no tools of their own other than hoes. In return for their labor, they are paid a percentage of the value of the crop they pick.[49] The migrants

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43. Under a separate agreement, Driscoll Strawberry Associates, Inc. (DSA) granted Donald J. Driscoll (Driscoll) "a license to grow a crop of DSA's patented strawberry varieties and the right to sublicense the growing of the crop to others," subject to the approval of DSA. Driscoll then granted the growers and pickers a sublicense to grow a strawberry crop for the account of DSA on a parcel of land owned or leased by Driscoll. Driscoll planted the strawberries and delivered already planted land to the sublicensees. In return, sublicensees agreed to furnish the labor necessary to care for the plants and land during the growing season, to harvest the crop and to sort, grade, and pack the strawberries for market by DSA. Sublicensees were paid a fixed percentage of the net proceeds actually received for the berries sold that week by Driscoll from DSA, less a percentage of certain expenses for baskets and crates. *Id.* at 750-752.

44. *Id.* at 751.

45. *Id.* at 755.

46. Donovan v. Gillmor, 535 F. Supp. 154 (N.D. Ohio 1982), *appeal dismissed,* 708 F.2d 723 (6th Cir. 1982).

47. *Id.* at 161.

48. *Id.*

49. *Id.*

have no control over the price charged for the pickles they pick and do not own or rent any of the cultivated land or equipment which they use.[50]

In applying the five economic reality factors, the court concluded that the facts led to the inescapable conclusion that the migrant workers were employees within the coverage of the Fair Labor Standards Act.[51] The court noted that the defendants managed all aspects of the farm operation; the migrants contributed no capital investment whatsoever except their hoes; they had no opportunity for profit or loss on the part of the migrants; their stake in the venture was wages; there was no degree of skill required to do the labor; and the relationship indicated permanency despite the fact that the harvesting industry is inherently seasonal.[52]

In *Beliz v. W.H. McLeod & Sons Packing Co.*,[53] Waldo Galan, a registered farm labor contractor provided three families of migrant workers to McLeod, an agricultural producer that grew, harvested, and shipped cucumbers, tomatoes, and beets in Beaufort County, South Carolina.[54] McLeod owns the land on which it grows vegetables, maintains the machinery and equipment necessary for the operation, and owns a packing house where the produce is graded, packed, and loaded onto trucks for delivery.[55] McLeod employed six to eight full-time truck drivers, a supervisor, and a full-time mechanic.[56] To harvest and pack vegetables in May and June each year, McLeod used a seasonal work force consisting of two or three crews of harvest workers.[57] One crew was provided from local labor sources, and additional labor is provided by migrant farm workers.[58]

Although Galan was a registered farm labor contractor, his registration did not authorize him to transport and house workers.[59] In addition, Galan committed several other statutory violations while providing the workers to McLeod.[60] In determining McLeod's responsibility for Galan's Farm Labor Contractor's Act[61] violations, the district court found in favor of each worker against the farmer and the labor contractor for statutory violations, but refused to find the farmer vicariously liable for the contractor's violations.[62] Furthermore, the court found that the farmer did not qualify as the workers' "employer" under the Fair Labor Standards Act.[63]

In deciding the question of the nature of the relationship between the farmer and the workers, the court noted that it has been held repeatedly that the ultimate decision of whether an individual is an employee within the meaning of

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50. *Id.*
51. *Id.* at 163.
52. *Id.*
53. 765 F.2d 1317 (5th Cir. 1985).
54. *Id.* at 1320.
55. *Id.* at 1321.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1323.
60. *Id.*
61. Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-55 (1983) now repealed by the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801-56.
62. Beliz, 765 F.2d at 1334.
63. *Id.* at 1320.

the Act is a "legal determination rather than a factual one."[64] Courts have not always followed that rule.[65]

If the labor contractor rather than the farmer was held to be the employer of the workers, the Fair Labor Standards Act might require the conclusion that the recruiter-contractor and the farmer were joint employers of the workers.[66] In making such determination, an examination of the economic reality of the situation among the workers, the contractor, and the farmer is made, and the classification of employee is bestowed on those who, as a matter of economic reality, are dependent upon the business for which they render service.[67]

The totality of the situation controls the determination. The decision does not turn on whether the farmer has control over all aspects of the work of the laborers or the contractor. The critically significant factors are the specialized nature of the work and whether the individual contractor is sufficiently independent to be in business for himself.[68] Applying these standards to the facts of the case, the court observed that the work performed by the laborers was not specialized because it involved only one item of equipment, a bucket, and one task, picking the desired vegetable.[69] The independence of the labor contractor also was examined and found to be insufficient for the court to conclude that the contractor was in business for himself. The contractor had no capital other than a rundown truck and van. He lacked the money to transport himself or the crew to South Carolina or to provide the buckets used in picking.[70]

In *Donovan v. John Jay Aesthetic Salons,*[71] the court considered whether beauty parlor "lessees" are employees or independent contractors. John Jay Aesthetic Sales (John Jay) was a business offering hair dressing and cosmetic services at outlets located throughout Louisiana.[72] Individuals who worked for the company were classified as hairdressers, manicurists, cosmetologists, and shampoo maids.[73] When individuals began working for John Jay, they had the option of signing a lease or an employment agreement, even though their functions and duties would be essentially the same regardless of the document they signed and the status they assumed.[74] The employment agreement provided that an employee performs his or her duties "faithfully subject to the direction, supervision, control, rules and regulations of the Employer."[75] Employees were paid a straight salary or a straight commission based on a set percentage of the business they performed.

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64. *Id.* at 1327 (citing Castillo v. Givens, 704 F.2d 181, 185 (5th Cir. 1983), *cert. denied, Givens v. Castillo,* 464 U.S. 850 (1983)).

65. *Id.* (citing *Castillo,* 704 F.2d at 187 n.12). *See* Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973), *rehearing denied,* 472 F.2d 1405 (5th Cir. 1973), *cert. denied, Griffin & Brand of McAllen, Inc. v. Brennan,* 414 U.S. 819 (1973); Wirtz v. Lone Star Steel Co., 405 F.2d 668, 669 (5th Cir. 1968).

66. *Id.*

67. *Id.* (citing *Castillo,* 704 F.2d at 189).

68. *Id.*

69. *Id.* at 1328.

70. *Id.*

71. 26 Wage & Hour Cas. 823 (D.C. La. 1983).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

If a worker signed a lease agreement with John Jay, the worker would be given working space, but could independently determine the routine, the number of hours worked per day, and the choices of days worked per week.[76] John Jay provided the basic facilities, but the workers were responsible for furnishing their own equipment and hand tools. A percentage of each individual lessee's gross receipts was paid to John Jay as rental for the use of the space provided to them.[77]

The Secretary of Labor argued that, notwithstanding the provisions of the lease agreements, all lessees should be considered employees rather than independent contractors, because lessees and employees performed essentially the same function.[78] In applying the "economic reality" test, the court examined the relationship between John Jay and its alleged employees.[79] Two factors primarily were relied upon to determine the status of the alleged employees: 1) the specialization of the work involved; and 2) the degree of control exercised by the employer.[80] Applying these factors, highly skilled hairdresser, cosmetologist, and manicurist lessees were classified as independent contractors. The shampoo maids, who performed work that required no special aptitude, training, or skill, and who were entirely dependent on the hairdressers for whom they worked, were classified as employees of the hairdressers and John Jay.[81]

In reaching these different conclusions, the court relied on the following facts: 1) some of the work required special skill and training; 2) hairdressers and cosmetologists used their skill and judgment to build up a loyal clientele; 3) they controlled their own work and had flexibility in setting their schedules; and 4) no withholdings were taken from their earnings as each was responsible for paying his or her own taxes and appropriate insurance.[82]

Among the most interesting cases that apply the economic reality test are *Donovan v. Brandel*[83] and *Secretary of Labor v. Lauritzen,*[84] because both deal with similar facts, yet reach opposite conclusions, on classifying workers as employees or independent contractors. The cases involved migrant workers who came to farms in Michigan and Wisconsin where cucumbers were growing and ready to be harvested.[85] The head of a family of migrant workers would contract with the farm operator to harvest particular fields of cucumbers. Decisions as to when and how to pick the cucumbers were made by the workers.[86] Farm operators in *Lauritzen* occasionally visited the fields to check on the families and the crops. Operators also supervised activities such as irrigation and pesticide application.[87] In *Brandel*, the farm operator did not venture out into the fields to control the day to day harvesting operations.[88] Farm operators supplied irrigation and pesticides

76. *Id.* at 824.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 825.
82. *Id.*
83. 736 F.2d 1114 (6th Cir. 1984), *rehearing denied,* 760 F.2d 126 (6th Cir. 1985).
84. 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988), *reh. denied*, 488 U.S. 987 (1988).
85. *Brandel,* 736 F. 2d at 1116; *Lauritzen,* 835 F.2d at 1532-33.
86. *Brandel,* 736 F. 2d at 1116; *Lauritzen,* 835 F.2d at 1532-33.
87. *Lauritzen*, 835 F.2d at 1533.
88. *Brandel*, 736 F.2d at 1119.

when the workers deemed it necessary to do so. As compensation the workers were paid fifty percent of the proceeds from the sale of the cucumbers to commercial processors.[89] Under this arrangement, workers had an incentive to exercise care for the plants and the cucumbers, an arrangement that benefited both workers and operators.

In each case, the Department of Labor sought to classify the workers as employees of the farm operator under the Fair Labor Standards Act.[90] Each court referred to the economic reality test as the basis for its decision. *Brandel* concluded that the workers were independent contractors.[91] *Lauritzen* concluded that the workers were employees.[92] The *Lauritzen* decision was decided later and it recognized the *Brandel* decision. However, *Lauritzen* noted that other courts in the Sixth Circuit distinguish *Brandel* rather than follow it.[93]

Regarding the first factor of the degree of control over the manner in which the work is performed, the *Brandel* court found that the arrangement between the operator and the workers to be a sharecropper agreement designed to relinquish control of the harvesting operation from the operator to the workers.[94] In *Lauritzen,* testimony was offered in which the workers referred to the operator as "the boss" and believed he had authority to fire them.[95] The court found the operator had the right to exercise control over the workers and the entire cucumber farming operation, not just the harvesting aspect of it.[96]

In regard to the second factor of the workers' opportunity for profit or loss, the court in *Brandel* concluded that the workers' opportunity for profit was based on their successful management of the harvest process.[97] Because the workers' skill and judgment was employed in deciding when to pick the cucumbers, the workers controlled that aspect of the business.[98] In regard to a loss, the court held that there was little evidence in the record to support the finding that the workers in *Brandel* were exposed to any risk of loss.[99] In *Lauritzen,* the court focused on the lack of an investment in the business. Without the investment, the workers essentially risked nothing, while the operator bore the brunt of a significant investment placed at risk.[100]

In regard to the third element concerning the workers' investment in equipment and material needed to perform the job, the *Brandel* court noted that the workers' only investment involved gloves and pails for cucumbers.[101] Although the operator's investment was significantly higher in terms of dollars, the operator had no investment in the harvesting side of the operation because

89. *Id.* at 1116; *Lauritzen,* 835 F.2d at 1532.
90. 29 U.S.C. § 201-19 (1994).
91. *Brandel,* 736 F.2d at 1120.
92. *Lauritzen,* 835 F.2d at 1538.
93. *Id.* at 1536. In the Sixth Circuit, *Brandel* has been narrowed and distinguished. Although Brandel is similar to this case, the court viewed the factual similarities differently than the court in Brandel.
94. *Brandel,* 736 F.2d at 1119.
95. *Lauritzen,* 835 F.2d at 1536.
96. *Id.*
97. *Brandel,* 736 F.2d at 1119.
98. *Lauritzen,* 835 F.2d at 1536.
99. *Brandel,* 736 F.2d at 1119.
100. *Lauritzen,* 835 F.2d at 1536.
101. *Brandel,* 736 F.2d at 1118.

that investment was covered by the workers.[102] This disparity in terms of dollars invested was more significant to the court in *Lauritzen,* which held that the small investment by the workers was indicative of an employee relationship.[103]

In regard to the fourth factor involving the skill required of the workers to do the job, the *Brandel* court concluded that the workers possessed specific skills in selecting cucumbers to harvest, preparing the plants for harvest, and determining the need for irrigation and pesticides.[104] In *Lauritzen*, the court noted the existence of the skills, but concluded the skills were essentially the same as those of other agricultural workers.[105]

Under the fifth factor involving permanency and duration of the work relationship, the *Brandel* court noted that forty to fifty percent of the harvesters return in the following year to harvest the same fields.[106] This was interpreted as a sign of a mutually satisfactory experience between the workers and operators rather than an indication of a permanent relationship between the parties.[107] The *Lauritzen* court concluded that, however temporary the relationship may be, it was still permanent and exclusive for the duration of the harvest season.[108] The percentage of workers returning from year to year was another indication of a permanent relationship between operator and employees.[109]

The sixth factor focuses attention on the nature of the activity and its relation to the operator's business.[110] To a farm operator, harvesting a growing crop is certainly an essential part of the farm operation. The *Brandel* court concluded that the workers were not economically dependent upon the farm operators, because the workers were in great demand throughout the cucumber farming region and freely went from farm to farm.[111] In *Lauritzen,* the court simply noted the *Brandel* observation that harvest is an integral part of a production agricultural enterprise.[112]

On the central question of whether the workers were economically dependent upon the farmers for whom they toiled, the *Brandel* court concluded they were not dependent.[113] The court cited the fact that, although their compensation was based on a percentage of the price brought for the products they picked, neither the workers nor the farmers were able to control the prices.[114] The court also noted that the Secretary's argument and brief seemed to suggest that all migrant farm workers should be considered workers per se and, therefore, subject to the Fair Labor Standards Act.[115] In recognizing this, the court observed that such a position disregarded the premise that the determination of worker status be made on a case by case basis and on the unique factual record presented in each

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102. *Id.* at 1118-19.
103. *Lauritzen,* 835 F.2d at 1537.
104. *Brandel,* 736 F.2d at 1117-18.
105. *Lauritzen,* 835 F.2d at 1537.
106. *Brandel,* 736 F.2d at 1117.
107. *Id.*
108. *Lauritzen,* 835 F.2d at 1537.
109. *Id.*
110. *See, e.g., id.* at 1537-38.
111. *Brandel,* 736 F.2d at 1120.
112. *Lauritzen,* 835 F.2d at 1537-38.
113. *Brandel,* 736 F.2d at 1120.
114. *Id.*
115. *Id.*

case.[116] The *Lauritzen* court observed that if migrant families are cucumber pickers, they clearly need cucumbers to pick to survive economically.[117] Therefore, they are clearly dependent upon the cucumber business and the farmer-defendants for their continued employment and livelihood.[118] Were it not for the defendant-farmers providing work for these migrant families, they would have to find some other grower to hire them.[119] Until they found such a grower, they would be unemployed.[120] To find that workers are employees, rather than independent contractors, it is not necessary to establish that workers are unable to find work with any other employer.[121] In concluding the workers were employees, the court noted that the workers were dependent upon the defendant-farmers' land, crops, agricultural expertise, equipment, and marketing skills.[122] In a concurring opinion, Judge Easterbrook criticized the majority's reliance on the economic reality test, by noting it provides little guidance for future cases and fails to provide sufficient explanation of what the important elements of the test actually are and why they are important.[123]

V. THE IMMIGRATION REFORM AND CONTROL ACT[124]

The 1986 Act that amended federal law admitting immigrants to the United States also established specific requirements for employers.[125] Under the new requirements, it is unlawful for any person or entity to hire, or recruit for a fee, for employment in the United States after November 6, 1986, an alien knowing that the alien is an unauthorized alien in respect to such employment.[126] To determine identity and eligibility to work in the United States, any person or entity who hires, or recruits for a fee, any other person for employment must verify the employee's identity and eligibility to work in the United States.[127]

An essential part of this process is a determination of the status of the worker as an employee and not an independent contractor. Regulations define the term "employee" as a person who provides services or labor for an employer for wages, but excludes those individuals who are "independent contractors."[128] An independent contractor is an individual or entity who is contracted to do work according to his or her own means and methods, and is subject to control only as to the results.[129] Whether an individual or entity is an independent contractor is based on a case by case determination that disregards the label the parties apply to

116. *Id.*
117. *Lauritzen,* 835 F.2d at 1538.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1539-45.
124. 8 U.S.C. § 1324-1324c (1994).
125. *Id.*
126. 8 U.S.C. § 1324a(a)(1) (1994).
127. 8 U.S.C. § 1324a(b) (1994).
128. 8 C.F.R. § 274a.1(f).
129. 8 C.F.R. § 274a.1(j).

the relationship. Factors to consider include, but are not limited to, whether the individual or entity providing the service:

1. Supplies the tools or materials;
2. Makes the service available to the general public;
3. Works for a number of other clients at the same time;
4. Has an opportunity for profit or loss as a result of labor or services provided;
5. Invests in the facilities of the work;
6. Directs the order or sequence in which the work is to be done; and
7. Determines the hours during which it is performed.[130]

VI. THE NATIONAL LABOR RELATIONS ACT[131]

The National Labor Relations Act, as amended, is the primary body of federal law governing labor-management relations in the private sector. An employer violates the Act when it refuses to bargain collectively with a union representing a majority of its employees in an appropriate bargaining unit.[132] Independent contractors are expressly exempt from the Act's definition of "employee."[133] A question of an employee's status for purposes of this act may arise in unfair labor practice cases and union representation elections. In such cases, an employer often argues that the workers at issue are not employees and thus are not protected by the Act.

Under the National Labor Relations Act, the "Right to Control" test is extremely important in determining whether an individual is an employee or an independent contractor.[134] It should be noted that it is the right to control, rather than the exercise of the right, that is significant for purposes of the Act.[135]

Although the degree of employer supervision over the agent is perhaps the most important factor, no one factor is determinative.[136] The entire relationship must be assessed to determine the degree to which the individual has an independent entrepreneurial interest in the work.[137] With increased supervision and stricter enforcement of the employer's standards, there is a greater likelihood that a court will find an employer-employee relationship.[138]

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130. *Id.*
131. 29 U.S.C. §§ 151-69 (1994).
132. *Id.* § 157.
133. *Id.* § 152.
134. N.L.R.B. v. Associated Diamond Cabs, Inc., 702 F.2d 912, 919 (11th Cir. 1983).
135. N.L.R.B. v. Deaton, Inc., 502 F.2d 1221, 1224 (5th Cir. 1974), *cert. denied, Deaton, Inc. v. N.L.R.B.*, 422 U.S. 1047 (1975).
136. News Syndicate Co., 164 N.L.R.B. Dec. (CCH) 422, 424 (1967).
137. N.L.R.B. v. Associated Diamond Cabs, Inc., 702 F.2d at 919.
138. Sida of Hawaii, Inc. v. N.L.R.B., 512 F.2d 354, 357 (9th Cir. 1975).

National Labor Relations Act Cases

A case that illustrates the National Labor Relations Board's approach to independent contractor cases is *NLRB v. H & H Pretzel Co.*[139] The pretzel company had entered into collective bargaining agreements with the Teamsters Union to cover its truck-driver salesmen for more than thirty years.[140] Shortly before the last collective bargaining agreement was set to expire, H & H notified the union that it would not negotiate the terms of their agreement and that it intended to convert the relationship with its drivers from employees to independent contractors.[141] H & H planned to sell or lease the vehicles to the drivers and assign specific routes on a first-come first-serve basis.[142] Three of the twelve union drivers signed the independent contractor agreement and nine new drivers were hired as independent contractors.[143] As independent contractors, the drivers leased their trucks from a separate company owned by H & H's owner.[144] H & H controlled the hours worked, frequency of calls on customers, color and design of trucks, cleanliness of drivers and trucks, qualifications of helpers, apportionment of customers among the drivers, and the supply of the equipment used by the drivers.[145]

The National Labor Relations Board found that H & H violated the National Labor Relations Act by withdrawing union recognition because its drivers remained employees despite the company's shift to the independent contractor terminology.[146] The Board reviewed the above factors and determined that the workers remained employees because of the extensive control granted to H & H under the independent contractor agreement, the lack of any proprietary interest in the business by the drivers, the lease of the trucks from an H & H owned company, and H & H's broad authority to terminate the arrangement unilaterally.[147]

In *NLRB v. Associated Diamond Cabs, Inc.*,[148] a case involving taxi cab drivers, the Board held that daily and annual taxi cab drivers were independent contractors, not employees. Diamond Cabs was a Florida association of thirty-three taxicab owners who leased their cabs to 125 drivers pursuant to standardized daily or annual lease agreements.[149] The lease agreements required the drivers to pay Diamond Cabs at the end of each shift, a flat fee plus a mileage charge for each shift driven.[150]

Drivers were split into two groups, daily lessees and annual lessees.[151] Daily lessees consisted of steady drivers who voluntarily and regularly worked a set five or six-day week and usually drove the same cab, and extra board drivers who were

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139. N.L.R.B. v. H & H Pretzel Co., 831 F.2d 650 (6th Cir. 1987).
140. *Id.* at 651.
141. *Id.*
142. *Id.*
143. *Id.* at 653.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 654.
148. 702 F.2d 912.
149. *Id.* at 916.
150. *Id.*
151. *Id.* at 916-17.

assigned taxicabs on a first come, first-serve basis.[152] If a steady driver failed to show up for work he or she was still required to pay the flat fee.[153] Extra board drivers could refuse a particular cab assignment and thus forfeit the day's work; however, they were not required to pay the flat fee.[154]

Annual lessees generally owned their cabs according to a standardized lease agreement and rented the necessary equipment such as taxi meters and lights from Diamond Cabs.[155] Neither annual nor daily lessees could sublease the taxicabs.[156] Annual lessees, however, could hire replacement drivers if necessary.[157]

In the NLRB's decision that the daily and annual taxi cab drivers were independent contractors, the key factor was that the evidence demonstrated that Diamond Cabs exercised only limited control over the drivers by prohibiting subleasing of the cab, requiring drivers to be neat and clean, and requiring them to behave reasonably and courteously.[158] Such requirements did not rise to the level required to conclude that the drivers were employees.[159]

VII. State Worker's Compensation Laws

Under a state workers compensation act,[160] rules that apply for ascertaining common law master-servant relationships apply to determine whether an employer-employee relationship exists at the time a worker's compensable injury occurs.[161] Elements to consider in determining the nature of a worker's relationship to his or her employer at the time of injury include:

1. Which party controls the manner in which the work is done?
2. Is the worker responsible for the result only?
3. What is the nature of the work or occupation involved?
4. What skills are required to perform the job?
5. Is the worker involved in a distinct occupation or business?
6. Which party supplied the tools needed to perform the job?
7. Is the worker paid by the time or by the job?
8. Is the work part of the regular business of the employer?
9. Does the employer retain the right to terminate the employment relationship at any time?[162]

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152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 924.
159. *Id.*
160. *See*, e.g., Worker's Compensation Act, PA. STAT. ANN. tit. 77 § 1 (1992).
161. Southland Cable Co. v. Workmen's Compensation Appeal Board, 598 A.2d 329, 330, (Pa. Commw. Ct. 1991) (citing Hammermill Paper Co. v. Rust Engineering Co., 243 A.2d 389, 392 (1968)).
162 *Id.* at 330-31.

While none of these factors alone is controlling, the right to control the manner in which the work is accomplished is the most persuasive indication of the presence or absence of the employer-employee relationship.[163]

State Workers' Compensation Cases

In *Cookson v. Knauff*, a dealer in livestock hired a Canadian dairy farmer to accompany and look after cattle the dealer had purchased and transported to Pennsylvania.[164] The farmer had performed similar services for the livestock dealer on prior occasions.[165] The dealer contracted with a trucking company and made arrangements for payment of the expenses occasioned by the transport.[166] While in transit, the farmer was to water, feed, milk, and otherwise care for the livestock.[167] For these services, the dealer paid the farmer a fixed amount per day, plus certain expenses.[168] Following an accident, the farmer filed a claim for workers' compensation benefits.[169] The referee awarded compensation and the Workers' Compensation Board affirmed the award.[170] On appeal, the issue raised was whether the farmer was an employee of the dealer when the injury occurred.[171]

In considering this question, the court noted that "the vital test for determining whether a worker is a servant of the person who engages him for the work is whether he is subject to the latter's control or right of control, not only with regard to the work to be done, but also with regard to the manner of performance."[172] The master and servant relationship exists where the employer has the right to select the employee, the power to remove and discharge him, the right to direct what work shall be done, and the way and manner in which it shall be done.[173]

In *Stillman v. Workmen's Compensation Appeal Board*[174] the court demonstrated the approach typically taken in worker's compensation cases determining whether an employee is an employee or an independent contractor. In *Stillman,* the employee was a portable toilet serviceman, who after several years of employment, agreed in writing to assume the status of an independent contractor with the same employer.[175] Notwithstanding the change in status, the claimant's duties remained unchanged.[176] As an independent contractor, Stillman received a paycheck from the employer from which was deducted an amount sufficient to

163. Lynch v. Workmen's Compensation Appeal Board, 554 A.2d 159 (Pa. Commw. Ct. 1989) *app. denied*, 578 A.2d 416 (1990).
164. Cookson v. Knauff, 43 A.2d 402 (Pa. Super. Ct. 1945).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 405 (citing Venezia v. Philadelphia Electric Co., 177 A. 25 (Pa. 1935)).
173. *Id.* (citing McColligan v. Pennsylvania R.R., 63 A. 792 (Pa. 1906)).
174. Stillman v. Workmen's Compensation Appeal Board, 569 A.2d 983 (Pa. Commw. Ct. 1990).
175. *Id.* at 984.
176. *Id.* at 986.

cover required tax contributions.[177] However, this deduction was not paid to government tax authorities. Rather, it was placed into a joint account from which Stillman was to pay the taxes on his own.[178]

In performing his work, all of the equipment needs were provided by the employer.[179] Little expertise was required to perform the job.[180] In the performance of his duties, Stillman was subject to the supervision of the employer.[181] At no time did Stillman hold himself out to others as an independent business man.[182]

Following Stillman's death on the job, Stillman's widow applied for worker's compensation benefits. The court found Stillman to be an employee, based on the following factors:

1. The company had sufficient control of the manner in which Stillman's work was to be performed.
2. The terms of the agreement between the parties were no different than Stillman's original terms and conditions of employment.
3. Stillman was not required to possess any special skills in his job.
4. Stillman did not have any distinct occupation or business.
5. All supplies and equipment were provided by the company.
6. Stillman's compensation was determined by the output of work required by the employer.
7. The claimant's work was part of the regular business of the employer.
8. Significant supervision and control were exercised over the claimant through the required maintenance of log and route sheets.
9. Stillman solicited business for the company using company business cards, which did not bear his name.[183]

Notwithstanding the change in title from employee to independent contractor, the agreement between Stillman and the enterprise for which he worked, designating the relationship as something other than that of employer-employee, was found to be ineffective to change the status of the relationship, where the facts and circumstances indicated otherwise.[184] If, as a matter of law, the relationship is that of employer-employee, any agreement to the contrary which deprived the claimant of the benefits of worker's compensation was null and void.[185]

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177. *Id.* at 985.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 987.
183. *Id.*
184. *Id.* at 986.
185. *Id.* at 988.

In *Potash v. Bonaccurso*[186] the worker was employed as a shochet, a religious official certified to slaughter animals in accordance with Jewish law and tradition.[187] One aspect of Potash's activities that was not subject to his employer's control was the determination of which animals slaughtered were kosher.[188] The court held that although the religious nature of Potash's duties were not subject to his employer's control, that fact alone was not enough to preclude him from having the status of an employee.[189] The fact that the claimant's occupation involved a degree of religious and technical skill, which prevented the employer from supervising the details of his performance, did not preclude a finding of a master and servant relationship.[190] Thus, the court affirmed the district court's finding that the employer had misclassified the individual as an independent contractor.[191]

Other workers' compensation cases describe the test for determining status in different ways. For example, *Burnham v. Downing* describes this test as a "totality of the circumstances" test, in that numerous factors are considered, with the presence or absence of one or more factors not necessarily conclusive as to the existence of an employer-employee compared to employer-independent contractor relationship.[192] In *Chute v. Mobil Shipping & Transportation Co.*, the court chose to define the status of an independent contractor, for purposes of workers' compensation, as a worker who, "[e]xercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the results of the work."[193]

In determining a worker's status at the time of injury, several presumptions and inferences are available. For example, although the burden of showing an employer-employee relationship is on the claimant, neither workers' compensation authorities nor the courts should be solicitous to find contractorship rather than employment. Inferences favoring the claimant's status as an employee need only be slightly stronger than those favoring an independent contractor relationship for the conclusion of employee status to prevail.[194] Likewise, the presence of a party's name on a commercial vehicle raises a rebuttable presumption that the vehicle is owned by that party and that the driver of the vehicle is an employee of that party acting within the scope of his or her employment.[195]

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186. 117 A.2d 803 (Pa. Super. Ct. 1955).

187. *Id.* at 804.

188. *Id.* at 805.

189. *Id.* at 806.

190. *Id.* (quoting Tetting v. Hotel Pfister, Inc., 266 N.W. 249 (Wis. 1936).

191. *Id.* at 806.

192. Burnham v. Downing, 480 A.2d 128 (N.H. 1984).

193. Chute v. Mobil Shipping and Transp. Co., 627 A.2d 956, 958 (Conn. App. Ct. 1993), *cert. denied,* 632 A.2d 688 (1993). In this case, the worker performed services as a consultant while associated with several independent consulting firms. He drew on his highly specialized knowledge as a marine engineer and used much of his own equipment. In this capacity, he was primarily engaged in advising Mobil, but nothing in the agreement precluded him from working for other clients. The worker held himself out as an independent contractor using a separate letterhead and doing business under several names, none of which included Mobil's.

194. Diehl v. Keystone Alloys Co., 156 A.2d 818 (Pa. 1959).

195. W.W. Friedline Trucking v. Workmen's Compensation Appeals Board, 616 A.2d 728 (Pa. Commw. Ct. 1992), *appeal denied,* 621 A.2d 584 (1993).

VIII. CONCLUSION

The question of status as an independent contractor or an employee is an important one because of the different statutes that address the question in an employment context. Determinations made under one set of rules may not satisfy requirements under other statutes. The parties to an employment relationship do not have the absolute right to determine the nature of an employment relationship by labeling it in a particular way. To the extent that an employer misclassifies a worker, the employer can be subject to significant general liability, plus specific penalties for failing to pay or withhold a tax or to provide required protection.