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CHAPTER 2
THE EMPLOYMENT RELATIONSHIP

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CASE QUESTIONS

BAKER v. FLINT ENGINEERING & CONSTRUCTION
137 F.3d 1436 (10th Cir. 1998)

A company that builds gas pipelines hires "rig welders" as independent contractors and has them sign independent contractor agreements. The welders are hired as needed to complete projects for short, but intense (10-14 hours a day, 6 days per week) periods of work. During projects, the welders do not work on other projects. The welders provide their own equipment. They are paid $30/hr. Welders are not given blueprints and must complete their tasks when told to do so. Foremen tell the welders when to report, take breaks, and end the workday. Foremen do not establish welding specifications or tell the welders how to complete welds. A rig welder sued under the Fair Labor Standards Act for unpaid overtime. The company maintained that, as independent contractors, the rig welders were not entitled to overtime pay. The trial court ruled that the welders were employees. The company appealed.

1. *What issue did the court decide in this case? What was its decision?*

The court had to decide whether, for purposes of compliance with the Fair Labor Standards Act, the rig welders were employees or independent contractors. Applying the economic realities test, the court affirmed the lower court's decision that the rig welders were employees.

2. *What is the economic realities test? What factors do courts consider in applying it? How does each of these factors help us distinguish an employee from an independent contractor?*

The economic realities test is used to determine whether a person performing work is an employee or independent contractor. It considers the following factors: *right of control* (if the person doing the work determines when, where, and how the work is done, this indicates contractor status); *extent of investment in tools and materials* (if the person doing the work provides his or her own tools and materials, or hires others to perform the work, this indicates contractor status); *method of payment* (if payment is for a particular project or piece of work and there is opportunity for profit or loss depending on how well the work was managed by the person doing it, this indicates contractor status); *duration of the working relationship* (a relatively short-term relationship that ends when a particular project is completed favors a finding of contractor status); *use of "special skill"* (if the person doing the work utilizes some particular, marketable skill not generally available, this indicates contractor status); *centrality of the work* (if the work is ancillary to, rather than an integral part of the employer's business, this indicates contractor status); and *dependence* (if the person performing the work does, or would readily be able to, market the service to other users, this indicates contractor status).
It is the totality of circumstances, and not any single factor, that determines employee or contractor status.

3. *What is the court's rationale for its decision?*

The existence of the independent contractor agreement was not material. Instead, the court applied the economic realities test criteria. The court found that the rig welders enjoy relatively little right of control since their work hours are set by a foreman, they are told when to take breaks, they cannot perform work on their own schedule, they are told what portion of the project to work on, and they are not given blueprints. There is little opportunity for profit or loss since the welders are paid a fixed hourly rate. While the investment made by the welders in their trucks and welding equipment was substantial, it was disproportionately small in relation to the capital investment of the pipeline company. Thus, the extent of investment was not sufficient to constitute evidence of independent contractor status. Likewise, the generally short-term nature of the work (rarely more than two months at a time) is characteristic of employment in the industry rather than choices made by the welders as to whom they would take on as customers. The court acknowledged the highly skilled nature of the work, but discounted that as a factor because the welders did not work independently and make discretionary judgments. The tasks performed by the welders were clearly integral to the process of constructing pipelines and the business of a pipeline construction company. Overall, the welders were judged to be dependent on the pipeline company to engage in their work, at least for the periods of time that they worked on projects. They did not offer their services simultaneously to multiple companies. They did not bid on projects. Considering the industry context, they had much in common with employees in other industries (e.g., construction, agriculture) who work on a seasonal or other temporary basis.

4. *Do you agree with the court's decision? Why or why not?*

This case is a much closer call than the decision suggests. The duration of work, extent of investment in tools and equipment, and special skill factors all weigh in the direction of contractor status, despite the court's effort to dismiss their significance in this context. On the other hand, the right of control, opportunity for profit/loss, and centrality factors all clearly point in the direction of employee status. In terms of dependence, one can question the court's implicit view that contractors must provide services to multiple customers at the same time in order to not be dependent on a particular company, and hence, an employee. The court seems to be influenced by this particular context in which other crafts working on the pipelines were deemed employees and worked under similar circumstances as the welders. Also, had the court decided this case differently, it might have had implications for the employment status of many different skilled crafts in the building trades, since it is generally true that their employment is short-term, they have special skills, and they frequently supply some or all of their equipment.

SALAMON v. OUR LADY OF VICTORY HOSPITAL
514 F.3d 217 (2d Cir. 2008)

A doctor with medical staff privileges at a hospital sued for discrimination. The hospital contended that the doctor was an independent contractor. The district court granted summary judgment to the hospital on the grounds that the doctor was an independent contractor.

1. *What was the legal issue in this case? What did the court decide?*

Were there triable issues of fact as to whether the doctor was an employee covered by Title VII, rather than an independent contractor. The appeals court determined that there were issues relating to the degree of control exerted by the hospital over the physician's practice. The lower court's grant of summary judgment was vacated and the case was remanded.

2. *What was the evidence that the hospital controlled the "manner and means" of the doctor's work? Was there any evidence to the contrary?*

The district court concluded that the factor of right of control over the manner and means of the work weighed against employee status because the doctor was a skilled professional who maintained independence with respect to diagnosing and treating her patients. For the most part, the doctor set her own hours and chose the patients that she would see. She determined whether they would be admitted to the hospital. The doctor was not paid directly by the hospital. She billed patients for her services, while the hospital also billed them for use of its facilities.

However, the appeals court pointed to a number of factors that suggested a degree of control more in keeping with employee status. As a practical matter, the doctor depended on use of the hospital's equipment to engage in her practice. She was required to use the hospital's nurses and support staff rather than contracting for these services on her own. She was required to comply with staff rules and regulations. She had to participate in one hour staff meetings every three months and to spend a certain amount of time "on call" for the hospital. In this capacity, she was required to treat all patient needs that arose and to continue treating those patients beyond the on call period. The hospital's Quality Assurance Program entailed extensive review of both the methods and outcomes of her practice. She alleged that reviews of her performance sometimes resulted in her being required to alter her treatment choices. Members of the hospital administration were designated as the doctor's supervisors and engaged in close surveillance of her work. Particular procedures were required and it was alleged that these were chosen for financial motives. When the hospital decided that it had problems with her performance, the doctor did not have her contract terminated. Instead, she was assigned to a detailed "re-education program."

3. *How useful is right of control as a factor in determining whether a professional is an employee or independent contractor? Are there other factors that should hold more weight in these cases?*

The appeals court criticizes the lower court's opinion, stating that "the court's reasoning is too broad. It overemphasizes the role of professional judgment, contrasting it to control over the manner and means of one's work in the common law agency test … . There is nothing intrinsic to the exercise of discretion and professional judgment that prevents a person from being an employee, although it may complicate the analysis. The issue is the balance between the employee's judgment and the employer's control."

Other factors need to be considered as part of the common law test and they might be more telling. In this case, the source of tools and materials, the location of the work, the right of the hiring party to assign additional projects, and whether the work is part of the regular business of the hiring party are factors that seem to also weigh in the direction of employee status. The appeals court did not analyze any factors other than right of control. The district court pointed to the facts that the doctor did not receive any remuneration from the hospital, she set her own hours, she chose most of her own patients, and she was highly skilled as additional evidence of employee status.

4. *To what extent is this case rooted in broader changes in the practice of medicine in the U.S.? Have these changes had the effect of making physicians more like other employees?*

Primarily for financial reasons, medical practice is being subjected to greater control by numerous parties – including administrators of medical facilities, but also insurers and government regulators. These changes are sometimes overstated. Being a medical doctor remains a relatively privileged line of work, but the general trend does seem to be in the direction of treating professionals more like other employees and this includes doctors.

ZHENG v. LIBERTY APPAREL CO.
355 F.3d 61 (2d Cir. 2003)

Twenty-six garment workers who worked in a factory in New York City's Chinatown sued six contractors that used the factory and an apparel manufacturer for violations of the Fair Labor Standards Act and state law. Because the contractors could not be located or had ceased doing business, the plaintiffs sought damages only from the manufacturer ("Liberty Apparel"). The manufacturer sub-contracted the last phase of the production process to the contract firms, relying on them to do the assembly work of stitching, sewing, cuffing, and hemming the garments. The garment workers were paid a piece rate for their labor.

1.) *What is the legal issue in this case? What did the appeals court decide?*

The issue is whether the apparel manufacturer is a joint employer of garment workers who performed assembly work for the manufacturer, but who had been hired and paid by contract firms. The appeals court concluded that the lower court did not consider all of the necessary factors when it determined that the manufacturer was not a joint employer of the garment

workers. The judgment in favor of the manufacturer was vacated and the case was remanded for the lower court to apply the proper criteria.

2.) *What criteria had the district court applied to determine whether the manufacturer was an employer of the garment workers? What additional criteria does the appeals court say must be applied? How do these criteria help determine whether an employment relationship exists?*

The district court based its decision on the fact that the defendants did not hire and fire the garment workers; supervise the workers or control their work schedules and conditions of employment; determine the rate and method of payment; and maintain employment records. The appeals court says that these indicators of formal right of control are insufficient to determine whether the manufacturer is a joint employer. On remand, the court also needs to consider whether work was performed on the manufacturer's premises; whether the contract firms had businesses that could shift as a unit from one putative joint employer to another; the extent to which the workers performed discrete line jobs integral to the manufacturer's production process; whether responsibility under the contracts could shift from one contract firm to another without material changes; the degree to which the manufacturer or its agents supervised the work; and whether the workers performed work exclusively or predominantly for the manufacturer.

Control over the work, and hence joint employer status, is more likely when the work is performed in the manufacturer's facility. Contract firms that serve a single client rather than seek business from a variety of firms are more likely to be part of joint employment relationships. When employees of contract firms perform work that is integral to the manufacturer's production process, the manufacturer is more likely to be a joint employer. However, since sub-contracting is common to many production processes, the court cautions that the extent of sub-contracting of integral tasks has to be judged against industry custom. If responsibility for contracts could pass from one contractor to another without material changes – such as by a new contractor continuing operations with the same set of employees – the manufacturer is likely to be deemed a joint employer. Extensive supervision also suggests joint employment, but only to the extent that such supervision demonstrates effective control over the employees' terms and conditions of employment - and not merely verification of contractual production standards. If the employees perform work exclusively or predominantly on behalf of the manufacturer, that is also evidence of a joint employment relationship. De facto control by the manufacturer over pay and work hours often accompanies such arrangements, as distinct from situations in which the subcontractor performs "merely a majority" of its work for a single customer.

In applying these criteria, the court takes considerable pains to distinguish legitimate, arms-length contracting relations between business partners based on economic considerations from relationships that look more like a "subterfuge to avoid complying with labor laws."

3.) *From the limited, disputed facts presented, how would you decide the case?*

Many important facts are in dispute. However, the trial court did find that the manufacturers did not hire or fire the garment workers, supervise and control their work schedules or conditions of employment, determine the rate and method of payment, and maintain employment records. The work appears to not have been carried out in Liberty's own facility, as Liberty delivered cut fabric to be sewn together by assemblers and sent its representatives out to check on how the

work was being done. The amount of work being done for a single manufacturer is disputed, with the plaintiff's saying perhaps as much as 75% and Liberty's owner saying as little as 10%. The plaintiff's claims that the quality control inspectors from Liberty were in the factory numerous times each week for hours at a time and that they gave orders directly to employees (including general urgings to work harder) are potentially significant, although the owner suggests a much more limited role for company representatives. The assembly work is certainly integral to the production process, although heavy use of sub-contractors is common in the industry. Overall, although the plaintiffs survived summary judgment, they are likely to have a difficult time showing that the manufacturers were joint employers, even if they can persuade the court of the facts that remain in dispute.

4.) *What are the practical implications of this case? For workers who are victims of unscrupulous contractors? For firms that subcontract or otherwise outsource parts of their operations?*

This decision signals a willingness on the part of the courts to look beyond formal, direct indicators of an employment relationship to the underlying economic realities when determining whether joint employer liability should be placed with companies that sub-contract aspects of their production process. Once again, employers are not safe assuming that the sub-contracting of work or procuring labor from staffing services ends any legal responsibilities to the persons performing that work. As contracting out becomes more widespread throughout the economy and corporate actors become more closely entwined within supply chains, these issues of legal (and social) responsibility for the actions of contractors should loom ever larger. For employees of small contract companies that might disappear overnight, establishing the joint employer status of client companies may be the only chance to recover damages for violations of the law.

JUST THE FACTS

Stan Freund installed home satellite and entertainment systems for a company that sold these systems. The company scheduled installations, although Mr. Freund could reschedule them. The installer worked on his own, but was required to wear a company shirt, follow certain minimum specifications for installations, not perform any additional services for customers without the company's approval, and call the company to confirm that installations had been made and to report any problems. Mr. Freund was paid a set amount per installation. He used his own vehicle and tools. Mr. Freund was free to perform installations for other companies and to hire others to do installations. However, while other installers did accept jobs from other companies, Mr. Freund worked six days a week for this company. Is Mr. Freund an employee with rights under the Fair Labor Standards Act? Freund v. Hi-Tech Satellite, 185 Fed. Appx. 782 (11th Cir. 2006).

The issue is whether Mr. Freund is an employee or an independent contractor. Since this case was brought under the Fair Labor Standards Act, the economic realities should be used to decide this question. The appeals court affirmed the trial court's ruling that the installer was an independent contractor. In doing so, both court's relied heavily on testimony from other installers who had set up their own companies, hired assistants, worked for other installation

brokers, and did not work six days a week for one company. In the absence of compelling evidence that this installer's relationship with Hi-Tech was unique, evidence of how it treated its other installers was probative of the working relationship. In terms of right of control, the lower court had concluded that it favored contractor status because the installer was still able to do the work as he saw fit, to re-schedule appointments, and to do work for other companies. The court deemed it relevant that the control exercised over the installer was "the end result of customer satisfaction" rather than "day to day regulation" of his work. He was seen as able to realize a profit or loss based on payment per job, the number of jobs accepted, his efficiency, and his ability to hire assistants (even though he did not actually do so). He used his own vehicle, tools, and supplies. He had a special skill at installation, which included troubleshooting and explaining things to customers. The only factor that the lower court said was consistent with employment was that the installer's work was integral to the business.

Michelle Hirsch started a dog grooming business. Her domestic partner Tammy Steelman worked with her at the business for four years. Her full-time work included bathing and grooming dogs, ordering and selling merchandise, and supervising other employees. Ms. Steelman did not receive regular paychecks. Instead, both women used credit cards to pay for personal expenses from company revenues. However, only Ms. Hirsch could directly made withdrawals from the business account. The couple discussed providing Ms. Steelman with an ownership share in the business, but never took this step. When the couple's romantic relationship ended, Ms. Steelman left the business. She subsequently brought a number of legal claims against Ms. Hirsch, including alleged violations of the Fair Labor Standards Act. Is Ms. Steelman an "employee" with rights under the FLSA? Steelman v. Hirsch, 473 F.3d 124 (4th Cir. 2007).

The issue was whether the domestic partner was also an employee. The appeals court affirmed the decision of the trial court that she was not an employee. Because this is not a case where the alternative to employee status is being an independent contractor, the court does not apply the usual economic realities test criteria. The court starts with the observation that "the intended lifetime partnership … was not the bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship." The court emphasized the plaintiff's discretion in drawing on the assets of the firm by using a credit card whose bills were paid by the business and by withdrawals (although not directly) from an account containing business funds. The court also observed that the relationship was "significantly entrepreneurial." Their sharing of risks and rewards in their joint venture was "more characteristic of a partnership than an employer-employee relationship." The court also deemed it relevant that even though a formal business partnership was never entered into, "alleged promises of a 26 percent ownership stake in the business … do not bespeak a traditional employment relationship, to say the least." Lastly, the court noted that both women performed similar duties in the business and exercised supervisory authority, including hiring and firing, over other employees hired for the business. In contrast to the majority's suggestion that the plaintiff was more like a co-owner than an employee, another judge on the panel concurred in the decision, but suggested that she was more like a volunteer who "worked to build a business with Michelle Hirsch, without regard to any precise compensation for the precise hours she labored …" Thus, in this judge's view, the

necessary element of working with an expectation of compensation for one's labor was missing from this relationship.

A farm labor contractor recruited and hired workers to de-tassel and remove unwanted corn plants in the fields of the Remington Seed Company. De-tasseling is necessary for the growing of hybrid plants and must be performed several times during a season. The workers were paid by the labor contractor. They took instructions from the labor contractor, but also followed Remington's work rules. Remington had supervisors in the fields to inspect work and determine when jobs needed to be re-done. The labor contractor had no other clients than Remington Seed. Remington advanced several payments to the contractor so that the workers could be paid and covered by workers' compensation insurance. Tools and portable toilets were supplied by Remington. The workers brought suit under the Fair Labor Standards Act against both the labor contractor and Remington Seed Company. Is Remington a joint employer liable for violations of these workers' rights? Reyes v. Remington Hybrid Seed Company, 495 F.3d 403 (7th Cir. 2007).

The district court had granted summary judgment to Remington. The appeals court vacated the decision on the grounds that Remington was a joint employer of the farm workers. Relevant facts included that the farm labor contractor had no business organization that shifted from one place to another. Instead, he put together crews for Remington alone. The workers took instructions from the farm labor contractor, but also followed work rules established by Remington. They started employment at company headquarters and received a briefing about pesticide safety. Remington supplied tools and outhouses. Remington had supervisors in the fields that inspected the work and decided if jobs needed to be re-done. However, any liability for Remington was limited to unpaid wages and did not reach the farm labor contractor's unfulfilled promises of more work hours and better housing.

PRACTICAL CONSIDERATIONS

Try your hand at drafting an independent contractor agreement that a company like Hi-Tech Satellite might use for its installers. Don't worry about making your agreement sound like "legalese." Focus instead on what such an agreement should specify.

The point is to try to incorporate as many of the criteria for establishing independent contractor status as possible. The independent contractor agreement should specify what the person performing the work is expected to accomplish and any deadline for doing so, but should not specify hours of work, methods, requirements to attend meetings, supervisory relationships, or other provisions that indicate the contracting entity is substantially retaining its right of control. The agreement should make it clear that the contractor is in business for him or herself by placing responsibility for tools, materials, equipment, the hiring of assistants, and other expenses on the contractor. The agreement should generally leave the contractor free to perform services for others and should pertain only to the performance of some particular project or piece of work. The agreement should state that the contractor is responsible for payment of employment taxes and is not entitled to benefits. Payment should be related to completion of the agreed upon

project and not be based on hours of work. The agreement should be for a limited period of time and not open-ended as to duration. A new agreement should be drawn up if additional projects are desired, and this should not be done on a continuous basis

So, how should companies that use the services of temp workers supplied by temp agencies deal with those workers? If performance problems emerge? If temp workers complain about inequitable treatment? If temp workers request leave under the Family and Medical Leave Act?

A tricky balance must be maintained if client companies do not wish to face potential liability as joint employers. That balance involves refraining from exercising employer-like control, while still taking steps to integrate temporary workers into the workplace. Performance problems sometimes have to be dealt with on the spot, but for the most part, unsatisfactory performance by temps should be brought to the attention of the temporary staffing firm and dealt with by them. The client company should refrain from any attempt to "discipline" individual temps or to request/require that particular temps not be assigned. Ultimately, if the quality of temps is not satisfactory, the client company should find another source for temporary workers. If inequitable treatment is complained of and relates to protected class characteristics, the client company has an obligation to do what is within its power to end any discriminatory treatment. Complaints about unequal treatment of temps in comparison to the client firm's "permanent" employees are not so much a legal problem as an issue of employee relations. Efforts should be made to treat temporary workers with dignity and to not needlessly reinforce the perception of second class status. However, it also has to be made clear to temps that the staffing firm is their employer and that they are working under different arrangements than the client company's own employees. If teamwork and close working relationships over a period of time are important, those are indicators that a company would be much better off not staffing these positions with temps. Under the Family and Medical Leave Act, the temporary staffing firm is typically the "primary employer" – even when there is joint employment. Thus, staffing firms are typically responsible for responding to temps' requests for leave and providing required notices.

END OF CHAPTER QUESTIONS

1.) *A company that sells subscriptions to magazines enlisted persons to research the telephone numbers of potential subscribers. These "home researchers" worked out of their own homes, set their own hours, and were subject to relatively few requirements as to how they carried out their tasks. They were given index cards with names and addresses and were paid according to the number of cards returned with telephone numbers. Each was asked to sign an "independent contractors agreement" before beginning to work for the company. The home researchers generally performed their services only for this company and a number of them did so for several years. The company also used in-house researchers to find telephone numbers. Overall, the home researchers accounted for about 4-5 percent of the total telephone numbers obtained by the company. Most of the home researchers used the job as a secondary source of income. Some of the home researchers claimed that they were not being paid the minimum wage for their hours of work. The company contended that they were independent contractors and not employees with rights under the Fair Labor Standards Act. What should the court decide?* (*Donavan v. DialAmerica Marketing*, 757 F.2d 1376 (3d Cir.), *cert. denied*, 474 U.S. 919[(1985])

The Department of Labor concluded that the company violated the Fair Labor Standards Act when it failed to pay the home researchers the minimum wage and properly maintain wage and hour records. The district court ruled that the home researchers were independent contractors not covered by the FLSA. The appeals court reversed, holding that the home researchers were employees.

The economic realities test is used to distinguish employees from independent contractors in Fair Labor Standards Act cases. The definition of employee is intended to be particularly broad under the FLSA, so courts lean toward finding employee status under this test unless it clearly indicates otherwise. The court decided that the home researchers were employees because although the right of control factor weighed in favor of finding them contractors – because they performed the work at home on their own schedules and without supervision – the other factors all pointed to employee status. There was little investment in tools or materials, opportunities to increase the payment received through efficient management were minimal, and their skills were quite general. The home researchers tended to remain on the job, rather than to perform work for other companies. The activity of finding numbers was central to the business, even though the home researchers were responsible for finding only a small proportion of the numbers obtained. Dependency stemmed from the inability to sell their services to others, and did not hinge upon the extent to which researchers depended on the income.

2.) *Taxi drivers for the Yellow Cab Company sign independent contractor agreements with the company, from whom they lease cabs for a daily fee. With a few exceptions, drivers are free to drive any routes and to work as many hours as they chose. Drivers' payment consists of the fares taken in minus the leasing fee and other expenses. Rates for cab rides are set by the company. Drivers are required to use meters, to meet certain appearance requirements, to have their radios on and respond to a dispatcher, to avoid profanity, and to adhere to a variety of other rules of conduct. Drivers who violate rules are subject to suspension. Drivers are required to obtain oil changes and maintenance work from the cab company and to buy gas from it. The cab company provides drivers with insurance and business cards. When one of the Yellow Cab Company's drivers was murdered on the job, his estate sought to obtain workers' compensation death benefits. The cab company claimed that the estate had no entitlement to those benefits because the deceased was an independent contractor. What should the court decide?* (*Nelson v. Yellow Cab Co.*, 564 S.E.2d 110 (S.C. 2002)

The South Carolina Supreme Court affirmed the decision of the state appeals court that the deceased cab driver was an employee of Yellow Cab. The court employed a version of the common law test and thus focused on right of control. It looked at the facts related to the direct exercise of control, the furnishing of equipment, power to discipline and terminate, and the method of payment. In terms of the direct exercise of control, the court acknowledged that the drivers were able to set their own hours and for the most part their own routes. However, drivers were subject to a long list of rules and policies regarding their appearance and operation of the cabs. Most importantly, Yellow Cab determined the rates that drivers could charge. The court concluded that this factor weighed in favor of a finding that there was direct control exercised by Yellow Cab. Regarding the furnishing of equipment, drivers leased their cabs from Yellow Cab for a daily fee. However, they were required to obtain their cabs through the company, to purchase gas from it, and to obtain maintenance from it. Additionally, the company obtained the

business license needed to operate cabs, maintained insurance on the cabs, and provided drivers with business cards. The court concluded that, overall, this factor was relatively neutral. In contrast, the factor of right to discipline or fire employees weighed heavily in favor of finding an employment relationship. Yellow Cab's administration of discipline, including suspensions, went far beyond the simple termination of a contractor relationship. Lastly, the method of payment, which was the drivers' earnings after subtracting the $79 leasing fee and any other expenses, afforded opportunities for profit and loss and weighed in the direction of independent contractor status. On the whole, however, the cab drivers looked more like employees. Thus, the deceased employee's estate was entitled to workers' compensation benefits.

3.) *An attorney and member of the New York Bar Association became actively involved with international environmental issues. She proposed, developed, and presented a program that was presented under the auspices of the association. She engaged in other efforts, including creating a new Bar Association committee on international environmental law, making presentations, and participating at the first United Nations Conference on Environment and Development. In return, the association provided her with workspace, clerical support, publicity, and reimbursement for out-of-pocket expenses. The attorney experienced harassment by a Bar Association official and sued. Was she a volunteer or an employee?* (*York v. Association of the Bar of the City of New York,* 286 F.3d 122 (2nd Cir. 2002)

When the issue is whether someone performing work is an employee or a volunteer, the nature of any payments received is usually a key fact. There must be wages or benefits, or a promise to provide these, beyond some minimum level of significance or substantiality. The court concluded that the benefits that the lawyer received, including clerical support, workspace, networking opportunities, and reimbursement for out-of-pocket expenses did not constitute significant reimbursement of the sort that would signal an employment relationship in the absence of any contractual agreement. The court opined that holding otherwise would transform a wide variety of efforts undertaken on behalf of voluntary member organizations into employment.

4.) *Several participants in New York City's Work Experience Program, a mandatory welfare work program, experienced harassment at their worksites. When they sued under Title VII, the city argued that they were not employees. The women worked at a number of different city agencies. For their work, they received cash public assistance, food stamps, transportation, childcare expenses, and eligibility for workers' compensation. Recipients who unjustifiably refuse to work lose a portion of their family's grant. Are participants in this "welfare-to-work" program employees?* (*United States of America v. City of New York,* 359 F.3d 83 (2d Cir. 2004), *cert. denied,* 2005 U.S. LEXIS 1465)

The district court found that the program participants were not employees within the meaning of Title VII. The appeals court vacated the lower court's decision and remanded the case. It concluded that the program participants were employees covered by Title VII.
The court first asked whether the persons performing work were hired by the putative employer and received substantial remuneration for services rendered. The remuneration need not be wages or a salary. In this case, program participants received cash payments and food stamps in return for their work. Benefits were contingent on performing the work and did not flow solely

from their status as welfare recipients. The court then went on to apply the common law test, emphasizing right of control. There was little dispute that the work was performed under the supervision and control of the relevant city agencies. The court noted that both the EEOC and DOL have endorsed the view that welfare work program participants should be treated as employees under the law. It rejected the "artificial dichotomy" that "one must be either a welfare recipient or an employee and cannot be both."

5.) *A musician regularly played the French horn for a non-profit corporation that provides free classical music concerts to inner-city public schools and other disadvantaged groups. The musicians are all professionals. They are union members and are paid on a per-concert basis at union scale. Each year, the musicians are contacted to determine if they agree to play the series of concerts that has been scheduled. Musicians are free to perform elsewhere and can opt out of particular concerts if they provide prior notice and arrange an acceptable substitute. However, in order to remain a "regular" who is invited to play at most or all of the group's concerts, musicians must "accept the vast majority of the work." The corporation does not withhold income or Social Security taxes. No benefits or paid leave are provided except for contributions to the union administered pension fund. The French horn player sued for disability discrimination when she was not offered work after being absent to recover from injuries. The corporation says that she was an independent contractor and not covered by the ADA. What should the court decide?* (*Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003).

The court applied the common law test of agency to determine whether the musicians were employees or independent contractors. The appeals court affirmed the trial court's decision that the musicians were independent contractors. The court rejected the argument that primary consideration be given to the right of control factor and that the fact that the conductor determined the music played, scheduled rehearsals and concerts, and controlled the manner in which the concert music was collectively performed showed that right of control rested with the corporation. The court observed that accepting this argument would mean that all musicians who perform in a conducted band or orchestra would automatically be considered employees. Instead, the court focused on other aspects of the common law test, particularly the ability these highly-skilled musicians who provided their own instruments and required no training to decline particular concerts and play elsewhere. It also saw it as very significant that the corporation had not withheld income or FICA taxes and did not provide benefits (except contributions into an independent, union-administered pension fund).

6.) *A surgeon worked as part of the medical staff at a hospital. The surgeon leased his own office space, scheduled his own operating room time, employed and paid his own office staff, billed patients directly, received no benefits, and did not receive tax documents (W-2 or 1099) from the hospital. The doctor performed all of his surgeries at this hospital and could use its nurses and other staff to assist in the treatment of patients. Medical staff membership required the doctor to follow medical staff bylaws, keep medical records, attend an orientation program, participate in continuing education programs, and agree to take calls from the emergency room. After the doctor was diagnosed with and treated for bi-polar disorder, he was reinstated with numerous conditions. These included submitting to close review of all of his surgical cases, meeting periodically with a monitoring physician, and providing extensive personal and medical information. When the surgeon subsequently had an acute manic episode while performing open-*

heart surgery, his medical staff privileges were rescinded. He sued for disability discrimination and the hospital argued that he was an independent contractor. What should the court decide? (Wojewski v. Rapid City Regional Hospital, 450 F.3d 338 (8th Cir. 2006)

The appeals court affirmed the lower court's ruling that the doctor was an independent contractor. Therefore, he had no standing to sue under the employment provisions of the ADA. Both courts applied versions of the common law test. The court noted that the surgeon performed highly skilled work, leased his own office space, hired and paid his own staff, billed patients directly, and did not receive any benefits or tax documents from the hospital. Although the 2003 letter of agreement subjected the surgeon to an extensive set of controls and (in the words of the appellant) "perhaps rendered him the most controlled doctor in America," the court saw these stipulations as still falling within the normal tension that exists between hospital administrators and staff physicians. The hospital could "take reasonable steps to ensure patient safety and professional liability while not attempting to control the manner in which [the doctor] performed operations." It is difficult to square this case with the outcome in *Salamon*. Certainly, most decisions prior to *Salamon* had found staff physicians to be independent contractors (e.g., *Cilecek v. Inova Health System Services*, 115 F.3d 256 (4th Cir. 1997). While these cases are always fact-specific, it remains to be seen whether *Salamon* marks a new trend or is merely an aberration.

7.) *A waitress at a diner sued for sexual harassment. The employer argued that it had fewer than 15 employees and was thus not subject to Title VII. Whether the diner had the requisite number of employees depended on whether the two managers in charge of the diner were "employees." The diner is owned by a woman who is the sole proprietor. However, she has delegated virtually all responsibility for the operation of the restaurant to these two managers. Without the owner's input, the managers decide who to hire and fire, work schedules, work rules, and all of the other operational decisions of the restaurant. The two managers do not have ownership interests in the restaurant (although one is married to the sole proprietor) or hold positions as board members (there is no board). Should the two managers be counted as employees?* (*Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006).

The appeals court reversed the lower court's entry of summary judgment for the employer. The lower court erred in concluding that the managers were partners or principals in the firm, rather than employee agents. The appeals court expressed considerable doubt as to whether the criteria advanced by the EEOC and endorsed by the Supreme Court in its *Clackamas* decision (538 U.S. 440) for distinguishing partners from employees were relevant to a situation where the actors exercised control at the pleasure of an owner who delegated those responsibilities, rather than as a matter of right. The court held that if *Clackamas* is still applicable, it must be applied with consideration of the source of the authority exercised by the managers. The court concluded that "a small business owner like Gonzalez has the option of running the business herself … . In that way, she might keep the number of employees below Title VII's threshold. If instead, she chooses to engage another person to run the business on a day-to-day basis for her, without giving him a stake in the business that lets him share the power to control it, then she is taking on an additional employee that may put her workforce over the statutory threshold, just as if she had taken on an additional cook, server, cashier, or busboy."

8.) *A supermarket and drug store chain in New York City contracted with another company to provide personnel to make home deliveries to customers. This arrangement remained in place for a number of years. The delivery workers operated directly out of the stores. The stores directed the delivery workers in their tasks and instructed them concerning what to pick up, where to go, how to log their deliveries, and how much to receive in payment. The delivery workers worked as individuals, and not as a group shifting from store to store in accordance with demand for delivery workers. Is the supermarket/drug store chain a joint employer liable for violation of the delivery workers' rights under the Fair Labor Standards Act?* (*Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 [S.D.N.Y. 2003])

The district court found that the companies were joint employers (and that the delivery persons were, in fact, employees rather than independent contractors). The contractor providing delivery services claimed that it merely "placed" workers with the stores, but the court found that they paid the delivery workers, and controlled hiring, transfers, and termination. The court found that the other factors in the economic realities test were also satisfied with respect to an employment relationship with the delivery company. Regarding the chain, the court found that the delivery service was integral to the business by allowing the stores to compete with mail order drug companies, the delivery persons worked directly out of the stores, they sometimes helped out in the stores with other tasks, and they were told by store personnel what to do.

9.) *Should student-athletes be considered employees of the universities that they attend?*

Student-athletes are actively recruited and sign contracts to participate in activities that consume much of their time. They receive substantial payment in the form of scholarships and sometimes generate substantial revenues and publicity for their universities. However, the NLRB's decision that graduate assistants are not employees is not favorable to making the case that student-athletes should be considered employees. Arguably, athletics is less central to what universities do than are the teaching and research performed by graduate assistants. Further, the mode of payment of athletes is less obviously a wage for services rendered. Nevertheless, the concept of the "student-athlete," devised by the NCAA to legitimize the amateur, non-employee status of athletes, is increasingly being challenged, as major school sports programs grow ever larger and top athletes treat college as brief internships on the path to professional careers.

10.) *What are the consequences of denying back pay and other individual remedies to undocumented workers? Justice Breyer, dissenting from the majority opinion in Hoffman Plastic Compounds, Inc. v. NLRB, writes that denying the NLRB the power to award back pay "… lowers the cost to the employer of an initial labor law violation … It thereby increases the employer's incentive to find and to hire illegal-alien employees." Does denying remedies to undocumented workers reinforce or undermine national immigration policies?*

At first blush, it appears entirely consistent with public policy on immigration to deny remedies under employment law to persons who do not have legal status to be employed and who are unlawfully in the country. However, doing so might actually increase the incidence of illegal immigration, because the potential cost to employers of employing these workers might be

reduced. This decision appears to increase the vulnerability of undocumented workers. If they try to organize unions or otherwise assert their rights under the law (e.g., recover unpaid wages), they can be terminated with little consequence for the employer, beyond perhaps a court order to not engage in such behavior in the future. And given the lack of a meaningful remedy for the affected individuals, who would bring such a case in the first place?

11.) *Commenting on the increasingly widespread use of labor contractors by large companies, attorney Della Bahan claimed "These companies are pretending they're not the employer. The contractor is willing to work people seven days a week, not pay payroll taxes, not pay workers' comp taxes. The companies don't want to do that for themselves, but they're willing to look the other way when their contractors do it." Do you agree? To what extent should companies be held responsible for the employment practices of companies with which they contract?* (Steven Greenhouse. "Middlemen in the Low-Wage Economy." *New York Times* (December 28, 2003), Wk-10)

Companies that use their leverage to negotiate low-bid contracts with small contractors set in motion a process under which exploitation of workers is likely. Firms do not have to be privy to the details of their contractors' employment arrangements to know that it is low-wage workers who are going to bear the brunt of these arrangements. Yet, it is difficult to blame companies for seeking the best deal from contractors and to clearly identify when a firm has sufficient knowledge of its contractor's employment practices and/or control to warrant holding the firm liable.

12.) *Legally, it makes a great deal of difference whether someone performing work is an employee or an independent contractor. But should it make a difference? What is the justification for excluding independent contractors from protection of antidiscrimination and other laws?* (Danielle Tarantolo, "From Employment to Contract: Section 1981 and Antidiscrimination law for the Independent Contractor Workforce," 116 *Yale Law Journal* 170, 202-04 (2006).

As a general matter, the argument is that the ability of independent contractors to sell their services to other users gives them greater bargaining power than that possessed by most employees and makes them less subject to mistreatment or exploitation. However, as use of independent contractors to perform a wide range of tasks increases and distinguishing between independent contractors and employees becomes more difficult, there might be good reason to re-think the exclusion of independent contractors. This would seem particularly true for the likes of anti-discrimination laws which, in contrast to wage and hour laws, would reinforce basic societal values without unduly infringing on freedom of contract. Tarantolo notes that independent contractors already receive some protection from discrimination under 42 U.S.C § 1981 which prohibits discrimination in "making and enforcing contracts." However, this protection is limited to claims of disparate treatment based on race or national origin. She proposes to use this venerable, Reconstruction-era statute, "to modernize the workplace antidiscrimination regime."

FOR A CHANGE OF PACE

Students might critique an actual independent contractor agreement if one is available. If not, they might be presented with a hypothetical example like the following:

"I agree to provide services to the XYZ Company as an independent contractor. These services include writing software, "trouble shooting" computer network problems, and other tasks that might be assigned. I agree to respond to requests for my services in a timely fashion. I realize that I am free to consult for other companies and to use my own best professional judgment in determining how to provide these services to XYZ Co. I agree that I will be paid at the rate of $35/hr for all time spent performing services for the XYZ Corp."

What, if anything, is good about this agreement? What, if anything is problematic about this agreement? Should it say other things?

This can be used as another way to get students to think about the criteria for distinguishing between employees and independent contractors and how contractor relationships must be structured in order to retain contractor status.

The sample IC agreement is inadequate from the standpoint of ensuring that the person doing the work will not be deemed an employee. On the plus side, it explicitly states that the individual is free to offer her services to other users and refers generally to her right of control over how the work is done. However, the wording that allows the company to "assign" unspecified other tasks without additional negotiation and agreement reads like the "and any other tasks assigned" language typically found on an employee job description. The language about responding in a "timely fashion" also suggests right of control, and hence employee status, particularly considering that the task is writing software. Independent contractor status does not preclude payment on an hourly basis if other aspects of the relationship are clearly more contractor-like, but it seems possible to arrange payment on a project or per call basis that would be more consistent with IC status. Without loading the agreement with excess verbiage, it would be useful to elaborate further on the contractor's right of control, to specify that any training, manuals, supplies, or other materials are the responsibility of the IC, to specify that the payment cited is the sole payment for work performed and that the IC is responsible for any benefits as well as payment of all employment taxes, and to make the contract less open-ended in terms of duration.