CONTRACTORS, JOINT EMPLOYERS, AND EVERYTHING IN BETWEEN

THE CONTROLLING LEGAL STANDARDS FOR INDEPENDENT CONTRACTOR AND JOINT EMPLOYMENT CASES, AND BEST PRACTICES

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I. Introduction

Common sense suggests that employment liabilities are limited to the individuals on your payroll (i.e., the people you consider to be your employees). There was a time when that was true, for the most part—but not today. Modern employment liabilities are layered between three groups: 1) the workers you treat as your employees; 2) the individuals you treat as independent contractors instead of employees; and 3) the employees who work for your vendors, or who work for you but through vendors who employ them (creating possible joint employment).

The latter two categories may or may not present employment liability, depending on the facts and circumstances, and the applicable law. With independent contractor risk, the question is whether workers are employees of anyone. With joint employer risk, there is no question that the workers are employees—rather, the question is who employs them.

An employer hoping to assess whether a particular individual may be classified as an independent contractor, or whether there is joint employment risk with respect to a worker employed by someone else, must navigate a maze of never-ending "tests," "factors," and "requirements" that vary from one context to another. Here, we provide an overview of the evolving law of independent contractor status under prominent federal employment statutes and state law, in addition to the law of joint employment under the those laws. We conclude with some best practices for avoiding independent contractor and joint employer problems.

II. Independent Contractor Tests

Individuals who provide services to a business do so as either an independent contractor or an employee. The independent contractor category includes essentially every person who is not an employee of your company, or anyone else. Thus, independent contractor tests determine employment status in general. These tests often are unique to the particular statute in question.

For example, the test for employee status under the Fair Labor Standards Act (FLSA), which regulates the payment of wages and the hours worked by employees, is different than the test used by Title VII, which prohibits workplace discrimination. Similarly, the standards used by taxing authorities vary by agency, and there may be significant differences between state and federal laws covering the same general areas. All of these laws seek to ensure that an employer does not erroneously treat an employee as an independent contractor.

The increasingly heavy-handed employment laws lead many employers to gravitate towards classifying individuals as independent contractors. Employees are far more expensive to maintain than independent contractors. Consider the expenses that apply to employees but not independent contractors: employment taxes, workers' compensation insurance, unemployment insurance, health insurance benefits, immigration compliance, minimum wages, and overtime pay, to name a few.

Given the ever-rising costs involved in employing individuals, it is not surprising that failing to treat employees as employees may lead to significant damages and penalties after the fact. Thus, the stakes are high for employers who mistakenly treat an employee as an independent contractor. A single misclassified worker can trigger audits and claims that quickly rise to the six figures with even a small group of independent contractors. Therefore, it is important to understand and follow the development of the law in this area.

A. The Independent Contractor Test Under The Fair Labor Standards Act

The FLSA is a good starting point for understanding the spectrum of independent contractor tests. However, the FLSA statute itself is not known for its clear definitions. It defines "employee" as "any individual employed by an employer,"[1] and defines "employ" as "to suffer or

[1] 29 U.S.C. § 203(e)(1).

permit to work.[2] Neither defines much. The Supreme Court first added clarity in 1947 when it articulated what is commonly known as the "economic realities" test to determine whether a worker may be properly classified as an independent contractor under the FLSA. The test is still in use today. Under the economic realities test, "employees are those who *as a matter of economic reality* are dependent upon the business to which they render service."[3]

The Supreme Court has not elaborated much on its economic realities test, leaving the circuit courts to fill in the gaps over the last 70 years. The circuits have developed a list of non-exhaustive, non-mandatory, and always malleable factors to guide their application of the economic reality test. Those factors generally boil down to: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.[4]

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[2] 29 U.S.C. § 203(g).

[3] *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979), quoting *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947) (emphasis in original).

[4] *Bolduc v. Nat'l Semiconductor Corp.,* 35 F.Supp.2d 106, 112 (D.Me.1998); *Brock v. Superior *912 Care,* 840 F.2d 1054, 1058 (2d Cir.1988)[4]; *Donovan v. Dial-America Marketing, Inc.,* 757 F.2d 1376, 1382 (3rd Cir. 1985), *cert. denied,* 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)[4]; *Donovan v. Brandel,* 736 F.2d 1114, 1119-20 (6th Cir.1984); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen,* 835 F.2d 1529, 1534 (7th Cir.1987); *Karlson v. Action Process Serv. & Private Investigations, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017)[4]; *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) *Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1310 (11th Cir. 2013).[4] No factor is by itself dispositive. The analysis depends "upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947)).

Similarly, the United States Department of Labor (USDOL) generally relies on the Supreme Court's *Bartels* factors, with some modifications in the wording, plus an additional seventh factor: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation.[5]

Of note, the USDOL made "the extent to which the services rendered are an integral part of the principal's business" its first enumerated factor, signaling it is the most important, buried the "control" test in the middle, and then added a seventh factor (the degree of independent business organization and operation) which appears to have some overlap with the first. This suggests the USDOL is acutely focused on scenarios where the independent contractor is critical to the alleged employer's business. This focus is also consistent with the growing ABC test, discussed below.

B. The Independent Contractor Analysis Under Title VII

The Title VII definition of "employee" is as unhelpful as the FLSA's. It defines "employee" as "an individual employed by an employer."[6] As the Supreme Court aptly stated in the seminal *Darden* decision when assessing identical wording found in statutes governing ERISA, this definition "is completely circular and explains nothing."[7]

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[5] See, USDOL fact sheet at https://www.dol.gov/whd/regs/compliance/whdfs13.htm.
[6] 42 U.S.C. § 2000e(f).
[7] *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

While *Darden* involved an alleged joint employer question within the confines of ERISA, the "common law" test it articulated for analyzing joint employment questions is now widely used in Title VII cases as well. The *Darden* test is functionally similar to the economic realities test, and begins with assessing "the hiring party's right to control the manner and means by which the product is accomplished." The remaining factors are (i) the skills required for the work performed; (ii) the source of the instrumentalities and tools; (iii) the location of the work; (iv) the duration of the relationship between the parties; (v) whether the hiring party has the right to assign additional projects to the hired party; (vi) the extent of the hired party's discretion over when and how long to work; (vii) the method of payment; (viii) the hired party's role in hiring and paying assistants; (ix) whether the work is part of the regular business of the hiring party; (x) whether the hiring party is in business; (xi) the provision of employee benefits; and (xii) the tax treatment of the hired party.[8]

Courts have routinely adopted the *Darden* "common law" test, or a slightly distilled version of it, in Title VII, ADEA, and ADA cases.[9] In *Alexander v. Rush N. Shore Med. Ctr.*,[10] the Seventh Circuit distilled the test down to five factors: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in

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[8] *Id.* at 323.

[9] *Dykes v. DePuy, Inc.,* 140 F.3d 31, 37-38 (1st Cir.1998); *Speen v. Crown Clothing Corp.,* 102 F.3d 625, 631 (1st Cir.1998) (applying common law test under ERISA and Age Discrimination Employment Act); *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 361 F.3d 1, 6 (1st Cir. 2004); *Eisenberg v. Advance Relocation & Storage, Inc.,* 237 F.3d 111, 113–14 (2d Cir.2000); *Farlow v. Wachovia Bank of N.C.,* 259 F.3d 309, 313–14 (4th Cir.2001); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (applying the common law test to an ADEA case, while noting "little discernible difference" between the so-called "hybrid test" which combines the common law test with the economic realities test, and the common law test); *Murray v. Principal Financial Group, Inc.*, 613 F.3d 943, 946 (9th Cir. 2010).

[10] *Alexander v. Rush N. Shore Med. Ctr.*,101 F.3d 487, 492 (7th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (Feb. 7, 1997).

the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

In *Cobb v. Sun Papers, Inc.*, the Eleventh Circuit affirmed the district court's use of the common law analysis in concluding that Title VII plaintiff was an independent contractor and dismissed the case.[11] *Cobb* appears to be the preferred case in the Eleventh Circuit, although it predates *Darden* by 10 years. The *Cobb* court articulated the factors slightly differently: Under the *Cobb* test, a court may consider: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[12]

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[11] *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341, 342 (11th Cir. 1982).

[12] *See*, *Nemo, v. RR Donnelley Logistics Services,* (N.D. Ala., Feb. 8, 2019, No. 2:17-CV-02130-MHH) 2019 WL 498998, at *2, citing *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341, 342 (11th Cir. 1982).

Functionally, the line between the economic realities test and the "common law" test is increasingly blurred, and the analysis is increasingly fact-driven. However, the courts see them as distinct tests.[13]

C. The Rise Of The ABC Test In State Courts

California recently joined New Jersey, New Hampshire, and Massachusetts in deploying the "ABC" test to determine whether a worker is an independent contractor under state law. The ABC test differs from all other tests because it does not contain *any* "factors" to be "applied" on a subjective balancing basis. It instead contains three specific, mandatory requirements, each of which must be met for the worker to be an independent contractor:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
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> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[14]

The ABC test has been implemented in Massachusetts and New Hampshire by their state legislatures.[15] The California Supreme Court adopted the ABC test in *Dynamex*, *supra*, shortly after the New Jersey Supreme Court adopted it in *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 453 (N.J. 2015).

The chief problem with the ABC test is its rigidity. While other independent contractor tests rely on malleable factors that leave businesses room to make plausible arguments under

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[13] *U.S. Equal Empl. Opportunity Commn. v. Glob. Horizons, Inc.*, __ F.3d __, 16-35528, 2019 WL 453482, at *7 (9th Cir. Feb. 6, 2019) (holding that the common law test applies to Title VII claims and not the economic realities test utilized for FLSA cases, even while acknowledging "little functional difference among" the various tests, all of which "usually produce the same outcome").

[14] *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 40 (Cal. 2018), *reh'g denied* (June 20, 2018).

[15] Mass. Gen. Laws Ann. ch. 151A, § 2; N.H. Rev. Stat. Ann. § 282-A:9(III).

virtually any scenario, the ABC test requires employers to satisfy each of three strictly construed requirements.

On top of the rigidity imposed by the three requirements (not factors), the "B" prong – that the worker performs work that is outside the usual course of the hiring entity's business – will be devastating for certain industries. Strictly construed, the "B" prong forecloses businesses from using any independent contractors, regardless of how appropriate it may otherwise be, where the independent contractor performs work within the putative employer's "usual course of business."

A company's "usual course of business" is not meaningfully defined, leaving plaintiffs' attorneys room to argue that only workers performing services completely unrelated to a company's business may be treated as independent contractors. This effectively precludes any amount of outsourcing within a business's industry. A CPA firm, for instance, could not retain independent contractor CPAs to help with the busy tax season, in theory. A larger company may not be able to retain IT or marketing independent contractors because a larger business would arguably be expected to have IT and marketing professionals as part of its usual course of business.

Most profoundly, the *Dynamex* case involved delivery drivers. It is no secret that much of the nation's transportation and logistics industry has relied on independent contractors, and the ABC test is a proverbial punch in the gut to the entire transportation industry. This is equally true for "gig economy" businesses. Gig economy businesses often rely almost exclusively on independent contractors to perform the "labor" of the business. They will be left to define with precision exactly what their business is and does. This is why ride sharing businesses make clear

that their business is *technology* that pairs willing drivers with paying customers. The extent to which the ABC test will be used to dismantle gig economy businesses is yet to be seen.

D. Common Questions To Ask In An Independent Contractor Analysis

The common law test and all variations of the economic realities test place varying amounts of emphasis on the level of control retained and exercised by the putative employer. It is also clear, however, that at least some courts are becoming increasingly sensitive to business models in which the independent contractor is crucial to the alleged employer's business. Many courts clearly are uncomfortable with the concept of replacing the employer's primary workforce with independent contractors, in contrast to the historical use of independent contractors to perform functions which are not part of the employer's core service or product offering.

Some questions that are frequently considered in an independent contractor analysis include:

- How dependent is the worker on the putative employer's assignment of work?
- How strong is the connection between the worker's work and the putative employer's business?
- As a practical matter, who determines the worker's schedule?
- Does the worker have other clients?
- Is the worker practically prevented from working for other clients?
- Is the worker contractually prevented from working for other clients, and in reality does the worker perform services for other clients?
- How many hours per week is the worker performing services for the putative employer? And for how many weeks per year?
- What specialized or unique knowledge does the worker have?
- What specialized or unique equipment or tools does the worker have?

- Where is the work performed?

E. Best Practices For Businesses Using Independent Contractors

While every situation is unique, and requires its own analysis, we generally recommend the following:

- Conduct internal audits to identify individuals who may be misclassified as independent contractors, as opposed to waiting for a claim. The company's list of 1099's issued to individuals with social security numbers (as opposed to business tax identification numbers) is a good starting point for identifying potential problems.

- If an internal audit identifies misclassified workers, carefully consider the process used to convert them to employees in order to avoid triggering claims and audits.

- If treating a worker as an employee is not practicable, and yet they are not clearly an independent contractor, consider utilizing staffing companies to serve as the employer of record. However, keep in mind that using a third-party employer does not eliminate all employer-related liabilities.

- Ensure that independent contractors have executed independent contractor agreements that treat them as business owners as opposed to employees, which means the agreement clearly describes them as independent business people who control their own activities. Regardless of what the agreement says, courts and agencies will look at the reality of how the contractors are treated. If significant control is exercised, such as controlling their schedule and the details of their work, the agreement may be of little use.

- Encourage independent contractors to perform services for others, and provide for their right to do so in the agreement. If you do not want them working for others, that may an indicator of employee status.

- Ensure that contracts with contractors do not have prohibitions on providing services for competitors unless absolutely necessary.

- Ensure that managers – especially line-level managers – are well-versed in what they can and cannot communicate to contractors.

- Consider limiting independent contractors to individuals who have an established business, as evidenced by use of a business entity, a business license, a registered business name, and so forth.

- Ensure that billing procedures do not look like hourly payment of wages for work performed, as opposed to business-oriented billing procedures.

- Consider a renewable fixed term or limited scope of work for the agreement with the contractor, as opposed to an at-will arrangement which tends to look more like employment.

- Do not allow contractor to utilize your facilities and equipment without paying for such usage, if possible.

- If the nature of the business model is to provide services utilizing independent contractors, carefully consider the risks. Also consider alternative methods for structuring the business model. In some cases, such business models are most accurately described as a "connector" or "technology" services as opposed to a model that focuses on providing the service to the end-user of the contractor's product.

III. Joint Employment Tests

In contrast to the independent contractor situation, the joint employer scenario involves workers who are treated as employees. The question with joint employer is whether there is more than one potential employer of those employees. In recent years, many industries have grown reliant on third parties to supply employees to perform core functions of the business.

For example, distributors commonly use third-party staffing companies to employ workers in a distribution center, rather than putting those workers on the distributor's payroll. In the technology sector, many workers are hired as employees of a third party and converted to a "regular" employee only if necessary to retain them. In other situations, a contract labor company is used to employ classes of workers that may be outside the ideal risk code for workers' compensation insurance such as janitors and maintenance people.

In all of those situations, the employees of another business (i.e., vendor) are potentially under the control of the entity that hired the vendor (i.e., customer). The customer's control of the vendor's employees generally is what may create joint employer status and joint liability. This is similar to the situation where control of a putative independent contractor converts them to

an employee, and so control is a common factor in both contexts. However, in the customer/vendor arrangement, someone has treated the worker as an employee, so the basics of taxes, wages, and insurance may be covered. The joint employer analysis often comes into play when a prohibited act has occurred, like harassment or discrimination (i.e., Title VII violations). There also may be joint employer liability for wages where the vendor fails to pay overtime (i.e., FLSA violations), remit payroll taxes, or purchase workers' compensation insurance.

A. Joint Employment Tests Under FLSA

The Supreme Court has not articulated a joint employment test for FLSA cases, leaving the circuit courts to delineate an almost endless list of mostly (but not exactly) identical factors, most of which are based on the Ninth Circuit's four-factor "economic realities test" for joint employment in *Bonnette v. Cal. Health & Welfare Agency*.[16] Those factors examine whether the putative employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[17]

The First Circuit has adopted the economic realities test and examines the *Bonnette* factors: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[18]

The Second Circuit considers a "functional" economic realities test, which relies on the following factors, "listed in no particular order:" (1) whether the alleged employer's premises and

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[16] *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); *disapproved of* on other grounds *in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
[17] *Id.*, 704 F.2d at 1470 (9th Cir. 1983).
[18] *Baystate Alt. Staffing, Inc. v. Herman,* 163 F.3d 668, 675 (1st Cir.1998).

equipment were used for the alleged employee's work; (2) whether the direct employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which putative employee performed a discrete line-job that was integral to the putative employer's process of production; (4) whether responsibility under any relevant contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employers or their agents supervised plaintiffs' work; and (6) whether the putative employees worked exclusively or predominantly for the putative employer.[19] This test puts increased focus on the extent to which the putative employee's output directly benefits the putative employer's business. While all tests consider this to some extent, the "functional" economic realities test places particular emphasis on the extent to which the putative employer's business is dependent, as a business model, on the work performed by the worker.

The Third Circuit also uses the economic realities test, with particular focus on the "total employment situation," and some minor tweaks to the *Bonnette* analysis. Similar to the First Circuit, it focuses on the following factors: (1) authority to hire and fire the relevant employees; (2) authority to promulgate work rules and assignments and to set conditions of employment such as compensation, benefits, and work hours; (3) involvement in day-to-day employee supervision, including discipline; and (4) actual control of employee records, including payroll, insurance, and taxes.[20]

The tests in the Fourth Circuit diverge from the others. While the other circuits tend to focus on how integral the worker's duties are to the putative employer, the Fourth Circuit places

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[19] *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003), relying on *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

[20] *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 467 (3d Cir. 2012), quoting *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470-71 (9th Cir. 1983); *Reed v. Friendly's Ice Cream, LLC* 2016 WL 2736049, at *3 (M.D. Pa., May 11, 2016).

particular emphasis on the level of control exercised or available to the putative employer over the putative employee. Under the Fourth Circuit test, a court "must determine whether the defendants and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work," with reference to six non-exhaustive factors: (1) whether, formally or practically, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, directly or indirectly; (2) whether, formally or practically, the putative joint employers jointly determine, share, or allocate the power to hire or fire the worker or modify the terms and conditions of the worker's employment, directly or indirectly; (3) the degree of permanency and duration of the relationship between the putative joint employers; (4) whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over the functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.[21]

The Fifth Circuit utilizes a modified "economic realities test" to determine whether a defendant is a joint employer under the FLSA, but considers the following five factors, instead of the four used by the First and Third Circuits: (1) the degree of control exercised by the alleged

[21] *Hall v. DirecTV, LLC*, 846 F.3d 757 (4th Cir. 2017); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017).

employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.[22] The Fifth Circuit's test is particularly designed to assess the extent to which the putative employer's business is dependent on the work performed by the worker: "the touchstone of 'economic reality' in analyzing a possible employee/employer relationship for purposes of the FLSA is dependency."[23]

The Sixth Circuit has not articulated a joint employer test for FLSA purposes, but it did reference the following four factors in a case falling under the Railway Labor Act, which district courts have generally used to make a joint employment analysis in FLSA cases: (1) the interrelation of operations between the companies, (2) common management, (3) centralized control of labor relations, and (4) common ownership.[24] Notably, this test *does not* appear to be appropriate for a joint employment analysis, and instead appears to be the kind of test used to determine whether two entities are "integrated" – a test that is commonly used to evaluate whether an employee may be entitled to protected leave under the Family Medical Leave Act (FMLA).

The Seventh Circuit considers the four factors relied upon by the First and Third circuits to be "certainly relevant," but has held that the facts of the case guide the analysis more so than any specific test: "for a joint-employer relationship to exist, each alleged employer must exercise control over the working conditions of the employee, although the ultimate determination will

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[22] *Reich v. Circle C. Investments, Inc.,* 998 F.2d 324, 327 (5th Cir.1993).
[23] *Carnero v. Patterson Structural Moving and Shoring LLC* (E.D. La., Jan. 15, 2015, No. CIV.A. 14-2064) 2015 WL 225362, at *2.
[24] *Int'l Longshoremen's Ass'n, AFL-CIO, Local Union No. 1937 v. Norfolk S. Corp.*, 927 F.2d 900, 902 (6th Cir. 1991); *Keeton v. Time Warner Cable*, 2010 WL 2076813, at *2 (S.D. Ohio May 24, 2010); *Narjes v. Absolute Health Services, Inc.* (N.D. Ohio, June 29, 2018, No. 5:17CV739) 2018 WL 3208180, at *3.

vary depending on the specific facts of each case."[25] Thus, the Seventh Circuit relies on an undefined analysis of how much control the putative employer has over the putative employee's working conditions.

The Eighth Circuit has not articulated a specific joint employment test under the FLSA, but district courts have generally, but not exclusively, gravitated towards the economic realities test. "To determine the economic reality of the relationship between an employee and a purported employer, courts consider whether the purported employer (1) had the power to hire and fire employees; (2) supervised and controlled employee's work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records."[26]

The Ninth Circuit is, not surprisingly, the most complex. It considers "layers" of factors, all of which are plainly designed to delve into a detailed version of an economic realities test. The Ninth Circuit first considers four "primary factors," derived from *Bonnette*, and focuses on "whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payment, (3) determined the rate and method of payment, and (4) maintained employment records."[27]

The Ninth Circuit has also repackaged the *Bonnette* factors as: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates of the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5)

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[25] *Moldenhauer v. Tazewell-Pekin Consol. Communications Center* 536 F.3d 640, 644 (7th Cir. 2008); *Reyes v. Remington Hybrid Seed Co.,* 495 F.3d 403, 408 (7th Cir.2007).
[26] *Larson v. Isle of Capri Casinos, Inc.*, 16-00902-CV-W-ODS, 2018 WL 6495074, at *4 (W.D. Mo. Dec. 10, 2018); *Childress v. Ozark Delivery of Mo. LLC*, 95 F. Supp. 3d 1130, 1139 (W.D. Mo. 2015).
[27] *Bonnette, supra,* 704 F.2d 1465 (9th Cir.1983).

preparation of payroll and the payment of wages.[28] Additionally, the Ninth Circuit has identified what it terms "non-regulatory factors" that may be relevant to deciding whether a joint employment relationship exists: (1) whether the work was a specialty job on the production line; (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; (3) whether the premises and equipment of the employer are used for the work; (4) whether the employees had a business organization that could or did shift as a unit from one worksite to another; (5) whether the work was piecework and not work that required initiative, judgment or foresight; (6) whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill; (7) whether there was permanence in the working relationship; and (8) whether the service rendered is an integral part of the alleged employer's business.[29] Though wordy and tedious, the Ninth Circuit's test does not appear to actually deviate much from the standard economic realities test.

The Tenth Circuit has not set a test for joint employment under the FLSA. The district courts in the Tenth Circuit, however, seem to gravitate towards the Fourth Circuit's test in *Hall* and *Salinas, supra.* That test focuses on: (1) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means; (2) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms and conditions of the worker's employment; (3) the degree of permanency and duration of the relationship between the putative

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[28] *Moreau v. Air France* (9th Cir. 2004) 356 F.3d 942, 947–948.
[29] *Torres–Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *Bonnette, supra,* 704 F.2d 1465, 1470-71 (9th Cir. 1983).

joint employers; (4) whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over the functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.[30]

The Eleventh Circuit considers the following factors: (1) the nature and degree of control exercised by the alleged employer over the alleged employees; (2) the alleged employer's degree of supervision, direct or indirect, of the alleged employees' work; (3) the alleged employer's right, directly or indirectly, to hire, fire, or modify the alleged employees' employment conditions; (4) the alleged employer's power to set the employees' pay rates or payment methods; (5) the alleged employer's preparation of payroll and payment of the employees' wages; (6) the alleged employer's ownership of the facilities where the work occurred; (7) the alleged employees' performance of a specialty job integral to the business; (8) the alleged employer's relative investment in equipment and facilities.[31]

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[30] *Merrill v. Pathway Leasing LLC*, 16-CV-02242-KLM, 2018 WL 2214471, at *6 (D. Colo. May 14, 2018); citing *Hall v. DirecTV, LLC*, 846 F.3d 757 (4th Cir. 2017) and *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017). See also, *Zevallos v. Stamatakis*, 2:17-CV-00253-DN, 2017 WL 6060623, at *4 (D. Utah Dec. 6, 2017) (applying both the Fourth Circuit analysis and the Ninth Circuit analysis); *Sanchez v. Simply Right, Inc.*, 15-CV-00974-RM-MEH, 2017 WL 2222601, at *7, fn 13 (D. Colo. May 22, 2017) (applying the Ninth Circuit factors, and others because the parties both advocated for the test, but also noting "If the Court were writing on a clean slate, it would likely not adopt either test advocated by the parties. Instead, the Court likely would be persuaded to adopt the test recently pronounced by the Fourth Circuit Court of Appeals" in *Salinas*. *See, fn*. 13).

[31] *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1177–78 (11th Cir. 2012); citing *Aimable v. Long & Scott Farms,* 20 F.3d 434, 437 (11th Cir.1994).

B. Joint Employment Under Title VII

The law regarding joint employer status under Title VII is somewhat more fractured amongst the various circuits. Some circuits (such as Seventh and Ninth Circuits) refer to the test as the "economic realities test," while most other circuits simply refer to the test as the "joint employer test," and all circuits seem to have some variance in how they articulate the various factors to consider. These distinctions, however, are predominantly in form rather than function.

All circuits agree that the joint employer analysis primarily hinges on whether an alleged joint employer "share[s] or co-determine[s] those matters governing the essential terms and conditions of employment."[32] From there, courts have articulated different factors to consider when assessing joint employment, which seem to be somewhat specific to the facts at issue in the case.

The First Circuit has cited with approval the Third Circuit's decision in *NLRB v. Browning–Ferris Industries of Pennsylvania, Inc.* in assessing joint employment Title VII cases.[33] There, the Third Circuit held that a joint employment relationship exists for purposes of the National Labor Relations Act (NLRA) where one employer while contracting in good faith with an otherwise independent company, "has retained for itself sufficient control of the terms and conditions of employment", and the two entities, though separate, "share or co-determine the conditions of employment."[34]

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[32] *Knitter v. Corvias Military Living, LLC,* 758 F.3d 1214, 1225–27 (10th Cir.2014).
[33] *NLRB v. Browning–Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir.1982).
[34] See also *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 (1st Cir. 1991).

The Second Circuit has not created a specific test for joint employment in Title VII cases. District courts, however, have generally used the economic realities test with a particular emphasis on ensuring the analysis is functional and factual.[35]

The Third Circuit distilled its joint employment test down to just three factors: (1) "authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours"; (2) "day-to-day supervision of employees, including employee discipline"; and (3) "control of employee records, including payroll, insurance, taxes and the like."[36]

The Fourth Circuit recently found nine factors to consider in joint employment cases under Title VII: (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship.[37]

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[35] *Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 313 (S.D.N.Y. 2014); *McFarlane v. Iron Mountain Inc.*, No. 17CV3311(DLC), 2018 WL 3773988, at *6 (S.D.N.Y. Aug. 9, 2018), citing *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 71-72 (2d Cir. 2003); *Yousef v. Al Jazeera Media Network*, 16-CV-6416 (CM), 2018 WL 6332904, at *1 (S.D.N.Y. Oct. 31, 2018).

[36] *Graves v. Lowery,* 117 F.3d 723, 727 (3d Cir.1997); *Ginsburg v. Aria Health Physician Services* (E.D. Pa., Aug. 31, 2012, No. CIV.A. 12-1140) 2012 WL 3778110, at *4.

[37] *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404 (4th Cir. 2015).

The Fifth Circuit has not articulated a joint employer test under Title VII. A district court recently examined "whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process."[38]

District courts in the Sixth Circuit have boiled down the joint employer test down to three factors: (1) exercise of the authority to hire, fire, and discipline; (2) control over pay and insurance; and (3) supervision."[39]

The Seventh Circuit distilled the test down to a five-factor "economic realities" test which focuses on: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.[40] This test is identical to the factors considered by the 7th Circuit in independent contractor cases.[41]

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[38] *E.E.O.C. v. Valero Refining-Texas L.P.*, 3:10-CV-398, 2013 WL 1168620, at *4 (S.D. Tex. Mar. 13, 2013).
[39] *Parrott v. Marriott Intl., Inc.,* 17-10359, 2017 WL 3891805, at *1 (E.D. Mich. Sept. 6, 2017); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 Fed.Appx. 587, 594, (6th Cir. 2009) ("in the NLRB context" factors "such as exercise of authority to hire, fire, and discipline, control over pay and insurance, and supervision ... can bear on whether an entity, which is not the formal employer, may be considered a joint employer"); *Reid v. Quality Serv. Integrity*, 2016 WL 229337, *2, 2016 U.S. Dist. LEXIS 5878, *6 (E.D. Tenn. Jan. 19, 2016); *Williams v. King Bee Delivery, LLC*, 199 F.Supp.3d 1175, 1180-1181 (E.D. Ky. 2016); *Politron v. Worldwide Domestic Servs., LLC*, 2011 WL 1883116, *1-3, 2011 U.S. Dist. LEXIS 52999, *2-7 (M.D. Tenn. May 17, 2011).
[40] *Frey v. Coleman*, 903 F.3d 671, 676 (7th Cir. 2018).
[41] *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492 (7th Cir. 1996).

The Eighth Circuit has not addressed joint employment in the context of a Title VII case, and there is no known consensus among the district courts.

The Ninth Circuit's joint employment test for Title VII cases is the *Darden* common law test, to examine: (1) the skill required of the employee; (2) the source of the instrumentalities and tools; (3) the location of the work performed; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; the method of payment; (7) the hired party's role in hiring and paying assistants; (8) whether the work is part of the regular business of the hiring party; (9) whether the hiring party is in business; (10) the provision of employee benefits; and (11) the tax treatment of the hired party.[42]

The Tenth Circuit prioritizes assessing whether putative joint employers "share or co-determine those matters governing the essential terms and conditions of employment." The most important factor is the right to terminate the putative employee's employment. Additional factors include (1) the ability to promulgate work rules and assignments; (2) set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision of employees, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes and the like."[43]

The Eleventh Circuit developed an eight-factor test for joint employment Title VII cases that examines: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the

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[42] *U.S. Equal Empl. Opportunity Commn. v. Glob. Horizons, Inc.*, __ F.3d __, 16-35528, 2019 WL 453482, at *7 (9th Cir. Feb. 6, 2019).

[43] *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1226 (10th Cir. 2014).

employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) ownership of facilities where work occurred; (7) performance of a specialty job integral to the business; and (8) investment in equipment and facilities.[44]

The D.C. Circuit held that "[a]t common law, the relevant factors defining the master-servant relationship focus on the master's *control* over the servant," whether that means the servant" 'is controlled or *is subject to the right to control* by the master,' " and so that "common-law element of control is the principal guidepost" in determining whether an entity is an employer of another.[45]

C. ABC Test?

California businesses were granted a small reprieve when a Court of Appeal confirmed that the devastating ABC test used in the *independent contractor* analysis does not apply in joint employment cases.[46] Instead, traditional employment principles apply in determining whether a putative joint employer is, in fact, an employer.

Curry examined the relationship between employees of a gas station management company, that management company, and Shell, which contracted with the management company. In the past, Shell owned and directly operated hundreds of gas stations in California. However, in May 2003, it changed its business model and instead of operating the gas stations, it leased the stations out to third parties to run and manage the businesses. The operators were subject to "Multi-Site Contractor Operated Retail Outlet Agreements" (MSO's) with Shell. The MSOs required operators to complete daily gasoline surveys, change the fuel prices as directed by Shell, and

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[44] *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012); *Phillips v. Bd. of Trustees of the U. of Alabama*, 218 F. Supp. 3d 1297, 1307 (N.D. Ala. 2016).
[45] *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 448, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (emphases added) (quoting Restatement (Second) of Agency § 2(2); *Browning-Ferris Industries of California, Inc. v. Natl. Lab. Rel. Bd.*, 911 F.3d 1195, 1211 (D.C. Cir. 2018).
[46] *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289.

"perform various tasks for the maintenance, safety, accounting, and maintaining Shell's brand standards." Shell also maintained audit rights over the facilities. The MSO also required that stations stay open 24 hours a day, seven days a week and not close for employee breaks. Shell also provided operators with an "Enhanced Customer Value Proposition Reference Guide" to help "Operators meet Shell's brand standards by recommending certain tasks and frequencies for the performance of the tasks." Shell provided a "Retail Service Station Health, Safety and Environmental Reference Manual" as well, which contained information on health, safety, environmental laws, and best practices to avoid robberies.

Because Shell, through its contract with the management company, did not make the day-to-day decisions regarding's Curry's employment—and despite the fact that Shell maintained additional control over the management company—the trial court granted summary judgment in Shell's favor:

> [Shell] did not determine Curry's compensation, did not pay for the work she performed and did not handle tax reporting. [Shell] did not determine what employment benefits Curry would receive. [Shell] did not set employment policies for ARS employees. [Shell] did not make disciplinary decisions, including termination decisions, involving ARS employees. [Shell] did not tell Curry where to work or what duties to perform. In addition, neither the terms of the MSO contract, the MSO lease, the operational manuals and training provided by [Shell] nor the periodic gas station inspections performed by [Shell] support Curry's employment theory.

The import of *Curry* is critical: it avoids courts analyzing prong "B" of the ABC test, meaning that businesses, at least under current law in California, may retain vendors and other businesses that are still within the hiring entity's "usual course of business" without joint employer liability.

D. California's Legislative Push To Expand Joint Employer Liability

California businesses face a specific legislative push to expand joint employer liability. Effective January 1, 2013, California passed Labor Code section 2810, which targeted businesses

that enter into contracts with vendors providing "construction, farm labor, garment, janitorial, security guard, or warehouse" services. Section 2810 first prohibits businesses from entering contracts with vendors in these industries where the hiring entity knows or should know that the contract "does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided."[47]

The legislature indulges businesses with the potential to enjoy a "presumption against liability" if the contract they enter with the vendor includes a laundry list of specific information. Some of that information is basic, such as: (1) the name, address, and telephone number of the person or entity and the vendor through whom the labor or services are to be provided; (2) a description of the labor or services to be provided and a statement of when those services are to be commenced and completed; (3) the employer identification number for state tax purposes of the vendor; (4) the workers' compensation insurance policy number and the name, address, and telephone number of the insurance carrier of the vendor; (5) the vehicle identification number of any vehicle that is owned by the vendor and used for transportation in connection with any service provided pursuant to the contract or agreement, the number of the vehicle liability insurance policy that covers the vehicle, and the name, address, and telephone number of the insurance carrier; (6) the address of any real property to be used to house workers in connection with the contract or agreement; and (7) the signatures of all parties, and the date the contract or agreement was signed.

Some of the requested information, however, requires businesses to make a predictive analysis, such as: (8) the total number of workers to be employed under the contract or

[47] Cal. Labor Code § 2810, subd. (a).

agreement, the total amount of all wages to be paid, and the date or dates when those wages are to be paid; (9) the amount of the commission or other payment made to the vendor for services under the contract or agreement; and (10) the total number of persons who will be utilized under the contract or agreement as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations. The law imposes penalties amounting to the greater of actual damages, or a penalty of at least $250 (and up to $1,000 for subsequent violations) per employee of the vendor, per pay period.

Three years after enacting section 2810, the California legislature passed Labor Code section 2810.3, which extends potential joint employer liability across a range of industries. Under that section, a hiring business, known as a "client employer," may be held jointly liable for the unpaid wages owed to vendors' employees, where the vendors' employees "perform labor within the client employer's usual course of business."[48] The "usual course of business" is "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer."[49]

While there are several industry-specific exemptions to section 2810.3, the overarching import of these new laws is to spread potential liability to multiple entities. This by itself puts employers in a Catch-22: do they simply trust their vendors to comply with the law? Or do they risk doing what this statute appears to pragmatically demand, and monitor their vendors' compliance – which will itself inevitably used as supposed evidence that the entities are "joint"?

[48] Cal. Labor Code section 2810.3, subd. (a)(3), (b).
[49] Cal. Labor Code section 2810.3, subd. (a)(6).

At the very least, agreements with vendors should spell out that vendors will comply with all applicable laws, and may also require audit rights and responsibilities.

E. Questions to Consider When Assessing A Potential Joint Employer Risk

Though none of these questions is in anyway dispositive, these questions may help guide an analysis in a joint employer question.

- Is the customer dependent any one vendor?
- Is the business model as a whole dependent on vendors?
- How much interaction will the customer have with employees of a vendor?
- Who will provide directives to employees of a vendor?
- Will the employees of the vendor hold themselves out to be employees of the retaining entity?
- Where will the work be performed?
- What equipment will be used to complete the work?
- Does the customer perform the same work as the entity it will hire?
- Does the customer have the ability to tell the vendor to stop using or start using specific workers?

F. Best Practices For Businesses In Potential Joint Employer Situations

While every situation is unique, and requires its own analysis, we generally recommend the following:

- Ensure that contracts with vendors have strong indemnity language and address the vendor's obligation to comply with all labor and employment obligations.
- Ensure that contracts with vendors do not have prohibitions on providing services for competitors. In fact, it may be to your advantage to allow vendors to provide services to your competitors where feasible.
- Ensure that managers – especially line-level managers – are well-versed in what they can and cannot communicate to employees of vendors.

- Ensure that the hiring business is as extricated as possible from hiring, firing, and discipline decisions. In fact, the hiring business should avoid making decisions of all kind as it relates to the other business's employees.

- Minimize your points of contact with vendors. This will help ensure that duty-based directives are not given to contractors and employees of vendors.