Surprise! Meet Your New Employees… The People You Thought Worked For Someone Else or Themselves

John Polson
Fisher Phillips LLP (Irvine)

Chris Boman
Fisher Phillips LLP (Irvine)

Introduction

There was a time when it was simple to identify your employees and take responsibility only for them, and not for the employees of other businesses. Times have changed. Modern employment liabilities are layered between three groups: 1) the workers you intentionally identify as your employees; 2) the individuals you treat as independent contractors but may turn out to be your employees; and 3) individuals you may unwittingly jointly employ with another employer such as a staffing company or a vendor working on your property.

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. Thus, the legal tests are very different, and it is easy to confuse them. The tests are evolving at a rapid pace. Legislatures and regulatory agencies are aggressively moving to establish new standards to account for recent changes in how businesses retain and deploy talent.

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 those laws. We include some best practices for avoiding independent contractor and joint employer problems.

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.

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 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]

---

1 29 U.S.C. § 203(e)(1).

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.

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]

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.

Of note, the USDOL issued an opinion letter in April of 2019 in which it provided guidance on how the agency will evaluate contractors who are deployed through a Virtual Marketplace Company ("VMC)". The identity of the business that requested the letter is unknown (as the USDOL removed the actual name to protect the entity's privacy), but what we do know paints the picture of the average modern "gig economy" business. The letter describes a VMC as an online and/or smartphone-based referral service that connects service providers to end-market consumers. While we do not know what service is provided by this specific entity, we can assume they provide a service typical of the gig industry: transportation, delivery, shopping, moving, cleaning, plumbing, painting, or household services.

Like virtually all gig economy businesses, this particular company was concerned about the risks of a misclassification claim that might lead to wage and hour liability

---

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)).

[5] See, USDOL fact sheet at https://www.dol.gov/whd/regs/compliance/whdfs13.htm.

under the Fair Labor Standards Act (FLSA). It asked the agency to provide a determination about whether the workers who provide these services would be considered employees or independent contractors if challenged under the current state of the law. The USDOL concluded that, assuming all the facts provided by the entity were accurate, the workers are contractors and not employees. To reach this conclusion, the agency applied its traditional balancing test derived from Supreme Court precedent (described above), to determine whether the workers are economically independent (leading to a finding of contractor status) or economically dependent (leading to an employee finding) in the working relationship with the entity in question.

In the announcement accompanying the publication of the letter, the USDOL confirmed that the opinion letter was an official, written opinion by the Department's Wage and Hour Division on how the FLSA applies in the specific circumstances presented by the entity that requested the letter. While not a "one size fits all" guidance, the letter is a helpful window into how today's USDOL will treat misclassification concerns that relate to gig economy (and similar) businesses.

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]

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

---

[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).

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 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 the 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

---

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).

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

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]

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 2018, the California Supreme Court determined that the so called "ABC" test should be used to determine whether a worker is an independent contractor for certain purposes under California law. The ABC test is not new. ABC has been used in several other states, but for limited purposes and in less onerous forms than what California has adopted.

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*

---

[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).

[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").

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[14]

1. *Dynamex* ushers in a new era

The California Supreme Court adopted the ABC test in *Dynamex*, *supra*, shortly after the New Jersey Supreme Court utilized it in *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 453 (N.J. 2015). California subsequently enacted Assembly Bill 5 which incorporates the ABC test into California statutory law and vastly expands the scope of areas covered by ABC. California ultimately will utilize the ABC test to determine independent contractor status for purposes of the California Wage Orders (the original subject covered by *Dynamex*), the California Labor Code, workers' compensation, and state unemployment.

Following California's lead, and fueled by concerns over the fiscal and socioeconomic impact of the expanding gig economy, other states may follow suit. Several states have signaled future legislation akin to AB5. However, the controversy over AB5 and its negative impact on business, consumers, and the freelancers who enjoy independent contractor status, may have a chilling effect on the spread of AB5.

For example, New Jersey recently had the opportunity to expand its use of ABC in response to the findings of a worker misclassification task force. Instead, New Jersey passed six bills only addressing the penalties and enforcement mechanisms related to independent contractor misclassification under existing New Jersey law. But the reprieve may only be temporary: lawmakers and worker advocates alike are already hard at work in the 2020 legislative session to pass a modified ABC test that would upend the current classification structure.

2. The "Prong B" problem

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

---

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

In addition to 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 large advertising company may not be able to retain IT or marketing independent contractors because a larger business might arguably be expected to have IT and marketing professionals as part of its usual course of business.

The *Dynamex* case involved delivery drivers. Much of the nation's transportation and logistics industry has relied on independent contractors, and the ABC test is potentially devastating to the entire transportation industry. This is equally true for other "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.

3. Businesses fight back

Given the disproportionately heavy impact on transportation, the transportation industry is putting up a fight. A federal court in California issued a temporary restraining order on New Year's Eve 2019, blocking California's misclassification law from taking effect against interstate trucking companies doing business in California. The court extended that ruling by granting a preliminary injunction which will block AB5 as to interstate truckers for the foreseeable future. The preliminary injunction only maintains

the status quo until the court can make a final ruling on whether AB5 is preempted by Federal law.

The broader gig economy world is also not going down without a fight. Uber and Postmates have also filed suit in California seeking to have AB5 declared invalid as it applies to them and other companies. More lawsuits are threatened and certainly will be filed. The freelance writers and other similar artists may be next. Essentially anyone who was not expressly exempted from coverage in AB5 may ultimately be affected by litigation attacking AB5.

4. AB-5 codifies the ABC test

With respect to the express exemptions in AB5, there are many. The legislature granted specific exemptions to a laundry list of industries, including: (1) licensed insurance agents; (2) doctors and veterinarians; (3) lawyers, architects, engineers, private investigators, and accountants; (4) registered securities broker-dealers or investment advisers; (5) direct sales salespersons (provided that the salesperson's compensation is based on actual sales rather than wholesale purchases or referrals); (6) commercial fishermen working on an American vessel (but only until January 1, 2023); (7) workers performing work under contract for "professional services;" (8) realtors; (9) licensed repossession agencies (but only if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact); (10) subcontractors in the construction industry (subject to certain requirements); (11) tutors (provided they teach their own curriculum and are not public school tutors); (12) construction truck drivers (until January 1, 2022, subject to certain requirements); (13) tow truck drivers affiliated with the American Automobile Association; and (14) newspaper distributors and deliverers (though only until January 1, 2021.

AB5 also exempts those providing "Professional Services" defined as (1) marketing services (provided that the contracted work is original and creative in character); (2) human resources administrators (provided that the contracted work is predominately intellectual and varied in character); (3), travel agents; (4) graphic designers; (5) grant writers; (6) fine artists; (7) enrolled tax agents licensed by the U.S.

Department of Treasury or who practice before the Internal Revenue Service; (8) payment processing agents (provided they are retained though an independent sales organization); (9) certain photographers (who do not license content submissions to a putative employer more than 35 times a year); (10) freelance writers, editors, newspaper cartoonist (provided that the individual contributes no more than 35 submissions a year to the hiring entity); and (11) licensed estheticians, electrologists, manicurists (until January 1, 2022), barbers, or licensed cosmetologists, subject to a number of additional requirements.

Beyond being included as a qualifying industry, the professional services exemption requires that the contractor; (a) maintains a business location that is separate from the hiring entity (including the individual's residence); (b) maintains a business license if the work is performed more than six months after the effective date of the bill; (c) has the ability to set his or her own hours and set or negotiate his or her own rates; (d) customarily engages in the same type of work performed under contract with another entity; and (e) customarily and regularly exercises discretion or independent judgment in the performance of the services.

In addition to the above exemptions, AB5 exempts, subject to stringent requirements, the relationships between a referral agency and service providers and bona fide business to business contracting relationships from the ABC Test. As discussed below, however, these exemptions are nuanced and require meeting multiple stringent requirements for their applicability.

5. Business-to-business questions

Although much of the publicity surrounding AB5 has rightfully centered on individuals working as independent contractors, businesses have also expressed concern that legitimate "business-to-business" relationships could be swept up in the ABC test as well. The new law attempts to address this issue, but likely does not go far enough to address all of the concerns of the business community.

Specifically, the statute identifies "business service providers," who provide business services to "contracting businesses," as exempt from the ABC test's reach. To

satisfy the exemption, however, a contracting business bears the burden of establishing that each of its "business service providers" satisfy each of 12 factors:

- **Control.** The business service provider must be "free from the control and direction" of the contracting business entity, both under the contract and in fact.
- **Services must be to the business, not customers.** The business service provider must provide services directly to the contracting business rather than to customers of the contracting business.
- **In writing.** The contract with the business service provider must be in writing.
- **Properly licensed.** The business service provider must have required business licenses and business tax registrations.
- **Separate location.** The business service provider must maintain a business location that is separate from the location of the contracting business.
- **Independent, established business.** The business service provider must customarily engage in an independently established business of the same nature as that involved in the work performed.
- **Other clients.** The business service provider must actually contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
- **Actively advertises.** The business service provider must advertise and hold itself out to the public as available to provide the same or similar services.
- **Provides own equipment.** The business service provider must provide its own tools, vehicles, and equipment to perform the services.
- **Negotiate rates.** The business service provider must be able to negotiate its own rates.
- **Set own hours and location.** Consistent with the nature of the work, the business service provider must be able set its own hours and location of work.

- **Not applicable to construction.** The business service provider must not perform the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

The factors that are most likely to create angst for businesses are vendors that have only one client in actuality (regardless of whether the vendor is or is not prohibited from having other clients); vendors that do not advertise their services; and vendors that have no independent location outside of their one client. Businesses will also want to carefully consider adding indemnity clauses in each of their contracts, and potentially even audit rights to ensure vendors are paying their employees correctly.

Business groups have expressed concern that a "business-to-business" relationship that fails to meet these 12 specific factors would automatically come within the gambit of the ABC test. However, in a "Letter to the Journal" expressing her legislative intent, the author of AB5 stated, "Importantly, while this provision exempts certain bona fide business-to-business contracting relationships from the holding in *Dynamex* if the criteria are satisfied, [it] is not intended to suggest, by negative implication, that the business services provider is necessarily an employee if those criteria are not satisfied."

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 model 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, the following best practices serve as a general guide:

- 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 contractors 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.

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, and the circuit courts have applied varying approaches, most of which are based on the so called "economic realities test." In an effort to achieve uniformity, and perhaps tip the scales in favor of not finding joint employer status, the USDOL recently finalized new regulations governing the joint employer analysis in FLSA cases. We will summarize the new regulations, and then provide an overview of the case law that pre-dated the new regulations. It is yet to be seen to what extent the courts will accept or reject the new regulations.

1. New Regulations.

In January of 2020, USDOL issued new regulations attempting to more precisely define the scope of joint employment liability for wage and hour matters. Although much remains to be seen, the regulations may usher in a new era, and could lead to fewer businesses being found to be joint employers by a court or agency when it comes to minimum wage, overtime, and other similar liability under the Fair Labor Standards Act (FLSA). However, many questions still remain about various aspects of this rule, particularly how courts will apply the test's four factors as well as the alternative "catch-all" test.

The USDOL's new rule will determine whether a business is a "joint employer" through a four-factor balancing test. It will assess whether the entity:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records.

In describing the first factor, the agency confirmed that the "hiring or firing" factor is narrow, considering only whether the potential joint employer truly hires or fires the employee. It specifically does <u>not</u> contemplate whether the potential joint employer has the "power" to hire or fire the employee in question. The USDOL said that requiring an

actual exercise of control in this regard should provide clarity for employers and encourage and increase innovative business agreements.

As for the second factor, the agency noted that courts require at least "substantial" supervision prior to reaching a finding of joint employer status, and therefore added the "to a substantial degree" clause to this second factor.

The agency also provided some clarifying examples that help explain the third factor more clearly. Most importantly, the USDOL said that an entity that requires its suppliers to pay its workers a minimum hourly wage higher than the federal minimum wage, for example, will not be considered a joint employer of the supplier's employees because of this requirement.

The fourth factor seems out of place given its relative triviality in comparison to the other factors. Some employers will be disappointed to see this fourth factor remain in the equation at all. In a positive development, however, the agency confirmed that maintaining employment records alone will not lead to a finding of joint employer status. Further, the USDOL rule says that records maintained by the potential joint employer related to compliance with contractual agreements are not considered "employment records" such to trigger this factor.

The regulations also include a catch-all provision which indicates that factors not specifically included in this four-part test may still end up being considered in the joint employment determination. However, this catch-call provision only applies if such unenumerated factors are indicative of whether the potential joint employer exercises "significant control" over the terms and conditions of the employee's work. This portion of the test is overbroad and could potentially be abused.

Just as important as identifying which factors will be examined under the new rule are those factors that are to be ignored by those interpreting the new joint employment test. The agency took the time to specifically articulate several aspects common to modern business arrangements that will not be factored into its joint employment consideration. They include:

- **Unused Right To Control:** An entity must actually exercise — directly or indirectly — one or more of the four control factors in order to be considered a

joint employer. "Standard contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status," the agency confirmed.

- **Economic Dependence:** Whether an employee is economically dependent on the potential joint employer will not be relevant. In fact, the agency identified certain factors that should be ignored under its analysis, including whether the employee:
    - is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
    - has the opportunity for profit or loss based on their managerial skill;
    - invests in equipment or materials required for work or for the employment of helpers; and
    - the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.
- **Franchisor Relationships:** The agency notes that operating as a franchisor or entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more likely.
- **Enforcing Legal Obligations:** A potential joint employer's contractual agreements requiring the employer to comply with specific legal obligations, or to meet certain standards to protect the health or safety of its employees or the public, do not make joint employer status more or less likely. These include provisions that mandate compliance with the FLSA or other similar laws, require the maintenance of sexual harassment policies, require background checks, ensure employers establish workplace safety practices and protocols, or to mandate that workers receive training regarding matters such as health, safety, or legal compliance.
- **Maintaining Standards:** Similarly, requiring quality control standards to ensure the consistent quality of the work product, brand, or business

reputation will not make joint employer status more or less likely. The agency pointed to agreements specifying the size or scope of the work project, requiring the employer to meet quantity and quality standards and deadlines, requiring morality clauses, and requiring the use of standardized products, services, or advertising to maintain brand standards as illustrative examples.

- **Standard Human Resources Forms:** The practice of providing a sample employee handbook, or other forms, to the employer will not impact the joint employment assessment.
- **"Store Within A Store" Arrangements:** The new rule confirms that allowing the employer to operate a business on its premises will not be factored into the legal test.
- **Health And Retirement Plans:** Offering association health plans or association retirements plan to the employer or participating in such a plan with the employer will not be considered.
- **Apprenticeships:** Finally, the new rule makes clear that jointly participating in an apprenticeship program with the employer will not make joint employer status more or less likely.

According to USDOL, "these factors are simple, clear-cut, and easy to apply." The agency's efforts aim to provide employers with clarity when it comes to FLSA compliance, saying that the test will assist stakeholders, as well as courts, in determining joint employer status with greater ease and consistency. Only time will tell whether the new tests will result in better outcomes for employers who are alleged to be joint employers.

2. Case Law.

Prior to the new regulations, the dearth of clear direction from either Congress or the USDOL left 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.[15] 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.[16]

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.[17]

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 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.[18] 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.

---

[15] *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).

[16] *Id.*, 704 F.2d at 1470 (9th Cir. 1983).

[17] *Baystate Alt. Staffing, Inc. v. Herman,* 163 F.3d 668, 675 (1st Cir.1998).

[18] *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).

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.[19]

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 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.[20]

---

[19] *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).

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

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 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.[21] 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."[22]

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.[23] 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 vary depending on the specific facts of each

---

[21] *Reich v. Circle C. Investments, Inc.,* 998 F.2d 324, 327 (5th Cir.1993).

[22] *Carnero v. Patterson Structural Moving and Shoring LLC* (E.D. La., Jan. 15, 2015, No. CIV.A. 14-2064) 2015 WL 225362, at *2.

[23] *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.

case."[24] 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."[25]

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."[26]

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) preparation of payroll and the payment of wages.[27] 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

---

[24] *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).

[25] *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).

[26] *Bonnette, supra,* 704 F.2d 1465 (9th Cir.1983).

[27] *Moreau v. Air France* (9th Cir. 2004) 356 F.3d 942, 947–948.

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.[28] 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 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.[29]

---

[28] *Torres–Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *Bonnette, supra,* 704 F.2d 1465, 1470-71 (9th Cir. 1983).

[29] *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);

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.[30]

B. Joint Employment Under Title VII

As with the FLSA, there is recent activity with the regulating agency, and a large body of case law.

1. Possible Guidance or Regulations.

Joining the USDOL in the effort to clarify joint employer status is the Equal Employment Opportunity Commission (EEOC). The EEOC answered in December of 2019 that it is developing its own guidance on joint employer status under Title VII. The EEOC's brief announcement states that it wants to explain its "interpretation of when an entity qualifies as a joint employer" based on the definitions of the statutory terms "employee" and "employer" under federal civil rights laws. "The proposed rule will clarify when an entity is covered under the federal EEO laws as a joint employer," the announcement states, "and consolidate the EEOC's position on the topic to regulatory locations that are easier for the public to find." We anticipate further word from the EEOC in early 2020.

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).

[30] *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).

2. Case Law.

The case law regarding joint employer status under Title VII is 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."[31] 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.[32] 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."[33]

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.[34]

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

---

[31] *Knitter v. Corvias Military Living, LLC,* 758 F.3d 1214, 1225–27 (10th Cir.2014).

[32] *NLRB v. Browning–Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir.1982).

[33] See also *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 (1st Cir. 1991).

[34] *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).

supervision of employees, including employee discipline"; and (3) "control of employee records, including payroll, insurance, taxes and the like."[35]

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.[36]

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."[37]

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."[38]

---

[35] *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.

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

[37] *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).

[38] *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).

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.[39] This test is identical to the factors considered by the 7th Circuit in independent contractor cases.[40]

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.[41]

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

---

[39] *Frey v. Coleman*, 903 F.3d 671, 676 (7th Cir. 2018).

[40] *Alexander v. Rush N. Shore Med. Ctr.,* 101 F.3d 487, 492 (7th Cir. 1996).

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

hours; (3) day-to-day supervision of employees, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes and the like."[42]

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 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.[43]

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.[44]

C. 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?

---

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

[43] *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).

[44] *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).

- 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?

D. 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.