INTRODUCTION

Questions of the existence of an employment relationship are not easily resolved by only turning to federal labor and employment statutes. Federal employment laws provide definitions for “employer” and “employee,” but the definitions are not always helpful and often do not provide enough guidance when the employment relationship is in dispute. It is crucial that labor and employment laws clearly define who is protected and who is not. The question of who is considered an employee and who is considered an employer is equally important to both parties. Employees need to know whether they are protected under the law, and employers need to know whether they are subject to liability.¹ Vague definitions in the statutes and application of ever-

changing tests, with the goal of defining an employment relationship, are evidence of inconsistency in the law.

The Seventh Circuit recently explored this topic in *Harris v. Allen County Board of Commissioners*. The plaintiff, Harris, was employed by the Allen County Superior Court as a Youth Care Specialist but was stationed at the Allen County Juvenile Center. The plaintiff signed the Allen Superior Court’s employee handbook, acknowledging the Superior Court as his employer. However, other documents that the plaintiff received during the term of his employment, such as his medical records authorization and performance evaluations, bore the seal of the Allen County Board of Commissioners, or listed the board as the plaintiff’s employer. The plaintiff was injured while at the Juvenile Center, collected workers’ compensation benefits and later tried to return to work, but was denied his position because of physical restrictions caused by his injury. The plaintiff filed a discrimination suit under the Americans with Disabilities Act (ADA) against both the Allen County Superior Court and the Allen County Board of Commissioners. The question at issue was whether the Board of Commissioners was an indirect employer of the plaintiff and the court determined it was not based on an analysis of “sufficient control.”

Part I of this note explores current labor and employment statutes and the statutory language courts turn to when beginning their analysis as to whether an employment relationship exists between an individual and an employer. Part II discuss the various tests used to establish the employment relationship and how the Seventh Circuit’s test has evolved over the years. Part III provides an overview of the Seventh Circuit’s opinion in *Harris v. Allen County Board of Commissioners*. Part IV then discusses whether the Seventh Circuit correctly decided the case. Part V provides a broad discussion about the concerns with

---

2 890 F.3d 680 (7th Cir. 2018).
3 Id. at 681.
4 Id. at 681-82.
5 Id. at 682.
6 Id. at 683.
7 Id.
inconsistency in the courts and how mislabeling employees as independent contractors has detrimental effects on both employers and employees. Finally, the note concludes with a suggestion as to how the courts may begin to address the blurred lines between employees and independent contractors.

BACKGROUND

A. Examples of Statutory Definitions

To begin the discussion about employment status, one would think it would be most helpful to turn to the actual language of the statute under which the employer or employee is seeking relief. Under the Americans with Disabilities Act of 1990 (ADA), an “employee” is defined as “an individual employed by an employer.” An “employer” is defined as “a person engaged in an industry affecting commerce that has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” Similar anti-discrimination laws define the terms almost identically.

8 42 U.S.C.A. § 12111(4).
10 The Age Discrimination in Employment Act (ADEA) defines “employee” as “an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term “employee” includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.” 29 USCS § 630(f). “Employer” under the ADEA “means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any
The Supreme Court previously “recognized that it is appropriate for a court construing one employment statute . . . to look to other employment law statutes . . . for guidance.”\textsuperscript{11} Consider the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) below.

The FLSA defines “employee” as “an individual employed by an employer”\textsuperscript{12} and “employer” as

\textsuperscript{11} Mitchell H. Rubinstein, \textit{Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland between an Employer-and-Employee Relationship}, 14 U. PA. J. BUS. L. 605, 611 (2012). See, Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947) (In an FLSA case, it was appropriate to turn to the NLRA for guidance because these acts are both considered to be part of “social legislation.”).

\textsuperscript{12} 29 U.S.C.A. § 203(e)(1). Exceptions outlined in (2)-(4).
any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.”

The NLRA defines “employee” as

Any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

“Employer” is defined as

any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

While some statutes are more detailed than others, it remains clear that the language is quite circular- leaving the courts to have to develop their own tests to establish whether an employment relationship exists.

B. The Standards Used to Establish an Employment Relationship are Plentiful (to say the least)

The Supreme Court has said that the common law agency test is the appropriate standard to apply when the statute does not provide a clear-cut definition.\textsuperscript{16} Under agency law, the employer (master) is a “principal who employs an agent . . . to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of that service.”\textsuperscript{17} The employee (servant) is “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the control by the master.”\textsuperscript{18} This begins the discussion of the numerous standards created by the courts to determine employment status.

The Court in\textit{Darden} adopted this common-law test to define “employee” under the Employee Retirement Income Security Act of 1974 (ERISA).\textsuperscript{19} The Court considered

the hiring party’s right to control the manner and means by which the product is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long the work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the


\textsuperscript{17} Restatement of Agency (Second) 220(1) (1958).

\textsuperscript{18} Restatement of Agency (Second) 220(2) (1958).

\textsuperscript{19} \textit{Darden}, 503 U.S. at 323.
provision of the employee benefits; and the tax treatment of the hired party.\textsuperscript{20}

Additionally, the Court noted that this common-law test calls for “all of the incidents of the relationship [to] be assessed and weighed with no one factor being decisive.”\textsuperscript{21}

In a more recent decision, the Supreme Court again was asked to determine whether an individual was an employee under the ADA.\textsuperscript{22} The individuals in that case were four physician-shareholders who owned the corporation,\textsuperscript{23} and they constituted the board of directors for the corporation.\textsuperscript{24} The Court, again looking at the relationship through an agency lens, determined that the element of control was “the principal guidepost that should be followed in this case.”\textsuperscript{25} The case turned on whether the shareholder-directors worked independently or whether they were under the control of the clinic.\textsuperscript{26} This analysis was also guided by a test created by the Equal Employment Opportunity Commission (EEOC) that used 6-factors to answer the Court’s very question.\textsuperscript{27} The factors consider

\begin{enumerate}
\item whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work;
\item whether and, if so, to what extent the organization supervises the individual’s work;
\item whether the individual reports to
\end{enumerate}

\textsuperscript{20} Id. (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989)).

\textsuperscript{21} Id. at 324 (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)). (“Since the common-law test contains ‘no shorthand formula or magic phrase that be applied to find the answer . . . .’”)


\textsuperscript{23} A medical clinic.

\textsuperscript{24} Id. at 442.

\textsuperscript{25} Id. at 448.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 449 (citing Equal Employment Opportunity Commission, Compliance Manual §§ 605:0008-605:00010 (2000)).
someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.28

Interestingly, the Court returned to its own language from Darden when it said that there is no “shorthand formula or magic phrase” by which an answer can be found in every case.29 This language seems to suggest that no one factor is determinative and all the circumstances surrounding each case should be considered.

States, such as California, have also developed their own standards when dealing with questions of employment status. The California Supreme Court in Dynamex created a new test for determining whether an individual is an employee or and independent contractor.30 After a lengthy discussion about previous California cases that dealt with this same question, the California Supreme Court concluded that it would apply a 3-factor test, also known as the “ABC” test.31 This test asks employers, when classifying individuals as independent contractors, to establish that

(A) 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 (C) that

29 Clackamas, 538 U.S. at 450 n.10.
30 Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018). This case addressed wage-hour issues, in comparison to other cases cited in this note that primarily fall under labor and employment statutes, but it is helpful to see how the standards in various courts can be so different.
31 Id. at 955. Under this standard, workers are automatically considered employees unless the employer can satisfy the test.
the worker is customarily engaged in an independently
established trade, occupation, or business of the same nature
as the work performed.\textsuperscript{32}

The Internal Revenue Service (IRS) also created its own standard
for employers to use when determining whether an individual is an
employee or an independent contractor for tax purposes.\textsuperscript{33} One scholar
suggested a rise in the use of independent contractors by businesses in
order to “cut costs while maintaining a high level of operational
efficiency.”\textsuperscript{34} This inevitably leads to blurred lines and the IRS
developed a 20-factor test\textsuperscript{35} by looking at “past cases and rulings
bearing on the determination of whether a business’s purported
independent contractors were actually employees.”\textsuperscript{36}

The Seventh Circuit, like many other circuits, applies a multi-
factor test to address the question of employment status. In \textit{Knight v. United Farm Bureau Mutual Insurance Company}, the Northern
District of Indiana addressed the “economic realities” test as one that
most courts use to “determin[e] whether a Title VII claimant is an
employee or an independent contractor.”\textsuperscript{37} The district court turned to
a D.C. Circuit case\textsuperscript{38}, among others,\textsuperscript{39} which looked to the “economic
realities” of the work relationship between the employee and the

\begin{footnotes}
\footnote{32} Id. at 957.
\footnote{33} Rev. Rul. 87-41 (IRS RRU), 1987-1 C.B. 296, 1987 WL 419174
\footnote{35} Rev. Rul. 87-41 (IRS RRU), 1987-1 C.B. 296, 1987 WL 419174
\footnote{38} \textit{Spirides}, 613 F.2d at 831.
\footnote{39} See Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987); Mares v. Marsh, 777 F.2d 1065 (5th Cir. 1985); Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir.1983); Cobb v. Sun Papers, 673 F.2d 337 (11th Cir.).
\end{footnotes}
employer.\textsuperscript{40} The D.C. Circuit considered the general principles of the law of “agency” and identified eleven factors which were pertinent in deciding whether an employment relationship existed between the parties.\textsuperscript{41} The factors included:

(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.\textsuperscript{42}

The district court in \textit{Knight}, without much of an explanation, consolidated the D.C. Circuit’s eleven-factor test into five factors.\textsuperscript{43} This test became known as the \textit{Knight} five-factor test. Its factors included:

(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

\textsuperscript{40} Spirides, 613 F.2d at 831.
\textsuperscript{41} Spirides, 613 F.2d at 831-32.
\textsuperscript{42} \textit{Id.} at 832.
\textsuperscript{43} 742 F. Supp. at 521.
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.\footnote{Id.}

The plaintiff appealed the case to the Seventh Circuit, which validated the use of the five-factor test.\footnote{Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 378 (7th Cir. 1991).} Today, the Seventh Circuit still applies the five-factor test when trying to determine whether an employment relationship exists.\footnote{See Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 702 (7th Cir. 2015).}

**HOW THE SEVENTH CIRCUIT MOST RECENTLY APPLIED THE KNIGHT FIVE-FACTOR TEST**

In *Harris v. Allen County Board of Commissioners*, the plaintiff, Harris, was employed by the Allen County Superior Court (Superior Court) to work in a juvenile center as a Youth Care Specialist.\footnote{890 F.3d at 682.} Under Indiana law, the Superior Court has the ability to establish juvenile detention and shelter care facilities, and the Superior Court decides who it will employ as staff and how to budget.\footnote{Id. at 681.} Under this statutory scheme, Allen County is responsible for paying the expenses of the facility.\footnote{Id.}

In 2003, the plaintiff injured his back after being kicked by an inmate at the juvenile center.\footnote{Id. at 682.} He received medical treatment, disability benefits, and permanent partial impairment benefits under this under Allen County’s workers compensation insurance.\footnote{Id.} The plaintiff was contacted by an Allen County employee who sent him...
forms regarding his workers’ compensation benefits.\textsuperscript{52} The forms listed “Allen County Government” as his employer.\textsuperscript{53} The plaintiff informed the county employee that his doctor determined the plaintiff had reached “maximum medical improvement” and was given work restrictions.\textsuperscript{54} The county employee told the plaintiff that he would not be able to return to his position at the Juvenile Center due to his work restrictions. However, she began helping him find another job within Allen County.\textsuperscript{55} The county employee offered the plaintiff a job as a part-time judicial assistant; however, the plaintiff rejected the offer because the position was without benefits.\textsuperscript{56}

The plaintiff was granted an independent medical exam by the Indiana Workers’ Compensation Board. The independent doctor concluded that the plaintiff had reached maximum medical improvement.\textsuperscript{57} It was after this second exam that the county employee reached out to the plaintiff to inform him that his benefits were terminated and he would not be able to return to work at the Juvenile Center because his work restrictions “prevented him from ‘perform[ing] the essential functions’ of his position at the Juvenile Center, ‘with or without a reasonable accommodation.’”\textsuperscript{58} The county employee claimed to be the ADA Coordinator and offered to help the plaintiff find another position within Allen County government.\textsuperscript{59} The county employee also offered to contact the hiring officials of job vacancies to assist the plaintiff in getting preference for positions for which he qualified.\textsuperscript{60} The county employee later informed the plaintiff that he did not qualify for the positions he applied for.\textsuperscript{61} Because the

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 682-83.
county employee could not identify a position that would accommodate the plaintiff’s work restrictions, the county employee informed the plaintiff that he was considered no longer employed.\textsuperscript{62}

The plaintiff brought suit against the Allen County Superior Court and the Allen County Board of Commissioners (the Board) for discrimination under the ADA.\textsuperscript{63} The district court found that the Board was not the plaintiff’s employer and therefore did not violate the ADA.\textsuperscript{64} The district court analogized the case to another Indiana case where probation officers were found to be employees of the court due to the statutory scheme in place.\textsuperscript{65} In O’Reilly, the county was not considered the probation officers’ employer because “the main indicia of employment, the right to control, [wa]s prescribed by statute solely to the court.”\textsuperscript{66} Based on this analysis, the Board in Harris was granted summary judgment.\textsuperscript{67}

The plaintiff appealed the district court’s decision, and the Seventh Circuit reviewed the decision \textit{de novo}. The Seventh Circuit affirmed the district court’s decision.\textsuperscript{68} The plaintiff argued: (1) the county paid his wages and benefits; (2) several documents identified the Board as his employer; and (3) the county employee dealt with his disability accommodations and his termination.\textsuperscript{69} The court noted that a five-factor test is typically used to determine whether a party is an indirect employer, but the court notes that the “factors are simply a detailed application of the economic and control considerations present in the ‘economic realities’ test.”\textsuperscript{70} The most important question

\textsuperscript{62} Id. at 683.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{66} 2017 U.S. Dist. LEXIS 57369 at 19 (quoting O’Reilly, 2003 U.S. Dist. LEXIS 4585 at *3).
\textsuperscript{67} 2017 U.S. Dist. LEXIS 57369 at 19-20.
\textsuperscript{68} Harris, 890 F.3d at 685.
\textsuperscript{69} Id. at 684.
\textsuperscript{70} Id. at 683 (citing Love, 779 F.3d at 702; Knight, 950 F.2d 377).
was whether the supposed employer exercised sufficient control over
the plaintiff.\footnote{Harris, 890 F.3d at 683. (citing Knight, 950 F.2d at 378; Love, 779 F.3d at 705).} The court turned to two “key control powers:” hiring
and firing.\footnote{Harris, 890 F.3d at 684. (quoting EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995)).} Under Indiana law, the Board did not control the
plaintiff’s “hiring, firing, day-to-day duties, and salary . . . .”\footnote{Harris, 890 F.3d at 685.} All of those aspects of the plaintiff’s employment rested with the Allen
Superior Court, not the Board.\footnote{Id. at 685.}

To the plaintiff’s first argument, the Seventh Circuit concluded
that the Board was statutorily required to pay the Juvenile Center’s
expenses, and, therefore, even though the Board was not required to
pay his workers’ compensation benefits, the Board paying those
benefits to the plaintiff was not enough to show that the Board
controlled the plaintiff’s employment.\footnote{Id. at 685.} To the plaintiff’s second
argument, the court concluded that the documents bearing the Board’s
seal or identifying the Board as the plaintiff’s employer were not
sufficient to show control of employment.\footnote{Id.} The plaintiff offered
evidence that the Board conducted performance evaluations, but he
was unable to show that the Board was responsible for his discipline
while employed at the Juvenile Center.\footnote{Id.} The Seventh Circuit noted
that the plaintiff’s final argument, that the county employee’s
involvement exceeded what was statutorily required, was his strongest
point because the employee was the one to notify the plaintiff that he
would not be able to return to his former position, she offered him an
alternative position, she assisted him in finding other employment, and
she was the one who informed him he was terminated.\footnote{Id.} However, the
plaintiff was unable to show that it was the county employee or the

\footnote{\textit{Harris}, 890 F.3d at 683. (citing \textit{Knight}, 950 F.2d at 378; \textit{Love}, 779 F.3d at 705).}
\footnote{\textit{Harris}, 890 F.3d at 684. (quoting EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995)).}
\footnote{\textit{Harris}, 890 F.3d at 685.}
\footnote{\textit{Id. at 685.}}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
Board that made the decision to terminate the plaintiff. The county employee indicated to the plaintiff in a letter that she was not in the position to hire him, and could only contact the hiring officials on his behalf. The Seventh Circuit concluded:

It would be unreasonable to infer that [the county employee] or the Board had the ability to control these aspects of [the plaintiff’s] employment, given that Indiana statutory scheme explicitly vests control over [the plaintiff’s] employment in the Allen Superior Court and that there is no evidence that would allow a trier of fact to find the reality was otherwise.

WAS THE COURT CORRECT IN ITS DECISION?

It is evident that the Seventh Circuit has evolved its determination of employment status and the associated tests over the last few decades. The court began by looking at various circuits to see how they were addressing the question of establishing employment relationships. It discussed the “economic realities” test used by the D.C. Circuit in Spirides but agreed with the district court that the inquiry was limited to five factors in Knight.

While the Seventh Circuit cited the five-factor test in Harris, it did not go through all the factors to conclude that the Allen County Board of Commissioners was not the plaintiff’s employer. Yet, in Spirides, the Seventh Circuit indicated that “consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative.” Still, the court stated that the

79 Id. (Emphasis added).
80 Id.
81 Id.
82 See Spirides, 613 F.2d at 831; Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986).
83 950 F.2d at 378-79.
84 613 F.2d 826 at 831 (citing Local 777 v. NLRB, 603 F.2d 862, 866 (D.C. Cir. 1978)).
employer’s right of control was the most important factor to review. The Seventh Circuit cases that used Spirides place the same emphasis on the right of control, which may explain why the Seventh Circuit in Harris only looked at the factor of control. But was the Seventh Circuit trying to establish a single-factor test for determining whether an employment relationship exists between individuals and employers?

Regardless of whether the court was attempting to create a new test, the Seventh Circuit should have let this case go to a jury. As previously mentioned, the Seventh Circuit cited its own precedent when discussing what factors are necessary in assessing whether an employer has the right to control and direct an individual’s work. The key elements are hiring and firing. In the present case, however, there was a clear dispute as to who fired the plaintiff. The plaintiff stated that the county employee made the decision when she initiated the conversations regarding his benefits, but he was not able to provide proof that she was the one who made the decision. In a footnote, the Seventh Circuit briefly mentions that the plaintiff also provided a statement that he spoke to a Superior Court employee who had no knowledge of his firing and who told the plaintiff that ‘‘downtown . . . handle[d]that.’’ The court dismissed the statement because it was inadmissible, but if the factor of control was so important, would it not have made a difference if Allen County made the decision to fire the plaintiff? This information, at the very least, created a genuine

85 Id. at 831.
86 See Knight, 950 F.2d 377; Love, 779 F.3d 697.
87 Harris, 890 F.3d at 683.
88 Id. at 684.
89 Id. (quoting EEOC, 69 F.3d 169).
90 The Board insisted that it did not make the decision to terminate the plaintiff, but the Superior Court also does not clearly state it made that decision. Harris, 890 F.3d at 684 n.1.
91 Harris, 890 F.3d at 685.
92 Id. at 686 n.2.
93 Harris, 890 F.3d at 686. Neither the district court nor the Seventh Circuit indicate why the statement was inadmissible.
dispute of material fact, which would bar granting summary judgment. Given the emphasis on the factor of control— in particular, the aspects of hiring and firing the employee— this fact could have led the jury to reach a different conclusion.

ADDRESSING THE INCONSISTENCY IN A BROADER CONTEXT

The concerns with inconsistency in the standards that help establish employment status can be better understood in the context of employees versus independent contractors. There are several industries in which workers’ classification falls somewhere between an employee and an independent contractor. Some of these industries include transportation, construction, hospitality, janitorial, personal care, and home health care. According to the IRS, independent contractors generally have the “right to control or direct the result of the work[, but] not what will be done and how it will be done.” Additionally, an independent contractor is considered to be “self-employed” for tax purposes.

The implications for classifying an individual as an employee or an independent contractor are quite substantial. For example, employers are not “bound to provide workplace protections and

94 FED. R. CIV. P. 56(a).
95 Brishen Rogers, Redefining Employment for the Modern Economy, 10 Advance 3 (2016), 3.
benefits” to independent contractors, only their employees.\textsuperscript{99} An example of this is Uber classifying its drivers as independent contractors and not employees. This allows Uber to avoid giving drivers health insurance.\textsuperscript{100}

When employers classify their workers as independent contractors, they also do not have to withhold or pay taxes on the payments made to the independent contractors.\textsuperscript{101} Doing this “[robs] unemployment insurance and workers’ compensation funds of billions of much-needed dollars, reducing federal, state and local tax withholding and revenues, while saving as much as 30% of payroll and related taxes otherwise paid for ‘employees.’”\textsuperscript{102}

One can see how straddling the lines between these classifications can leave an employee extremely vulnerable and without other protections discussed in this note. In the example of Uber drivers, a recent class action brought against the company by the drivers asks that the drivers be recognized as employees under the California Labor Code, and not independent contractors.\textsuperscript{103} Specifically cited in that case is the drivers’ wanting Uber to pay the full amount of the tips they receive as prescribed by the California’s labor code.\textsuperscript{104} In cases


\textsuperscript{103} O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1134 (N.D. Cal. 2015).

\textsuperscript{104} \textit{Id.}; Cal. Lab. Code § 351.
such as these, however, there are other consequences of being labeled as independent contractors. Because the workers are not employees, they are consequently not protected under anti-discrimination laws, such as the ADA, the ADEA, and Title VII. The drivers also do not have the opportunity to organize a union and have representation that can negotiate favorable employment terms for the drivers at least not under the NLRA. It is definitely possible that some form of organization may be created for these drivers to participate in bargaining with the companies, but the drivers and the union would not be afforded the same protections under the NLRA and disputes would not be addressed by an agency like the National Labor Relations Board (NLRB).105

Moreover, it is important to note that data has shown that 10-30 percent or more of employers misclassify their employees as independent contractors.106 Uncertainty in employment status likely leads to litigation, and if it is up to courts to decide whether individuals should be classified as employees or independent contractors, the individuals are at the mercy of the court (and the many conflicting tests) where they have raised their claim.

A SOLUTION?

It is concerning that courts do not have a concrete standard that can applied uniformly to establish an employment relationship between an employee and an employer. While it is clear many of the cases would depend on the specific circumstances of the case and, therefore, it is difficult to create a multi-factor test that would apply to each set of facts, there should be some sort of guide that can be used by the courts. In the context of employees versus independent contractors, California’s ABC test seems to make the most sense.

105 Brishen Rogers, Redefining Employment for the Modern Economy, 10 Advance 3 (2016), 7.

Given the very real concerns about misclassifying individuals as independent contractors rather than employees (due to ignorance or self-serving intentions), classifying individuals as employees unless the employer can satisfy a certain standard seems to be the best way to protect both employees and employers like. This author is not prepared to say what kind of factors should go into this standard, as the discussion in this note suggests that all the circumstances surrounding the potential employment relationship are essential and should be considered. However, in light of the numerous tests to establish an employment relationship between an individual and an employer and the lack of guidance in the labor and employment statutes, it seems to be a step in the right direction.

---

107 See supra part IV.
108 See case cited supra note 30.
109 See case cited supra note 29 and 85.