ARTICLES

UNCERTAINTY IN EMPLOYEE STATUS ACROSS FEDERAL LAW

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ABSTRACT

Numerous federal statutes rely on a distinction between employees and independent contractors. Based on a series of Supreme Court decisions from 1968 through 2003, courts and administrative agencies have used a common law multifactor test to draw this distinction. In an effort to enhance predictability and certainty within and across legislation, these cases have rejected a purposive approach in applying the test. But the Supreme Court has never said which, if any, of the factors are the most important in the analysis, nor has anyone determined whether the underlying purpose—enhancing predictability and certainty—has been attained.

This empirical study uses content analysis to answer these questions. First, based on a variety of statistics, it determines which factors are the most and least important under several federal statutory schemes. Next, it calculates the factors' accuracies and compares the results to determine if there is consistency within and across the legislation and whether predictability and certainty have been achieved. Concluding that predictability and certainty have not been achieved using the common law multifactor test, this Article proposes and evaluates reform efforts to solve, or at least reduce, the inconsistency problem while still achieving the goals of the legislation.

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INTRODUCTION

The term "employee" is prevalent among federal statutes. Employees, covered under these acts, are distinguished from independent contractors, who are not covered. For example, the National Labor Relations Act (NLRA) provides employees the rights to organize, join unions, and bargain collectively, but those same rights are not provided to independent contractors.[1] Antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), prohibit discrimination on the basis of race, color, religion, sex, national origin, disability, and age with respect to employees, but do not protect independent contractors.[2] The Occupational Safety and Health Act (OSHA) requires employers to provide a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees,"[3] but the act does not extend to those hiring independent contractors.[4] The Employee Retirement Income Security Act (ERISA) protects employees' and former employees' benefit plans by setting standards of conduct and mechanisms to protect plan funds,[5]

1. Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, §§ 2(3), 7, 61 Stat. 136, 137–38, 140 (1947) (codified as amended at 29 U.S.C. §§ 152(3), 157 (2018)); Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 76–77 (1997).

2. *See* 29 U.S.C. § 623(a)(2)–(3) (ADEA); 42 U.S.C. § 2000e-2(a)(2) (2018) (Title VII); *id*. §§ 12112(a)–(b)(1), 12112(b)(5)(A) (ADA); Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997).

3. 29 U.S.C. § 654(a)(1).

4. *See* Vergona Crane Co., 15 BNA OSHC 1782, 1992 WL 184539 (No. 88–1745, 1992) (affirming an OSHA violation in part because the worker was an employee, not an independent contractor).

5. *See* 29 U.S.C. § 1001(b).

while preempting state law claims,[6] but only applies to employees, not independent contractors.[7] And the Copyright Act grants initial copyright ownership to entities hiring employees but not those hiring independent contractors.[8]

Despite the key role of the term "employee" in these federal statutes, Congress has either not defined the term[9] or has given circular definitions that fail to clarify its meaning.[10] As a result, courts have been tasked with gap filling to provide meaning to the term "employee" in the various statutory schemes.[11] Over the years, courts have come up with multiple approaches to determine whether someone worked as an employee.[12]

After a series of Supreme Court cases from the mid-twentieth century through the early 2000s, courts have coalesced around a common law multifactor test.[13] But this test, consisting of roughly a dozen factors, gives no indication of which factors, if any, are the most important in the analysis.[14] With so many factors and no guidance as to their relative importance, it is no surprise that confusion and inconsistency abound. Confusion and inconsistency undermine predictability and certainty, which makes planning difficult for affected individuals and businesses[15] and results in a tremendous amount of litigation over whether hired individuals are employees or independent contractors.[16]

Moreover, given the variety of acts relying on employee status, a potential exists for inconsistent application and results of the test depending on which act applies. That is, an individual doing the same job could be an employee for copyright purposes but an

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6. JAYNE E. ZANGLEIN ET AL., ERISA LITIGATION 5 (5th ed. 2014) ("If an ERISA plan is involved, ERISA governs and preempts most state law claims.").

7. *See id.* at 34–35.

8. Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 198–99 (2014).

9. *E.g.*, *id.* at 209 (describing the Copyright Act's lack of a definition of "employee").

10. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' as 'any individual employed by an employer' is completely circular and explains nothing." (citation omitted)); Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 144 (2010) (describing circular definitions in Title VII, the ADA, and the ADEA).

11. *See* Patricia Davidson, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206–07 (1984).

12. See *infra* Section I for an overview of these approaches.

13. See *infra* Section I for an explanation of how courts, Congress, the American Law Institute, and commentators interchangeably refer to this test in its current and historical forms as the "right to control test," "common law multifactor test," "multifactor test," "common law multifactor right to control test," "common law agency test," and other combinations of the terms "right to control," "multifactor," and "common law."

14. *Darden*, 503 U.S. at 324; Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) ("No one of these factors is determinative."); NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968) ("[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive."); Vacca, *supra* note 8, at 199.

15. *See* Matthew T. Bodie, *Participating as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 682–83 (2013) ("Courts and commentators continue to bemoan its inability to deliver clear answers."); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298–99, 326 (2001) ("[T]he resulting multi-factored analysis becomes more complex and its outcomes less predictable."); *see also* Blake E. Stafford, Comment, *Riding the Line Between "Employee" and "Independent Contractor" in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1242 (2016) ("[T]he factors provide little clarity to business owners.").

16. *See* Stafford, *supra* note 15, at 1242.

independent contractor for purposes of Title VII, even though courts are applying the same test to identical facts. Such outcomes may impose unnecessary costs by furthering confusion and inconsistency. Then again, perhaps these costs are worthwhile given the different purposes of the acts.

This empirical study answers the questions of which factors in the common law multifactor test are the most and least important in several areas of federal law. In doing so, it examines whether the results are consistent with the stated purpose or purposes of adopting the test and compares the results under the different acts to determine if there is consistency across legislation using the same term and approach to defining "employee."

As described below, the results show that there is little consistency and predictability from using the common law multifactor test, and, although there is some consistency across legislation, the importance of the factors varies widely depending on which act applies. Sometimes these differences make sense given the purposes of the legislation, but sometimes they are inconsistent with the purposes or have no readily apparent justification.

Section I of this Article describes the development of the common law multifactor test for distinguishing employees from independent contractors as well as how and why the Supreme Court (or controlling agency) adopted this test for the NLRA, Copyright Act, ERISA, OSHA, Title VII, ADA, and ADEA. Section II explains the methodology of this study, including a description of content analysis and the specific data collected. Section III describes the results, including the different measures of importance and continua that group together factors sharing similar features with respect to the measures of importance. It then situates the results with the rationales for adopting the common law multifactor test in each area and highlights notable matters in the results. Section IV compares the continua across legislation to explore the similarities and differences and whether they are justified. This Section then proposes alternative approaches to achieve the goals of the examined legislation, while at the same time solving the problem of inconsistency within and across legislation.

I. COALESCENCE TOWARD THE COMMON LAW MULTIFACTOR TEST

To understand if the test to determine employee status is consistently applied within and across statutory schemes and also furthers the purpose of adopting such a test, it is necessary to understand what the test is and how it developed. This Section traces the history of the common law multifactor test from its history in eighteenth-century England through the early 2000s. For each body of legislation analyzed, this Section describes how and why the Supreme Court (or other controlling tribunal) adopted this test. It also illustrates how the Supreme Court has not only adopted a seemingly uniform test across these varied areas of the law but has done so with a common emphasis on predictability and certainty as well as a disdain for purposivism.[17]

17. Purposivism refers to the idea of interpreting statutes to carry out their legislative purpose. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119. Purposivism is derived from the notion that "[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947).

A. Early History

The distinction between employees and independent contractors originated from tort liability for the acts of third parties.[18] Prior to the introduction of respondeat superior, a master was responsible only for acts the master commanded the servant to perform.[19] Around the beginning of the eighteenth century, English courts began imposing liability on masters for their servants' acts regardless of whether the master had given explicit authority to perform the tort-causing act.[20] By 1765, Blackstone commented that a master's liability for the acts of its servant was an established common law principle.[21]

But during the early- to mid-nineteenth century, with an increase in industrial activity, there was an enormous growth in the number of individuals hired for a particular skill with the expectation that the hiring party would not be responsible for their conduct because they could not effectively control the individual's performance nor effectively insure against any potential negligence.[22] Courts struggled to draw the line between those who should be responsible for the harms to third parties and those who should escape liability.[23]

By the mid-nineteenth century, English and American courts circumscribed vicarious liability and respondeat superior by distinguishing between employees and independent contractors on the basis of the right to control.[24] The rationale for this limitation on vicarious liability and respondeat superior was that it protected hiring parties who purchased someone's services but had no realistic means to supervise the work, while also permitting a declaration of fault on the employer for controlling the injury-causing activity, failing to object to the work, failing to adequately supervise the work, or carelessly selecting the employee.[25]

And until the early- to mid-twentieth century, courts classified workers for respondeat superior purposes using the right to control; the more control a hiring party exercised over a hired party's performance, the more likely the court would find the hired party to be an employee.[26] If the hired party was an employee, then the hiring party would be liable for the employee's negligence.[27] But if the hired party was an independent contractor, then the hiring party could avoid liability.[28]

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18. Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 314 (2014).

19. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 96 (1984).

20. *Id.*

21. *Id.* at 97.

22. *See id.* at 98–100; *see also* Carlson, *supra* note 15, at 304.

23. Carlson, *supra* note 15, at 304.

24. Dowd, *supra* note 19, at 99–100; *see also* John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 339 (1991).

25. *See* Carlson, *supra* note 15, at 304; *see also* Robert L. Redfearn III, Comment, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1030 (2016).

26. Redfearn, *supra* note 25, at 1030.

27. Bernt, *supra* note 18, at 314.

28. *Id.*

In 1933, the American Law Institute published the *Restatement of Agency*, which aimed to analyze and explain the common law of agency.[29] Section 220 defined the term "servant" for purposes of tort liability to third parties.[30] This provision defined a servant as "a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."[31] The Restatement's adoption of the "right to control" test accurately reflected the common law practices. To distinguish between servants and independent contractors, the Restatement set forth a multifactor test listing the following factors to be considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer; and
(i) whether or not the parties believe they are creating the relationship of master and servant.[32]

In the comments, the Restatement explained that "[t]he relationship of master and servant is one not capable of exact definition," that "[i]t cannot . . . be defined in general terms with substantial accuracy," and that the factors listed above "are all considered in determining the question."[33] The common law multifactor test, as the Restatement described, was a flexible and ad hoc approach.[34]

Interestingly, and important for this Article, the Restatement also addressed the issue of interpreting the term in a statutory context.[35] The Restatement noted that "[s]tatutes have been passed in which the words 'servant' and 'agent' have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this [s]ubject."[36] Thus, the guidance was that the context and purpose of the statute was to be given weight when interpreting the term servant (now employee)

29. *See* RESTATEMENT (FIRST) OF AGENCY (AM. LAW INST. 1933); Burdick, *supra* note 1, at 87.
30. RESTATEMENT (FIRST) OF AGENCY § 220.
31. *Id.* § 220(1).
32. *Id.* § 220(2).
33. *Id.* § 220 cmt. b.
34. Burdick, *supra* note 1, at 89.
35. *Id.* at 90.
36. RESTATEMENT (FIRST) OF AGENCY § 220 cmt. d.

in a statute and to realize that the common law multifactor test may not be appropriate for particular statutory schemes.[37]

Although this test was almost exclusively used for imposing negligence liability on employers,[38] and considering the words of warning in the Restatement about interpreting the term in statutes, courts began using this common law test during the New Deal era in the areas of collective bargaining and worker protection.[39]

B. National Labor Relation Act (NLRA)

The first major development towards the establishment of the common law multifactor test in federal law occurred in the NLRA. After more than two decades of back-and-forth between Congress and the Supreme Court, the common law multifactor test became the test for distinguishing between employees and independent contractors.[40] It also serves as the basis for rejecting a purposive approach in interpreting the term "employee."[41]

The NLRA, enacted in 1935 as part of the Wagner Act, established a national policy in favor of collective bargaining.[42] It granted employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[43] It further banned employers from engaging in certain unfair labor practices, including interfering with, restraining, or coercing employees in exercising their collective bargaining rights; dominating or assisting labor organizations; discriminating based on union membership or participation in NLRA proceedings; and refusing to bargain in good faith with unions representing employees.[44] It also created the National Labor Relations Board (NLRB) to enforce the NLRA.[45]

Important for purposes of this Article is that the substantive rights granted under the Wagner Act pertained to employees.[46] The Wagner Act, in turn, defined employees as

> any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with,

37. *See* Burdick, *supra* note 1, at 90.

38. Carlson, *supra* note 15, at 305; Redfearn, *supra* note 25, at 1028.

39. Redfearn, *supra* note 25, at 1029–30.

40. *See infra* text accompanying notes 55–100.

41. *See infra* text accompanying notes 101–02.

42. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–33 (2002); *see* National Labor Relations Act of 1935 (Wagner Act), Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (codified as amended at 29 U.S.C. § 157 (2018)).

43. National Labor Relations Act of 1935 (Wagner Act) § 7.

44. Estlund, *supra* note 42, at 1533 (citing National Labor Relations Act of 1935 (Wagner Act) § 8).

45. National Labor Relations Act of 1935 (Wagner Act) §§ 3, 10.

46. *See, e.g.*, *id.* §§ 7–8 ("*Employees* shall have the right . . . . It shall be an unfair labor practice for an employer—(1) [t]o interfere with, restrain, or coerce *employees* . . . (4) [t]o discharge or otherwise discriminate against an *employee* . . . (5) [t]o refuse to bargain collectively with the representatives of his *employees* . . . ." (emphasis added)).

> any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.[47]

But other than excluding agricultural laborers, domestic servants, and some family relationships, the statutory definition of employee did not tell us much. The Wagner Act had no explicit exclusion for independent contractors.[48]

Because of the common law distinction between independent contractors and employees, the NLRB exempted independent contractors from the NLRA.[49] From 1935 until 1944, the NLRB distinguished between employees and independent contractors using the common law factors but also considered the purposes of the NLRA, as recommended in the Restatement, to have an expansive understanding of the term beyond what the common law provided.[50]

But in 1943, in *Hearst Publications v. NLRB*,[51] the Ninth Circuit rejected the NLRB's approach and held that the term "employee" in the NLRA was to be determined using the common law right to control test.[52] The Ninth Circuit cited to courts interpreting other federal statutes using the term "employee," such as the Federal Employers' Liability Act, Social Security Act, and Federal Safety Appliance Act, and noted that these courts interpreted employee using the common law right to control test.[53] It rejected the purposive approach that the NLRB advocated for.[54]

The Supreme Court reversed the Ninth Circuit and held that the term "employee" under the NLRA was not limited to how that term was interpreted under the common law test.[55] The respondents argued that because Congress did not explicitly define the term, it must be determined using the common law test for distinguishing employees from independent contractors.[56] The Court first rejected this argument by noting that although it "assumes there is some simple, uniform and easily applicable test which the courts have used . . . to determine whether persons doing work for others fall in one class or the other, [u]nfortunately this is not true."[57] The Court then explained how the right to control was used for determining tort liability under respondeat superior, but that the test is not controlling to determine the meaning in other contexts.[58] The Court also noted that the simplicity of the test was illusory and that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is

47. *Id.* § 2(3).
48. Burdick, *supra* note 1, at 76–77.
49. *Id.*
50. *See id.*
51. 136 F.2d 608 (9th Cir. 1943), *rev'd*, NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).
52. *Hearst*, 136 F.2d at 612–13.
53. *Id.* at 612.
54. *See id.*
55. *Hearst*, 322 U.S. at 134–35.
56. *Id.* at 120.
57. *Id.*
58. *Id.* at 120–21.

clearly one of independent, entrepreneurial dealing."[59] According to the Court, this illusion of simplicity was true with respect to tort liability and is more varied and problematic when applied to other areas of the law.[60]

Instead of using the common law right to control test, the Court held that a broader interpretation should be used, wherein economic factors should play an important role.[61] The Court justified this approach by explaining that the policies underlying the common law test differed from the policies underlying the Wagner Act.[62] In analyzing whether the hired parties in the case were employees or independent contractors, the Court explained that it "must be answered primarily from the history, terms, and purposes of the legislation" and that the term "'takes color from its surroundings . . . [in] the statute where it appears' and derives meaning from the context of [the] statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.'"[63]

As applied to the workers in question, the Court determined that the purposes of the Wagner Act allowed the NLRB to consider the economic facts of the employment.[64] The Court explained that the purpose of the Wagner Act was "to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power."[65] The Court noted that "[i]nequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of [independent contractors] as of [employees]" and that independent contractors, "when acting alone, may be as 'helpless in dealing with an employer,' as 'dependent . . . on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment' as [an employee]."[66] As such, the Court concluded that unions may be essential to help both groups deal with their employer[67] and that the Wagner Act should be interpreted broadly to cover more than employees as defined under the common law test.[68] As of 1944, *Hearst* established that statutory purpose was of primary importance in determining employee status and that in some contexts, the meaning of employee could vary from the common law standard.[69]

Shortly after *Hearst*, the Supreme Court decided two additional cases interpreting the term "employee" in the context of the Social Security Act (SSA) and the Fair Labor

59. *Id.* at 121.

60. *Id.*

61. *Id.* at 128–29; *see also* Bruntz, *supra* note 24, at 349–50; Redfearn, *supra* note 25, at 1032.

62. *See Hearst*, 322 U.S. at 125–29; Bruntz, *supra* note 24, at 350.

63. *Hearst*, 322 U.S. at 124 (omission in original) (first alteration in original) (first quoting United States v. American Trucking Ass'n, 310 U.S. 534, 545 (1940); then quoting S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

64. Burdick, *supra* note 1, at 106.

65. *Hearst*, 322 U.S. at 126 (citing National Labor Relations Act of 1935 (Wagner Act), Pub. L. No. 74-198, § 1, 49 Stat. 449, 450).

66. *Id.* at 127 (omission in original) (quoting Am. Steel Foundries Co. v. Tri-City Council, 257 U.S. 184, 209 (1921)).

67. *Id.*

68. *Id.* at 128–29; Burdick, *supra* note 1, at 107.

69. Carlson, *supra* note 15, at 319 (explaining why the legislative history supports a broad and purposive reading of the Wagner Act); *see* Burdick, *supra* note 1, at 90–92.

Standards Act (FLSA).[70] In *United States. v. Silk*,[71] the Court determined whether individuals who unloaded coal for a coal yard and truckers who made deliveries for their alleged employer were employees under the SSA.[72] The Court observed that the SSA lacked a helpful definition of employee, just like the Wagner Act, and like with the Wagner Act, the Court should construe the term in light of the purpose of the statute.[73]

That same day, the Court also handed down *Rutherford Food Corp. v. McComb*,[74] which dealt with the FLSA.[75] Similar to *Silk*, the Court noted the lack of a helpful definition in the FLSA.[76] After describing the purposes of the FLSA as trying to reduce "subnormal labor conditions," the Court held that "boners" working at a meat processing plant were employees covered under the FLSA's expansive definition of employee.[77] By 1947, the purposive approach to distinguishing employees from independent contractors had taken hold.

But three years later, Congress rejected the Supreme Court's decision in *Hearst*, including its purposive approach, when it enacted the Taft-Hartley Act of 1947.[78] The Taft-Hartley Act amended the NLRA to explicitly exclude independent contractors from the definition of employee.[79] The NLRA now defines employee as it did under the Wagner Act, but adds, in relevant part, that an employee "shall not include . . . any individual having the status of an independent contractor."[80]

The change to the statutory definition, standing alone, did not necessarily reject the Court's decision in *Hearst* as Congress did not provide an alternative test in the statute itself to distinguish employees from independent contractors.[81] However, the legislative history provided a strong expression of Congressional intent.[82]

The House Report extensively attacked the NLRB's and Supreme Court's opinions in *Hearst*.[83] The report introduced the change to the definition of employee by noting:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc*. (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond

70. Carlson, *supra* note 15, at 319–20; *see also* Redfearn, *supra* note 25, at 1032.

71. 331 U.S. 704 (1947).

72. Carlson, *supra* note 15, at 319.

73. *Silk*, 331 U.S. at 711–12.

74. 331 U.S. 722 (1947).

75. *Rutherford*, 331 U.S. at 723.

76. *Id.* at 728.

77. *Id.* at 727–29; *see also* Bernt, *supra* note 18, at 318; Carlson, *supra* note 15, at 320.

78. Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, § 101, 61 Stat. 136, 136–37 (1947) (codified as amended at 29 U.S.C. § 151 (2018)); Bruntz, *supra* note 24, at 350; Burdick, *supra* note 1, at 77–78; Carlson, *supra* note 15, at 321–22; Stafford, *supra* note 15, at 1227–28.

79. Bernt, *supra* note 18, at 318; Carlson, *supra* note 15, at 321.

80. Labor Management Relations Act (Taft-Hartley Act) § 2(3).

81. Carlson, *supra* note 15, at 321.

82. *Id.*

83. Burdick, *supra* note 1, at 78.

> anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board.[84]

But the critique of *Hearst* continued.[85] The House Report explained,

> In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.[86]

The House Report concluded its attack on *Hearst* with this passage:

> It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee."[87]

The Conference Committee Report was less harsh than the House Report.[88] Instead, it explained,

> The House bill excluded from the definition of "employee" individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc*. (1944), 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were "employees" within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be "employees" were not in fact and in law really independent contractors.[89]

As a result of the Taft-Hartley Act, Congress instructed the NLRB and courts to distinguish between employees and independent contractors using general agency principles, namely, the preexisting common law test.[90] The NLRB and, as demonstrated shortly, the Supreme Court took this legislative history to heart and adopted the common law multifactor test as the test for distinguishing employees from independent contractors.[91]

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84. H.R. REP. NO. 80-245, at 18 (1947).

85. *See* Burdick, *supra* note 1, at 113.

86. H.R. REP. NO. 80-245, at 18. *Contra* Burdick, *supra* note 1, at 113–14 (critiquing the House Report's commentary on *Hearst*).

87. H.R. REP. NO. 80-245, at 18.

88. *See* Burdick, *supra* note 1, at 119.

89. H.R. REP. NO. 80-510, at 32–33 (1947) (Conf. Rep.).

90. Burdick, *supra* note 1, at 121; *see* Carlson, *supra* note 15, at 322.

91. *See* Burdick, *supra* note 1, at 121 (describing how the Supreme Court adopted the right to control test); Carlson, *supra* note 15, at 323–24 (describing the NLRB's first decision after the Taft-Hartley Act was enacted).

Interestingly, in 1948, Congress also amended the SSA to exclude "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor" from the definition of "employee."[92] And more interestingly, Congress failed to amend the FLSA in the same way, so the Supreme Court's decision in *Rutherford Food*, which used an expansive test and purposivism, still remains in place.[93]

Coincidently, about a decade after the Taft-Hartley Act, the American Law Institute published the *Restatement (Second) of Agency*.[94] Like the original, it included a multifactor test to distinguish between employees and independent contractors but with one additional factor—"whether the principal is or is not in business."[95]

The Supreme Court's definitive ruling on the now-amended NLRA and how to distinguish between employees and independent contractors came in 1968, when it decided *NLRB v. United Insurance Co. of America*.[96] After recounting its decision in *Hearst* and how economic and policy considerations within the labor field set the standard, the Court acknowledged Congress's amendment to the NLRA and declared that the common law test was the standard to be used.[97] The Court noted that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[98] And although it did not cite to the Restatement's multifactor test, the Court described several of its listed factors.[99] Thus, the common law test, with its multitude of factors, is the test under the NLRA.[100] Consequently, purposivism in interpreting the meaning of the term employee has been soundly rejected,[101] despite the Restatement's recommendation to the contrary.[102]

C. Copyright Act

The next major development in interpreting the term "employee" in federal law came about two decades later in the context of copyright law. This development standardized the factors used across statutory schemes adopting the common law multifactor test.

The Copyright Act provides exclusive rights to authors and subsequent copyright owners in a wide range of creative works.[103] Important for purposes of this study, the act

92. Bernt, *supra* note 18, at 318 (quoting Social Security Act of 1948, § 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. § 3121(d) (2018))); Carlson, *supra* note 15, at 325 (quoting Social Security Act of 1948, § 2(a)).

93. *See, e.g.*, Bernt, *supra* note 18, at 318; Carlson, *supra* note 15, at 325; Redfearn, *supra* note 25, at 1033 n.46.

94. RESTATEMENT (SECOND) OF AGENCY (AM. LAW INST. 1958).

95. *Id.* § 220(2).

96. 390 U.S. 254 (1968).

97. *United Ins. Co.*, 390 U.S. at 256.

98. *Id.* at 258.

99. *See id.* at 259–60.

100. *See id.*

101. *See* Bruntz, *supra* note 24, at 350; Burdick, *supra* note 1, at 121.

102. *See supra* notes 35–37 and accompanying text.

103. *See* 17 U.S.C. § 106 (2018).

provides that an author is the initial owner of the copyright.[104] In many circumstances, determining authorship is easy, because the general rule is that "the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression."[105]

The exception to this general rule is the work-made-for-hire doctrine.[106] In relevant part, this doctrine provides that the copyright in "a work prepared by an employee within the scope of his or her employment"[107] is consequently owned by the employer.[108] Beyond ownership, the work-made-for-hire doctrine is also important because it helps determine how long the copyright lasts,[109] whether subsequent transfers of the copyright can be terminated,[110] and whether moral rights exist.[111] But like many of the areas of federal law, Congress failed to define the term "employee."[112]

Prior to the Supreme Court's 1989 decision in *Community for Creative Non-Violence v. Reid*,[113] courts used a variety of tests to determine employee status.[114] Some courts focused on whether "the hiring party retains the right to control the product."[115] Other courts used the actual control test, which was a variation of the "right to control the product" test.[116] Under this test, courts looked at whether the hiring party *actually* asserted control over creation of the work.[117]

Another test was known as the agency test.[118] Under this test, courts determined whether a hired party was an employee or independent contractor by using the meaning of the word "employee" as understood under agency law.[119] Courts applying this test

104. *Id.* § 201(a).

105. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). A poet who composes a sonnet while overlooking a scenic canyon while on vacation is an easy example of the traditional notion of authorship.

106. Vacca, *supra* note 8, at 198.

107. 17 U.S.C. § 101 (defining work made for hire).

108. *Id.* § 201(b).

109. *Compare id.* § 302(a) (providing that copyright generally persists for the life of the author plus seventy years), *with id.* § 302(c) (providing that copyright in a work made for hire "endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first").

110. *Id.* § 203(a) ("In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . is subject to termination . . . ."); *see also id.* § 304(c), (d) (showing the same exclusion applies to a different set of transfers).

111. *See* Vacca, *supra* note 8, at 199.

112. *Id.* at 209. For a full account of the legislative history of this provision, see I.T. Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y U.S. 210, 221–41 (1988) and Vacca, *supra* note 8, at 206–09.

113. 490 U.S. 730 (1989).

114. *See* Michael B. Landau, *"Works Made for Hire" After* Community for Creative Non-Violence v. Reid*: The Need for Statutory Reform and the Importance of Contract*, 9 CARDOZO ARTS & ENT. L.J. 107, 120–21 (1990).

115. *Reid*, 490 U.S. at 738 (footnote omitted).

116. *See id.* at 739.

117. *Id.* at 742; Landau, *supra* note 114, at 123–27.

118. *Reid*, 490 U.S. at 739.

119. Vacca, *supra* note 8, at 213 (citing Easter Seal Soc'y for Crippled Children & Adults, Inc. v. Playboy Enter., 815 F.2d 323, 334–35 (5th Cir. 1987)).

used the *Restatement (Second) of Agency* as a guide, including the factors noted above.[120] The agency test is, in other words, the common law multifactor test.[121]

The final test used by the lower courts was the formal, salaried employee test.[122] Under this test, courts initially looked to see if the hired party "[held] himself or herself out as a freelancer."[123] If so, then the hiring party should have anticipated the work would not be a work made for hire.[124] But if the relationship was ambiguous, then courts examined a variety of factors, most of which were a subset of the factors identified under the agency test.[125] These factors included:

> (1) whether the [hired party] worked in his or her own studio or on the premises of the [hiring party]; (2) whether the [hiring party] is in the regular business of creating works of the type purchased; (3) whether the [hired party] works for several [hiring parties] at a time, or exclusively for one; (4) whether the [hiring party] retains authority to assign additional projects to the [hired party]; (5) the tax treatment of the relationship by the parties; (6) whether the [hired party] is hired through the channels the [hiring party] customarily uses for hiring new employees; (7) whether the [hired party] is paid a salary or wages, or is paid a flat fee; and (8) whether the [hired party] obtains from the [hiring party] all benefits customarily extended to its regular employees.[126]

Unlike the other tests, the formal, salaried employee test did not inquire into the degree of control and input the hiring party exercised.[127]

Because of the four different approaches to determining whether a hired party was an employee or independent contractor, the Supreme Court granted certiorari in *Reid* to resolve this circuit split and interpret what Congress meant by the term "employee" in the work-made-for-hire doctrine.[128] Ultimately, the Court adopted the common law multifactor test (referred to by the Court as the "agency test") because it was "well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"[129] Since the Court explained,

> Congress used the term "employee" in conjunction with the term "scope of employment"—a widely used term of art in agency law—and did not use any other language in the statute to indicate that it meant something other than the

120. *Id.* at 213–14.

121. Creating unnecessary confusion, the Supreme Court referred to the right to control the product test as "the right to control test." *Id.* at 221. The confusion flows from the Court's misreading of the right to control cases, which actually apply the agency test. *Id.* The Court reframed these cases as focusing on control of the product and subsequently rejected this reframed test. *Id.*

122. *See Reid*, 490 U.S. at 739.

123. Dumas v. Gommerman, 865 F.2d 1093, 1105 (9th Cir. 1989).

124. *Id.*

125. *See id.*

126. *Id.* (footnotes omitted).

127. *See id.*

128. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 736 (1989); Vacca, *supra* note 8, at 218.

129. *Reid*, 490 U.S. at 739 (omission in original) (alteration in original) (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981)).

> common law notion of the relationship between employers and employees, the common law test was appropriate.[130]

The Court then fleshed out the test.[131] First, it stated that in determining whether a hired party is an employee, "we consider the hiring party's right to control the manner and means by which the product is accomplished."[132] Next, citing section 220(2) of the *Restatement (Second) of Agency*, the Court listed the following factors as relevant to this inquiry:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [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; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.[133]

Interestingly, this list of factors is not an exact match with the factors listed in the Restatement.[134] The Court failed to include some of the Restatement factors and added new factors not listed in the Restatement.[135] For example, the Court introduced the following factors: "the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the hired party's role in hiring and paying assistants; and the provision of employee benefits and tax treatment of the hired party."[136] Likewise:

> the Court omitted the following factors [listed] in the Restatement: whether or not the hired party is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; and whether or not the parties believe they are creating the relations of master and servant.[137]

Other than noting that "[n]o one of these factors is determinative," the Court failed to provide any guidance as to how these factors should be balanced.[138] In the course of justifying the common law multifactor test, the Court explained that this interpretation furthered "Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership."[139]

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130. Vacca, *supra* note 8, at 219; *see also Reid*, 490 U.S. at 740.

131. *See Reid*, 490 U.S. at 751–52.

132. *Id.* at 751.

133. *Id.* at 751–52 (footnotes omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958)).

134. Assaf Jacob, *Tort Made for Hire—Reconsidering the* CCNV *Case*, 11 YALE J.L. & TECH. 96, 109 (2009).

135. *Id.*

136. *Id.* (citing *Reid*, 490 U.S. at 751–52).

137. *Id.* at 110 (citing *Reid*, 490 U.S. at 751–52).

138. *Reid*, 490 U.S. at 752; Vacca, *supra* note 8, at 220.

139. *Reid*, 490 U.S. at 749.

In addition to its justification for the common law multifactor test, the Court also explained why it rejected the other proposed tests.[140] The Court explained that the actual control test undermined predictability and certainty because the parties would not be able to know until late in the process whether the hiring party had actually wielded sufficient control over the hired party.[141] The Court rejected the right to control the product test because it focused on the relationship between the hiring party and the product, rather than the hiring and hired parties.[142] Finally, the Court rejected the formal, salaried employee test because, although there was some support for this approach in the legislative history, the statute used the term "employee" rather than "formal employee" or "salaried employee" and amici could not agree on the standard under this test.[143]

Thus, the Court's adoption of the common law test in *Reid* rested primarily on the underlying policy concern of enhancing certainty and predictability.[144] As illustrated in the next Part, in addition to clarifying the test used to distinguish employees from independent contractors under the Copyright Act, *Reid* also served as the foundation for generalizing what "employee" means in statutes that do not define it or define it circularly.

D. Employee Retirement Income Security Act (ERISA)

The next major development in interpreting the term "employee" in federal law came in the context of ERISA. This development was the key for the generalizability of the common law multifactor test across federal legislation.

Congress designed ERISA to, inter alia, protect the interests of participants in employee benefit plans by requiring disclosures; setting standards of conduct; and providing remedies, sanctions, and access to federal courts.[145] A key issue is whether an employee welfare benefit plan, which is governed by ERISA, exists.[146] If so, then ERISA preempts state law claims.[147]

A key element in determining if a plan qualifies as an employee welfare benefit plan under ERISA is whether the benefits are provided to participants (or the participants' beneficiaries).[148] ERISA defines "participant," in relevant part, as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit."[149]

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140. *See id.* at 741–42.

141. *Id.* at 750.

142. *Id.* at 741. As noted above, this was based on a misunderstanding of the test. See *supra* note 121 for a discussion of the Court's misunderstanding of the test.

143. *Reid*, 490 U.S. at 742 n.8.

144. *See id.* at 749–50.

145. 29 U.S.C. § 1001(b) (2018).

146. *See* ZANGLEIN ET AL., *supra* note 6, at 5.

147. *Id.*

148. *Id.* at 8.

149. 29 U.S.C. § 1002(7).

Thus, employee status is key. But ERISA unhelpfully and circularly defines "employee" as "any individual employed by an employer."[150]

Three years after *Reid*, the Supreme Court granted certiorari in *Nationwide Mutual Insurance Co. v. Darden*[151] to resolve what "employee" meant under ERISA.[152] The district court in *Darden* applied the common law multifactor test and held the plaintiff was an independent contractor rather than an employee.[153] On appeal, the Fourth Circuit vacated the decision.[154] The Fourth Circuit held that although the plaintiff would not qualify as an employee under traditional principles of agency law, the declared policies and principles of ERISA mandated a broader understanding of employee.[155] The Fourth Circuit's decision relied upon the Supreme Court's decisions in *Hearst* and *Silk*, covering the NLRA and SSA, respectively, and took a purposive approach to interpreting the term.[156] To a certain extent, this approach made sense. Congress designed ERISA to provide security and stability to work-based retirement and health benefits, so construing "employee" broadly would fulfill the general purpose of the legislation.[157]

On appeal, the Supreme Court interpreted "employee" to incorporate the traditional agency law criteria for distinguishing between employees and independent contractors.[158] The Court recounted its then-recent decision in *Reid*, including the principle that when Congress uses terms that have a settled common law meaning, courts should infer, unless the statute otherwise dictates, that Congress meant to incorporate that meaning.[159] The Court then held that the same rationale applies to ERISA's definition of employee.[160] After declaring the common law test applies to ERISA, the Court listed the factors noted in *Reid* and cited to the *Restatement (Second) of Agency*, as well as its NLRA decision in *United Insurance*.[161] At this point, a strong foundation had been laid for having a uniform understanding of "employee" across federal law.

In rejecting the Fourth Circuit's reliance on *Hearst* and *Silk* and the principle that the term "employee" should be construed "in the light of the mischief to be corrected and the end to be attained," the Court declared that these cases were "feeble precedents for unmooring the term from the common law."[162] Although the Court had read the term "employee" more broadly in these cases, because Congress amended the statutes to reject independent contractors under the common law, these cases did not provide support for

150. *Id.* § 1002(6); *accord* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' as 'any individual employed by an employer' is completely circular and explains nothing." (citation omitted)).

151. 503 U.S. 318 (1992).

152. *Darden*, 503 U.S. at 322.

153. *Id.* at 321.

154. *Id.*

155. *Id.*

156. *Id.*

157. Carlson, *supra* note 15, at 332.

158. *Darden*, 503 U.S. at 319.

159. *Id.* at 322–23.

160. *Id.* at 323.

161. *Id.* at 323–24.

162. *Id.* at 324 (quoting Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986)).

continuing to read other statutes more broadly.[163] In addition, the Court noted that the Fourth Circuit's approach was "infected with circularity and unable to furnish predictable results."[164] And although acknowledging that the traditional common law multifactor test was not a "paradigm of determinacy," several of the factors were within an employer's knowledge to permit categorical judgments.[165] Moreover, by adopting the common law test, this would comport with other precedent, such as *Reid* and *United Insurance*.[166] Thus, *Darden* formally abandoned *Hearst*'s and *Silk*'s purposive approach to construing the term "employee" in federal statutes and, like in *Reid*, focused on promoting certainty and predictability not just for employers but across federal statutory schemes.[167]

E. Occupational Safety and Health Act (OSHA)

Three months after *Darden*, the Occupational Safety and Health Review Commission (OSHRC) was confronted with the issue of how to distinguish employees from independent contractors under OSHA. Congress enacted OSHA in 1970 after decades of industry-specific legislation.[168] The purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[169] To this end, OSHA requires an employer to "furnish to each of his *employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his *employees*"[170] and to comply with promulgated OSHA standards.[171]

As such, only an "employer" may be cited for a violation of the act.[172] Like with the NLRA and ERISA, the definitions in OSHA are circular. "Employer" is defined as "a person engaged in a business affecting commerce who has employees," but not federal, state, or local governments.[173] Unhelpfully, "employee" is defined as "an employee of an employer who is employed in a business of his employer which affects commerce."[174]

Prior to *Darden*, the OSHRC had considered several factors in determining whether someone was an employee, including:

(1) Whom do the workers consider their employer?

(2) Who pays the workers' wages?

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163. *Id.* at 324–25.

164. *Id.* at 326.

165. *Id.* at 327.

166. *See id.*

167. *See id.* at 324–27; Carlson, *supra* note 15, at 333, 338.

168. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590; MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 4 (2019).

169. 29 U.S.C. § 651(b) (2018).

170. *Id.* § 654(a)(1) (emphasis added).

171. *Id.* § 654(b); ROTHSTEIN, *supra* note 168, at 9.

172. Vergona Crane Co., 15 BNA OSHC 1782, 1783, 1992 WL 184539, at *1 (No. 88–1745, 1992).

173. 29 U.S.C. § 652(5).

174. *Id.* § 652(6).

(3) Who has the responsibility to control the workers?
(4) Does the alleged employer have the power to control the workers?
(5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
(6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
(7) How are the workers' wages established?[175]

But in *Secretary of Labor v. Vergona Crane Co.*,[176] the OSHRC noted that the Supreme Court had recently decided *Darden* and held that, unless indicated otherwise, the term "employee" in federal statutes should be interpreted under the common law test using the factors laid out in *Reid*.[177] Although the OSHRC did not officially reject its prior approach to determining employee status in *Vergona Crane*,[178] the vast majority of the decision focused on the *Reid* factors.[179] Of note, the OSHRC in *Vergona Crane* did not reject purposivism or articulate any other animating principles for adopting the common law test.[180]

In subsequent decisions, the OSHRC and courts interpreting OSHA have adopted *Darden* and *Reid* as the applicable test.[181] Although the Supreme Court has not yet definitively declared that the common law multifactor test determines "employee" under OSHA, the OSHRC and courts have seen the writing on the wall.[182]

F. Antidiscrimination Statutes

A final area of federal law where the distinction between employee and independent contractor status is important is the antidiscrimination statutes, namely Title VII, the ADA, and the ADEA. These acts prohibit discrimination on the basis of race, color, religion, sex, national origin, disability, and age, but only protect employees, not independent contractors.[183]

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175. *Vergona Crane*, 1992 WL 184539, at *2 (citing Van Buren-Madawaska Corp., 13 BNA OSHC 2157, 2158 (No. 87–214, 1989)).

176. 15 BNA OSHC 1782, 1992 WL 184539 (No. 88–1745, 1992).

177. *Vergona Crane*, 1992 WL 184539, at *2–3.

178. *Id*. at *5 (reasoning that the result in the case was the same regardless of which test applied).

179. *See id*. at *3–4.

180. *See id.* at *2–5.

181. *See, e.g.*, Absolute Roofing & Constr., Inc. v. Sec'y of Labor, 580 F. App'x 357, 361, 363 n.3 (6th Cir. 2014); Slingluff v. OSHRC, 425 F.3d 861, 867–68 (10th Cir. 2005); Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941–42 (9th Cir. 1994); R&S Roofing, LLC, 24 BNA OSHC 2151, 2014 WL 901286, at *3–4 (No. 12-2427, 2014) (ALJ). *But see* Sec'y of Labor v. Trinity Indus., Inc., 504 F.3d 397, 402 (3d Cir. 2007) (rejecting *Darden* as the standard for OSHA).

182. Bodie, *supra* note 15, at 679–81.

183. 29 U.S.C. § 623(a)(2)–(3) (2018) (ADEA); 42 U.S.C. § 2000e-2(a)(2) (2018) (Title VII); *id.* §§ 12112(a)–(b)(1), 12112(b)(5)(A) (ADA); *e.g.*, Carlson, *supra* note 15, at 363 (listing characteristics against which discrimination is prohibited in antidiscrimination acts); Maltby & Yamada, *supra* note 2, at 239–40 (explaining that antidiscrimination acts only prohibit such discrimination against employees and not independent contractors); Menetrez, *supra* note 10, at 143 (affirming that antidiscrimination protections extend only to employees and not independent contractors).

Title VII makes it unlawful for an employer "to limit, segregate, or classify his *employees* . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an *employee*, because of such individual's race, color, religion, sex, or national origin."[184] The ADEA uses identical language but prohibits discrimination based on the employee's age and prohibits "reduc[ing] the wage rate of any *employee* in order to comply with this chapter."[185] And the ADA prohibits employers from "limiting, segregating, or classifying a[n] . . . *employee* in a way that adversely affects the opportunities or status of such . . . *employee* because of the disability of such . . . *employee*"[186] and "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . *employee*, unless" the employer can demonstrate that doing so would impose an undue hardship.[187] Thus, an individual who is an independent contractor, rather than an employee, would not be a proper plaintiff under the antidiscrimination statutes.[188]

Furthermore, these acts only apply to employers with a certain number of employees.[189] Title VII and the ADA only apply to employers with fifteen or more employees.[190] And the ADEA only applies to employers with twenty or more employees.[191] Thus, a case under the antidiscrimination statutes will be dismissed if the defendant is not properly classified as an employer, which depends on determining the number of employees.[192]

Title VII, the ADA, and the ADEA define the term "employee" in a similar way: "An individual employed by an employer."[193] Because of this, these antidiscrimination acts can be grouped together when considering how to distinguish between employees and independent contractors.[194] But as with ERISA, the NLRA, and OSHA, the definitions under the antidiscrimination acts are completely circular and explain nothing.[195] The legislative histories provide little assistance.[196] For example, the legislative history of Title VII states that "employee" is "defined for the purposes of this title in the manner common for Federal statutes."[197] Therefore, as with the other federal statutes, the task of determining the test for employee status has been left to the courts.[198]

184. 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

185. 29 U.S.C. § 623(a)(2)–(3) (emphasis added).

186. 42 U.S.C. § 12112(b)(1) (emphasis added).

187. *Id.* § 12112(b)(5)(A) (emphasis added).

188. Menetrez, *supra* note 10, at 145.

189. Carlson, *supra* note 15, at 363.

190. 42 U.S.C. §§ 2000e(b), 12111(5).

191. 29 U.S.C. § 630(b).

192. *See* Menetrez, *supra* note 10, at 145.

193. 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 2000e(f) (Title VII); *id.* § 12111(4) (ADA).

194. *See* Maltby & Yamada, *supra* note 2, at 241.

195. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003); Menetrez, *supra* note 10, at 144.

196. Davidson, *supra* note 11, at 206–07.

197. H.R. REP. NO. 88–914, at 27 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402.

198. Davidson, *supra* note 11, at 206–07.

Until the Supreme Court's decision in *Clackamas Gastroenterology Associates v. Wells*,[199] the lower courts used a variety of approaches for determining who counted as an employee under the antidiscrimination statutes.[200] Some courts saw the writing on the wall in *Darden* and used the common law multifactor test.[201] Others applied a broader, economic realities test as used under the FLSA.[202] And others used a hybrid test, which combined aspects of the previous two.[203]

Finally, in 2003, the Supreme Court provided clear guidance on this issue in *Wells*. Technically, *Wells* dealt with the issue of whether shareholders and directors of a professional corporation counted as employees under the ADA rather than how to distinguish between employees and independent contractors.[204] Nonetheless, the Court's broad pronouncement of the law in *Wells* solidified that the common law multifactor test is applicable to these antidiscrimination acts.[205]

The Court in *Wells* began its discussion by referring to *Darden* and its holding that the common law test applied when Congress uses the term "employee" without defining it (or nominally defining it).[206] The Court rejected the Ninth Circuit's purposive approach, which focused on the purpose of the ADA: "ridding the Nation of the evil of discrimination."[207] The Court rejected this purposive approach because there was a conflicting policy goal of sparing smaller firms from the ADA's reach[208] and because Congress had previously "overridden judicial decisions that went beyond the common law in an effort to correct 'the mischief' at which a statute was aimed."[209]

The Court then adopted the common law multifactor test.[210] It cited the Restatement's list of factors and noted the particular importance of the right to control.[211] Buttressing its argument was the fact that the Equal Employment Opportunity Commission, which enforces the ADA and other antidiscrimination acts, used the *Darden* and *Reid* factors to distinguish between employees and independent contractors.[212] Although *Wells* was an ADA case and the Supreme Court had not specifically addressed which test should be used under Title VII and the ADEA, given that the Court noted the similar definition of "employee" in these acts, the Court clearly intended *Wells* to apply to all three antidiscrimination acts.[213]

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199. 538 U.S. 440 (2003).

200. Menetrez, *supra* note 10, at 148, 157.

201. *See id.* at 148; *see also* Bodie, *supra* note 15, at 679.

202. Menetrez, *supra* note 10, at 148.

203. *Id.*

204. *Wells*, 538 U.S. at 442.

205. *Id.* at 448; Bodie, *supra* note 15, at 679–80; Menetrez, *supra* note 10, at 157–58.

206. *Wells*, 538 U.S. at 444–45.

207. *Id.* at 446–47.

208. *Id.* at 447.

209. *Id.* (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992)).

210. Bodie, *supra* note 15, at 679–80.

211. *Wells*, 538 U.S. at 448 (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958)).

212. *Id.* at 448–49. With respect to the narrower issue in *Wells*—whether shareholders or directors qualified as employees—the Court adopted a modified test that focused on six factors that are more closely aligned with the unique relationship between a company and its shareholders or directors. *Id.* at 449–50.

213. Menetrez, *supra* note 10, at 157 n.119.

Interestingly, in a dissenting opinion in *Wells*, Justice Ginsburg noted that the hiring party should not be able to avoid liability by not counting shareholders and directors as employees for antidiscrimination purposes when it selected this business entity to qualify these same individuals as employees for ERISA purposes.[214] Justice Ginsburg seemed troubled by the inconsistency in this case,[215] and this is especially so given the nearly identical, circular definitions of "employee" under the antidiscrimination statutes and ERISA. As applied to the facts of *Wells*, there seems to be inconsistent treatment of the hired parties under ERISA and the ADA despite the rejection of a purposive approach to interpreting the statutes.

By 2003, the Supreme Court had adopted or strongly hinted at adoption of the common law multifactor test for many major federal statutory schemes that rely on the distinction between employees and independent contractors. And in many of these cases, it expressly rejected a purposive approach to interpreting the term "employee."[216] Moreover, the animating policy concerns for some of these interpretations were furthering predictability and certainty for affected parties.[217]

But in none of the cases did the Court indicate which factors, if any, in the common law multifactor test were most important. And although predictability and certainty within and between statutes were oftentimes important driving forces, we are left to wonder whether this result has been achieved.

II. METHODOLOGY

This study answers the questions left open after adoption of the common law multifactor test discussed above. It determines which factors are the most and least important and whether the policy concerns of predictability and certainty, which led to the adoption of this test, are being furthered. This Section describes the methodology used in this study, including a general description of content analysis[218] and the specific data collected.[219]

214. *Wells*, 538 U.S. at 453 (Ginsburg, J., dissenting).

215. *See id.* ("I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes.").

216. *See supra* notes 100–01, 166–67, 206–08 and accompanying text.

217. In 2006, the American Law Institute published the *Restatement (Third) of Agency* that modernized the language from section 220 of the *Restatement (Second) of Agency* (changing "servant" to "employee") but kept right to control as the standard. *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958), *with* RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006). Despite the modernization, the doctrine remains the same, although the factors were moved to the comments rather than remaining in the text. *Id.* § 7.07 cmt. f; Bodie, *supra* note 15, at 677 n.81.

218. *See infra* Part II.A.

219. *See infra* Part II.B.

A. Overall Approach

This study's basic methodology is the well-established content analysis technique.[220] Researchers using content analysis "systematically read and empirically analyze textual data sources."[221] As empirical legal scholar Jason Rantanen described,

> Underlying the technique of content analysis is the fundamental idea that judicial opinions should be read systematically and relevant information about each opinion recorded while or shortly after the opinion is read. Content analysis thus holds as its goal the creation of a set of systematically collected data—that, ideally, can be empirically tested—about the shape and contours of the law, and stands in contrast to other approaches to legal scholarship that focus on carefully interpreting a small set of opinions that are considered "important."[222]

Content analysis involves three steps.[223] First, the researcher collects cases likely containing information about the issues being explored.[224] Second, the researcher systematically reads and codes the collected cases to collect basic information about the case itself and case content relating to the relevant legal issues.[225] Finally, the researcher analyzes data, describes patterns, and, if applicable, tests hypotheses.[226]

As with any methodology, limitations exist.[227] With a content analysis study, reproducibility and subjectivity are two issues that may undermine a study's reliability.[228] With reproducibility, the concern is whether others can take the same steps and come up with the same results.[229] To maximize reproducibility, a researcher should follow standardized procedures when collecting and coding data.[230] The procedures used in this study are described below.

The second concern is subjectivity—the coders entering information based on their own beliefs and interpretations rather than the content of the case itself.[231] Although every datum of a case and its content could involve some measure of subjectivity, reproducibility may be maximized by following a set of best practices.[232] Some information in this study was either obtained directly from Westlaw or automatically coded by a computer, and involved no human determinations.[233] Despite attempts to

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220. *See generally* KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK 1 (2002) (describing content analysis and noting that it "is perhaps the fastest-growing technique in quantitative research").

221. Jason Rantanen, *The Federal Circuit's New Obviousness Jurisprudence: An Empirical Study*, 16 STAN. TECH. L. REV. 709, 722 (2013).

222. *Id.* at 722–23 (footnote omitted).

223. *Id.* at 723.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id*.

228. *Id.* at 723–24.

229. *See* NEUENDORF, *supra* note 220, at 112.

230. *See* Rantanen, *supra* note 221, at 723.

231. *Id.* at 723–24.

232. *Id.* at 723.

233. These data included case name; citation; URL; tribunal name; which regional circuit, if any, the tribunal falls within; and the year the case was decided.

automate much of the coding, humans collected a great deal of the information, which involved subjective determinations. To minimize subjectivity and maximize reproducibility and reliability, the vast majority of the coding was categorical, which, as described below, required coders to make an assessment within a set of predetermined and predefined categories.

To address reproducibility and subjectivity, independent coders read a sample of cases and coded the applicable fields pursuant to the codebook.[234] The reliability of the coding was assessed using either average pairwise percent agreement[235] or Fleiss' kappa.[236] Average pairwise percent agreement, although it is not a perfect measure of intercoder reliability because it does not account for chance agreement, gives a fairly strong indication of agreement especially when there is little variation in the coding.[237] Fleiss' kappa accounts for chance agreement and is superior to the commonly used Cohen's kappa in this scenario because Fleiss' kappa can be used to calculate the reliability for three or more coders.[238] The results of the intercoder reliability testing provide a strong indication of the reproducibility and lack of subjectivity of the results reported in this Article.[239]

Although reliability is important to consider in content analysis studies, doing so in the context of cases raises additional concerns, including unobserved reasoning, selection bias, and strategic behavior.[240] Drawing conclusions about legal principles based on judicial opinions assumes that the opinion is an accurate representation of the judge's thoughts on the issue.[241] But this assumption might be false.[242] The author of the opinion might fail to reveal his or her true reasoning.[243] Another concern is selection bias.[244]

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234. See *infra* Appendix B for the codebook.

235. *See* NEUENDORF, *supra* note 220, at 161.

236. KILEM LI GWET, HANDBOOK OF INTER-RATER RELIABILITY 87 (4th ed. 2014); *see also* NEUENDORF, *supra* note 220, at 161.

237. NEUENDORF, *supra* note 220, at 149; *see also* CRISTINA GRISOT, COHESION, COHERENCE AND TEMPORAL REFERENCE FROM AN EXPERIMENTAL CORPUS PRAGMATICS PERSPECTIVE 139 (2018) (discussing the importance of avoiding the problem of chance agreement through chance-corrected coefficients).

238. *See* GWET, *supra* note 236, at 87 n.4; NEUENDORF, *supra* note 220, at 161. One limitation of Fleiss' kappa is that it can only be used for nominal data, but because the human-coded variables in this study are nominal, its use is proper. GWET, *supra* note 236, at 87 n.4.

239. To calculate the average pairwise percent agreement and Fleiss' kappa, thirty cases from the collection of cases were randomly sampled, and each coder independently coded values for all of the human-entered fields in the study. Each coders' entries were then copied into spreadsheets for each variable and the average pairwise percent agreement and Fleiss' kappa were calculated using ReCal3. *See* Deen Freelon, *ReCal3: Reliability for 3+ Coders*, DFREELON.ORG, http://dfreelon.org/utils/recalfront/recal3/ [https://perma.cc/8WWG-KSFS] (last visited Nov. 1, 2019). Appendix A reports the results of the intercoder reliability testing. I performed several rounds of intercoder reliability testing with adjustments made to the codebook after each round. As illustrated in Appendix A, every variable had either an average pairwise percent agreement above 90% or a Fleiss' kappa above 0.750. Although there is no firmly established benchmark for Fleiss' kappa, at least one expert in intercoder reliability explains that a Fleiss' kappa above 0.75 is considered excellent. GWET, *supra* note 236, at 167.

240. Rantanen, *supra* note 221, at 724.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

Cases available in commercial databases are a subset of all filed cases, which is a subset of all potential cases that could have been filed.[245] There is also the potential for strategic behavior by judges or the parties, such as emphasizing particular legal issues or factors.[246]

A final limitation on judicial opinion-based content analyses such as this one relates to their predictive power.[247] This study describes which factors were more or less relevant in the employee status analysis under a variety of federal statutes over several time periods. Predictive conclusions based on this analysis should be made with caution as the composition of the bench changes, judges' interpretations of the facts and factors may shift over time, new cases arise that present novel fact patterns, and external changes may influence how courts interpret these legal issues.[248] In addition, prior decisions may influence what types of cases are filed, which can result in selection effects.[249]

Despite the limitations, content analysis is still a useful technique.[250] Although subjectivity exists and judges' jurisprudence is not fully revealed through their opinions, consider the traditional form of legal analysis.[251] In traditional legal analysis, court opinions are read and conclusions are drawn about their meaning.[252] In other words, their content is analyzed.[253] Content analysis is simply a system whereby cases are read systematically and the results are methodically recorded.[254] Using this process can reveal trends and aspects of the law that have gone unobserved.[255] And notwithstanding the limitation regarding predictive values, courts typically decide future cases with reference to prior opinions.[256] Thus, this study provides individuals and businesses planning their relationships, as well as litigants, with a sense of how the status of their hired parties will be determined if a dispute arises.

B. Data Collection

This study systematically examines and codes the universe of cases where the status of the hired party has been determined using the common law multifactor test from the time the Supreme Court (or other controlling authority) adopted this test. To assemble the datasets to code, I ran broad searches in Westlaw from the dates of the controlling Supreme Court case (or other authority) through February 19, 2018. The table below shows the start date for each type of case and the relevant case name.

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245. *Id.*

246. *Id.* at 724–25.

247. *Id.* at 725.

248. *Id.*

249. *See* Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209, 210 (1995).

250. Rantanen, *supra* note 221, at 726.

251. *Id.*

252. *Id.*

253. *Id*.

254. *Id.*

255. *Id.*

256. *See id.*

Type of Case	Start Date
NLRA[257]	March 6, 1968 (*United Insurance*)
Copyright[258]	June 5, 1989 (*Reid*)
ERISA[259]	March 24, 1992 (*Darden*)
OSHA[260]	July 22, 1992 (*Vergona Crane*)
Title VII[261]	April 22, 2003 (*Wells*)
ADA[262]	April 22, 2003 (*Wells*)
ADEA[263]	April 22, 2003 (*Wells*)

These searches resulted in several hundred to several thousand results for each category. To exclude the false positives, my research assistants and I screened every case[264] to make sure it actually was an opinion where the court or agency determined the status of the hired party using the common law multifactor test, and that the court or agency actually interpreted the relevant statute.[265] We also randomly selected screened cases to double-check screening accuracy. Ninety-six percent of these cases were

257. Two searches were conducted for NLRA cases. One was for court cases and the other was for cases before the National Labor Relations Board and its Division of Judges. For court cases, the search was in Westlaw's "All State and Federal Cases" database and included the following search: (nlra nlrb) & (employee /p factor!) & ("common law" "right to control"). For NLRB cases, the search was in Westlaw's "NLRB Board & ALJ Decisions" database and included the following search: (employee /p factor!) & ("common law" "right to control").

258. Because I had already completed a study of the relevant copyright cases through June 5, 2014, which included searches in Westlaw, Lexis, and Bloomberg, I ran a Westlaw search from June 5, 2014, through February 19, 2018, and supplemented my existing dataset with the newly decided copyright cases. The Westlaw search was in the "All State and Federal Cases" database and included the following search: employee /p ("work for hire" "work made for hire") /p factor!.

259. The search for ERISA cases was in Westlaw's "All State and Federal Cases" database and included the following search: ERISA & (employee /p factor!) & ("common law" "right to control").

260. Two searches were conducted for OSHA cases. One was for court cases and the other was for cases before the OSHRC. For court cases, the search was in Westlaw's "All State and Federal Cases" database and included the following search: osha & (employee /p factor!) & ("common law" "right to control"). For OSHRC cases, the search was in Westlaw's "Occupational Safety & Health Review Commission" database and included the following search: (employee /p factor!) & ("common law" "right to control").

261. The search for Title VII cases was in Westlaw's "All State and Federal Cases" database and included the following search: "title vii" & (employee /p factor!) & ("common law" "right to control").

262. The search for ADA cases was in Westlaw's "All State and Federal Cases" database and included the following search: ADA & disabilit! & (employee /p factor!) & ("common law" "right to control").

263. The search for ADEA cases was in Westlaw's "All State and Federal Cases" database and included the following search: adea & age & (employee /p factor!) & ("common law" "right to control").

264. The only exceptions to screening all of the cases were ERISA and Title VII, where there were approximately 2,500 and 3,000 cases, respectively. For these two searches, we only screened the first 1,000 cases. The reason for this, as opposed to randomly selecting 1,000 cases, was that Westlaw sorted the cases in terms of relevance. Although we do not know how Westlaw makes this determination, based on the results of the other searches, Westlaw's algorithm did a pretty reliable job of ensuring the cases meeting the screening criteria were near the top of the result list. The end results of each search were nearly 100% false positives, so we felt comfortable using the first 1,000 cases to capture the universe of relevant ERISA and Title VII cases.

265. Most false positives were cases analyzing a different statute than the one at issue in the search. For example, in a search for ADA cases, a false positive might include an ERISA case addressing the same issue. Although eliminated from the ADA results, the ERISA case would be captured in the ERISA search described above.

accurately screened.[266] After combining all of the relevant cases, I deduplicated the data to avoid double counting.[267] This resulted in the following breakdown of relevant cases for each type of case.

Type of Case	Number of Relevant Cases
NLRA Court Cases	45
NLRA Board Cases	160
Combined NLRA (Court + Board)	199
Copyright	51
ERISA	53
OSHA[268]	60
Title VII	121
ADA	34
ADEA	43
Combined Antidiscrimination (ADA, ADEA, Title VII)	183
Total Unique Cases	**546**

For each relevant case, my research assistants and I manually recorded the following information: (1) whether the tribunal concluded the hired party was an employee or independent contractor; (2) the direction of each of the traditional Supreme Court's factors—that is, whether each factor favored employee status, independent contractor status, was indeterminate, or was not addressed by the tribunal; (3) the weight of each factor—that is, whether the tribunal gave additional weight to the particular factor, discounted the factor, or did not expressly weigh the factor; and (4) whether the tribunal cited binding or persuasive authority for the proposition that some factors are more or less important than others. We based all of this information on statements (or the absence of statements) by the tribunals.

Because the Supreme Court's common law test is a nonexclusive list of factors, we recorded and coded additional factors the tribunals discussed in their analyses just as the traditional factors. One factor the tribunals frequently addressed was how the hired and hiring parties referred to the hired party. Because of its prevalence, we treated this factor as part of the traditional common law factors.

266. All errors were cases screened as relevant, but in fact, were false positives. Presumably these cases would have been eliminated during the coding process. Based on the random inspection, no cases were mistakenly excluded from the dataset of relevant cases.

267. This process involved eliminating lower tribunal opinions that were fully addressed by a relevant higher authority (i.e., conducted its own analysis of the factors). This included removing trial court opinions that appellate courts reversed and trial court opinions that appellate courts affirmed but with the appellate court providing its own analysis. Deduplicating also involved removing instances of the same tribunal later modifying or reconsidering its own analysis in the same case. For NLRA cases, which I separated into court cases and agency cases, I kept NLRB decisions where the court of appeals affirmed employee status analyses (six cases in total). This was done to see if the NLRB analyzes the factors differently than courts do. When both types of NLRA decisions were combined, I removed the six NLRB cases from the analysis to avoid double counting.

268. Although I ran separate searches, only four of the seventy cases were court cases, so they were combined with the agency cases.

In addition to the manually-coded data, some data was automatically coded, such as case name; citation; URL; tribunal name; which judicial circuit, if any, the tribunal falls within; the date the tribunal decided the case; and whether the tribunal decided the case before the Supreme Court's decision in *Wells*. The codebook found in Appendix B provides the complete procedure for data collection, along with a description of each field.

III. RESULTS

Using this data, I made the following calculations: how frequently the tribunals addressed each factor, how consistent each factor was with the ultimate result of the hired party's status, and how frequently the tribunals' analyses gave additional weight or discounted each factor. These calculations are shown in the summary tables below as Frequency,[269] Consistency,[270] Favored Weighting,[271] and Discounted Weighting,[272] respectively.[273]

These calculations all measure, in some form, the importance of the factors. The frequency with which a factor is analyzed suggests whether tribunals are considering the factor in the first place or simply ignoring it. A frequently ignored factor is less likely to be important than one frequently addressed. Likewise, consistency illustrates importance, because a factor that is less reliable in predicting the ultimate outcome suggests that courts treat that factor as having less impact on the ultimate result than other factors.[274] Finally, whether a factor is discounted or given additional weight in the analysis reflects its importance as the tribunals are directly addressing which factors they take more seriously and find more probative in the analysis as well as which factors they declare to be of less importance.

Although each calculation by itself is helpful in understanding the importance of a particular factor in the employee-independent contractor analysis, no single calculation can tell the entire story. As a result, all of the calculations must be examined together to discover which factors are the most and least important. Based on all four calculations in each table below, I propose the continua shown in the figures in each Part, which describe the relative importance of common law factors for that particular act. Whether a particular factor belongs one group down or one group up in the continua is certainly

269. Frequency for each factor is calculated as the number of total cases minus the number of cases in which the factor was not addressed by the tribunals.

270. Consistency for each factor is calculated by adding the total number of cases where the factor's outcome is consistent with the tribunal's ultimate conclusion about the hired party's status. For example, if the skill-required factor favors a finding of employee status and the court ultimately concludes the hired party is an employee, then this is consistent. If, however, the court finds that the skill-required factor favors a finding of employee status, but the court ultimately concludes the hired party is an independent contractor, then this is inconsistent. The percentage in parentheses is calculated by dividing this number by the number in the Frequency column. In other words, when the factor is addressed, how consistent is it with the ultimate conclusion?

271. Favored Weighting for each factor is calculated by adding together the total number of cases where the factor is given additional weight. The percentage in parentheses is calculated by dividing this number by the number in the Frequency column. In other words, when this factor is addressed, how often is it favored?

272. Discounted Weighting for each factor is calculated the same way as Favored Weighting but counts cases where the factor is discounted rather than given additional weight.

273. Tables for each calculation as sorted by that calculation's percentage are found in Appendix C.

274. Inconsistent factors are also less useful to the parties and attorneys in predicting outcomes.

debatable; reasonable minds can differ. Illustrating the importance of the factors using continua with dashed lines rather than strict lines of demarcation between the groups was purposefully chosen to acknowledge this.

To test how useful these groups are at predicting outcomes, I analyzed the factors in the various groups to see if more than fifty percent of the addressed factors favored the ultimate outcome. If so, I considered this a successful prediction. Otherwise, I considered it an unsuccessful prediction. I added the total successful predictions together and then divided by the total number of cases to calculate a measure for determining how many of the total cases could be accurately predicted based on the factor(s) in the group(s). I performed the same analysis with the least important and the middle groups. These accuracy percentages are displayed in the figures below. At the conclusion of each Part, I explain notable results peculiar to that legislation and note interesting results worthy of further study.

A. National Labor Relations Act (NLRA)

For the NLRA, the tables and continua below illustrate the courts' and NLRB's treatments of the factors since the Supreme Court's decision in *United Insurance*. Because the NLRA cases consist of both decisions from the NLRB and courts, this study examines the factors for all NLRA cases and also separates out NLRB and court cases to see if they are treated the same or differently.

Table 1
Combined NLRA (Board and Court)
(March 6, 1968 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	67% (134)	94% (126)	16% (21)	1% (1)
Skill required	23% (45)	76% (34)	0% (0)	2% (1)
Source of instrumentalities and tools	75% (149)	69% (103)	1% (1)	5% (8)
Work location	38% (76)	80% (61)	0% (0)	3% (2)
Relationship duration	28% (56)	63% (35)	2% (1)	4% (2)
Additional projects	45% (89)	84% (75)	1% (1)	3% (3)
When and how long to work	63% (125)	72% (90)	2% (2)	6% (8)
Payment method	72% (143)	69% (98)	6% (8)	3% (5)
Hiring and paying assistants	52% (104)	70% (73)	3% (3)	6% (6)
Part of regular business of hiring party	30% (59)	73% (43)	3% (2)	3% (2)
Hiring party in business	3% (6)	100% (6)	0% (0)	0% (0)
Employee benefits	55% (109)	59% (64)	1% (1)	4% (4)
Tax treatment	64% (127)	54% (69)	2% (2)	2% (3)
Label	46% (91)	62% (56)	3% (3)	4% (4)

Figure 1
Combined NLRA

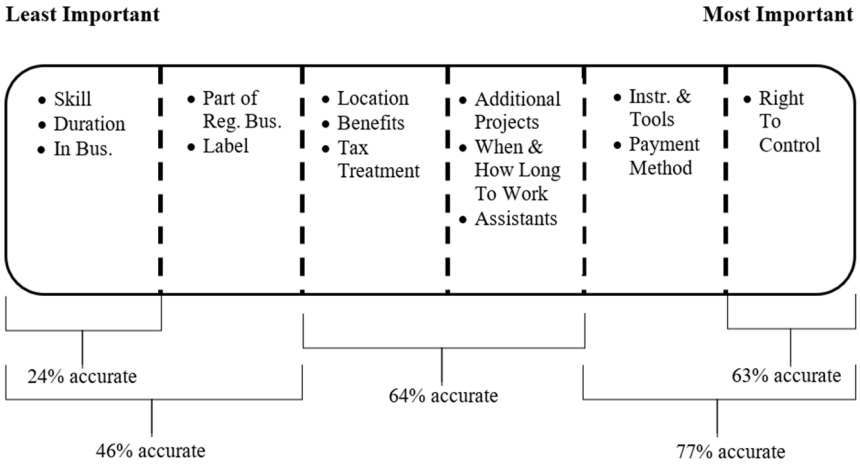


Table 2
NLRA Board Decisions
(March 6, 1968 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	73% (117)	94% (110)	13% (15)	1% (1)
Skill required	21% (34)	71% (24)	0% (0)	3% (1)
Source of instrumentalities and tools	74% (119)	68% (81)	0% (0)	4% (5)
Work location	36% (58)	83% (48)	0% (0)	0% (0)
Relationship duration	26% (41)	63% (26)	2% (1)	2% (1)
Additional projects	44% (70)	80% (56)	1% (1)	3% (2)
When and how long to work	61% (97)	70% (69)	2% (2)	4% (4)
Payment method	72% (115)	69% (79)	3% (4)	2% (2)
Hiring and paying assistants	53% (84)	73% (61)	2% (2)	2% (2)
Part of regular business of hiring party	31% (50)	78% (39)	4% (2)	0% (0)
Hiring party in business	4% (6)	100% (6)	0% (0)	0% (0)
Employee benefits	56% (89)	55% (49)	1% (1)	4% (4)
Tax treatment	64% (102)	51% (52)	1% (1)	2% (2)
Label	44% (70)	61% (43)	3% (2)	6% (4)

Figure 2
NLRA Board

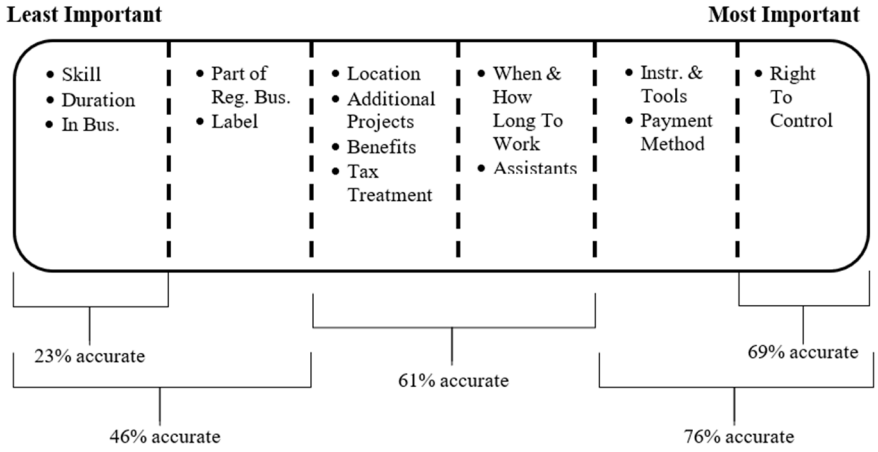
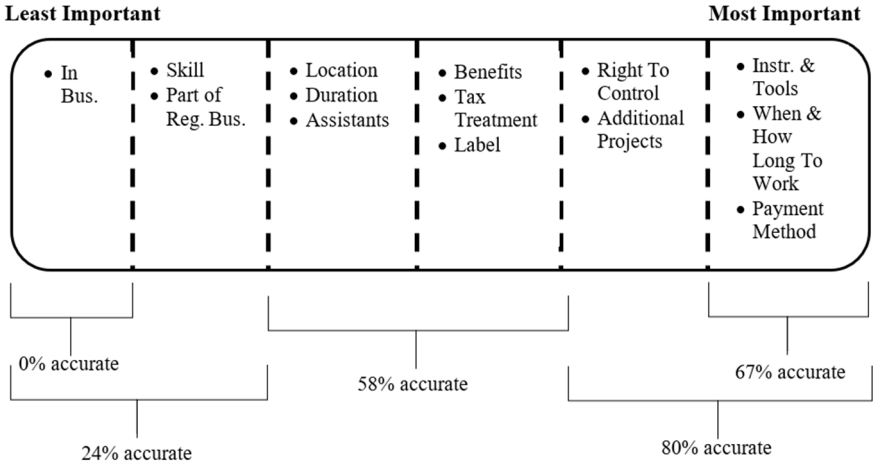


Table 3
NLRA Court Decisions
(March 6, 1968 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	44% (20)	95% (19)	30% (6)	0% (0)
Skill required	24% (11)	91% (10)	0% (0)	0% (0)
Source of instrumentalities and tools	76% (34)	76% (26)	3% (1)	9% (3)
Work location	44% (20)	75% (15)	0% (0)	10% (2)
Relationship duration	38% (17)	65% (11)	0% (0)	6% (1)
Additional projects	47% (21)	100% (21)	0% (0)	5% (1)
When and how long to work	69% (31)	77% (24)	0% (0)	13% (4)
Payment method	71% (32)	63% (20)	16% (5)	9% (3)
Hiring and paying assistants	49% (22)	64% (14)	5% (1)	18% (4)
Part of regular business of hiring party	24% (11)	55% (6)	0% (0)	18% (2)
Hiring party in business	0% (0)	undefined (0)	undefined (0)	undefined (0)
Employee benefits	53% (24)	67% (16)	0% (0)	4% (1)
Tax treatment	67% (30)	60% (18)	3% (1)	7% (2)
Label	53% (24)	58% (14)	4% (1)	0% (0)

Figure 3
NLRA Courts



There are a few interesting observations to make with respect to the NLRA cases. First, right to control is less important to courts than to the NLRB. The main difference between them is that the NLRB more frequently considers the right to control factor than the courts (73% versus 44%). Second, work location seems slightly less significant for courts than the NLRB. Although addressed more frequently (44% versus 36%), the work location consistency is lower (75% versus 83%) and discounting is higher (10% versus 0%). Third, the work being part of the regular business of the hiring party is more important for the NLRB than courts. This factor is addressed less frequently (31% versus 24%), is quite a bit less consistent (78% versus 55%), and is much more heavily discounted by the courts (0% versus 18%).

With respect to the continua, it is interesting that the NLRA continua (especially for the NLRB) fit well with the House Report accompanying the Taft-Hartley Act suggesting that payment method, hiring assistants, and right to control are the key factors.[275] In addition, it is remarkable that the accuracy of the top two groups is quite low in comparison to other examined legislation (except for the ADA). This suggests that consistency and predictability are lacking.

B. Copyright Act

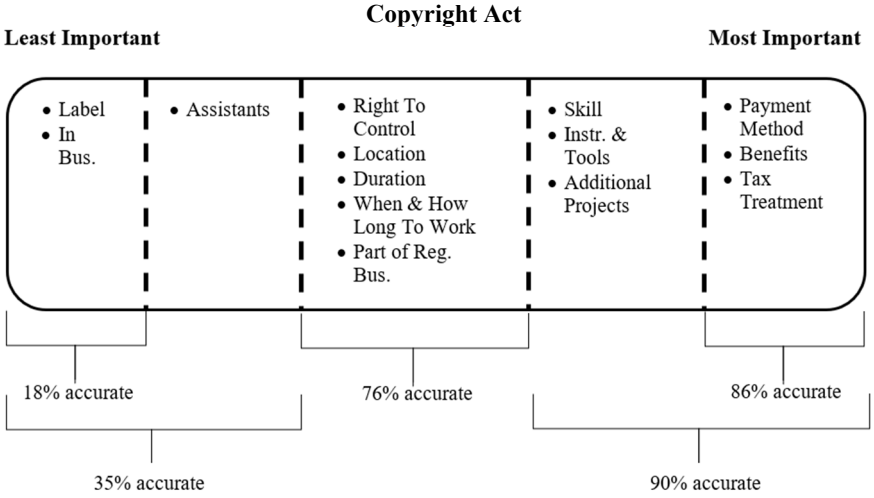
For the Copyright Act, the summary table and continuum below illustrate the courts' treatment of the factors since the Supreme Court's decision in *Reid*.

275. *See supra* text accompanying note 86.

Table 4
Copyright Act
(June 5, 1989 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	80% (41)	59% (24)	17% (7)	12% (5)
Skill required	55% (28)	86% (24)	36% (10)	4% (1)
Source of instrumentalities and tools	73% (37)	89% (33)	5% (2)	3% (1)
Work location	73% (37)	76% (28)	0% (0)	11% (4)
Relationship duration	63% (32)	81% (26)	6% (2)	6% (2)
Additional projects	67% (34)	85% (29)	26% (9)	3% (1)
When and how long to work	67% (34)	82% (28)	0% (0)	6% (2)
Payment method	86% (44)	84% (37)	14% (6)	2% (1)
Hiring and paying assistants	37% (19)	74% (14)	0% (0)	11% (2)
Part of regular business of hiring party	63% (32)	84% (27)	0% (0)	13% (4)
Hiring party in business	18% (9)	44% (4)	0% (0)	33% (3)
Employee benefits	78% (40)	90% (36)	38% (15)	5% (2)
Tax treatment	80% (41)	85% (35)	34% (14)	7% (3)
Label	20% (10)	50% (5)	10% (1)	30% (3)

Figure 4
Copyright Act



As described in a previous article, the right to control factor is not of much importance.[276] That said, it has become slightly more important over the last few years. Also, skill is notably important. When considered in light of legislation revolving around creativity, it is not surprising that this factor stands out. Of course, that also fits with a purposive approach, which the Supreme Court has strongly rejected.[277] Another factor of interest is the label the parties use to describe their relationship. The courts have determined that this factor is mostly unimportant. Instead, courts look beyond the label the parties affix and see what really occurs between the parties.

When looking at the continuum, it is remarkable that using the top three factors—payment method, benefits, and tax treatment—leads to 86% accuracy in predictability. These factors were key factors in the formal, salaried employee test the Supreme Court rejected in *Reid*.[278] Despite its rejection, it looks like the formal, salaried employee test is, in actuality, driving the outcomes in these cases. These results are consistent with the previous study and the same observations apply today.[279] If certainty and predictability are of primary importance, as the Supreme Court explained in *Reid*, then perhaps using a subset of the factors makes more sense.

C. Employee Retirement Income Security Act (ERISA)

For ERISA, the summary table and continuum below illustrate the courts' treatment of the factors since the Supreme Court's decision in *Darden*.

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276. *See* Vacca, *supra* note 8, at 232.

277. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–27 (1992) ("[A] principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term 'in the light of the mischief to be corrected and the end to be attained.'" (quoting United States v. Silk, 331 U.S. 704, 713 (1947))).

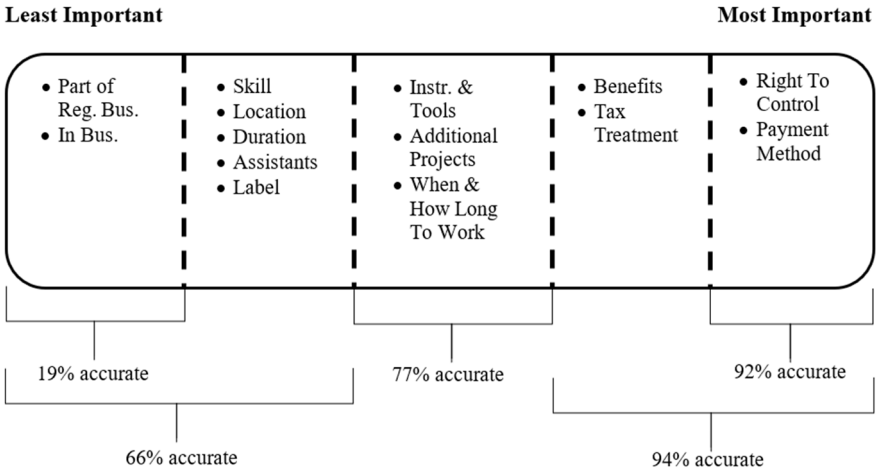
278. *See* Vacca, *supra* note 8, at 234.

279. *Id.*

Table 5
ERISA
(March 24, 1992 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	70% (37)	92% (34)	35% (13)	3% (1)
Skill required	49% (26)	69% (18)	8% (2)	19% (5)
Source of instrumentalities and tools	62% (33)	85% (28)	3% (1)	9% (3)
Work location	49% (26)	62% (16)	0% (0)	0% (0)
Relationship duration	47% (25)	60% (15)	0% (0)	4% (1)
Additional projects	43% (23)	100% (23)	9% (2)	4% (1)
When and how long to work	58% (31)	87% (27)	0% (0)	10% (3)
Payment method	85% (45)	87% (39)	7% (3)	0% (0)
Hiring and paying assistants	42% (22)	73% (16)	0% (0)	9% (2)
Part of regular business of hiring party	42% (22)	45% (10)	5% (1)	9% (2)
Hiring party in business	9% (5)	60% (3)	0% (0)	0% (0)
Employee benefits	68% (36)	83% (30)	6% (2)	6% (2)
Tax treatment	74% (39)	85% (33)	8% (3)	3% (1)
Label	45% (24)	67% (16)	8% (2)	4% (1)

Figure 5
ERISA



The most remarkable aspect of the factors under ERISA is the high degree of accuracy when isolating the right to control, payment method, benefits, and tax treatment

factors. The Court in *Darden* emphasized certainty, predictability, and what was within the hiring party's knowledge.[280] It is no surprise that tax treatment, benefits, and payment method are of high importance as they are easily determined. But the use of other factors seems to inject more uncertainty and unpredictability into the analysis. Like with the Copyright Act, perhaps it makes more sense to only look at a subset of the factors if certainty and predictability are of paramount concern. Also, as with the Copyright Act, the label the parties use to describe their relationship is of little importance in the analysis.

D. Occupational Safety Health Act (OSHA)

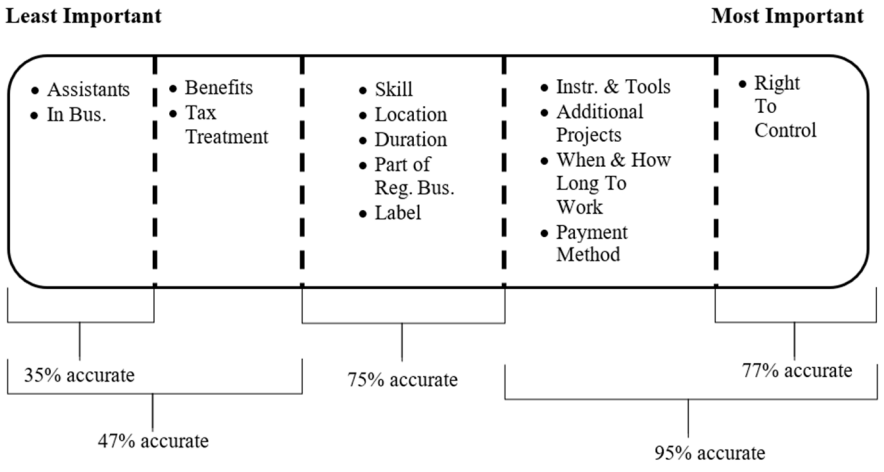
For OSHA, the summary table and continuum below illustrate the courts' and the OSHRC's treatments of the factors since the OSHRC's decision in *Vergona Crane*. Because all but four of the cases were OSHRC decisions, agency and court cases were not separately analyzed.

280. *See Darden*, 503 U.S. at 326–27.

Table 6
OSHA
(July 22, 1992 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	80% (48)	96% (46)	69% (33)	0% (0)
Skill required	42% (25)	72% (18)	0% (0)	0% (0)
Source of instrumentalities and tools	82% (49)	90% (44)	4% (2)	0% (0)
Work location	53% (32)	78% (25)	3% (1)	6% (2)
Relationship duration	48% (29)	72% (21)	0% (0)	3% (1)
Additional projects	65% (39)	92% (36)	3% (1)	0% (0)
When and how long to work	68% (41)	93% (38)	2% (1)	0% (0)
Payment method	88% (53)	75% (40)	0% (0)	9% (5)
Hiring and paying assistants	37% (22)	59% (13)	0% (0)	5% (1)
Part of regular business of hiring party	50% (30)	70% (21)	0% (0)	10% (3)
Hiring party in business	27% (16)	63% (10)	0% (0)	13% (2)
Employee benefits	53% (32)	53% (17)	0% (0)	19% (6)
Tax treatment	55% (33)	42% (14)	0% (0)	15% (5)
Label	58% (35)	83% (29)	0% (0)	5% (2)

Figure 6
OSHA



There are two interesting points to note about the OSHA results. First, although the right to control factor stands apart as the most important factor, it is not great in terms of

accurately predicting the outcomes. It only accurately predicts the outcome in 77% of the total cases.

Second, OSHA tribunals are more hostile to the benefits and tax treatment factors than tribunals analyzing other legislation. The tribunals only address them about half the time (53% and 55%), they are only consistent about half the time (53% and 42%), and the discounting is quite high (19% and 15%). It is unclear why this is the case. These facts are easily determined and do not appear to have particular relevancy to worker safety. Further study is warranted.

E. Antidiscrimination Statutes

For the antidiscrimination acts, the summary tables and continua are below. For these results, the study combines all the antidiscrimination cases together and also separates out each act to see if there are differences between them.

Table 7
Combined Antidiscrimination
(April 22, 2003 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	84% (153)	91% (139)	44% (67)	1% (2)
Skill required	38% (70)	81% (57)	0% (0)	4% (3)
Source of instrumentalities and tools	56% (102)	67% (68)	3% (3)	4% (4)
Work location	58% (106)	58% (62)	1% (1)	5% (5)
Relationship duration	38% (69)	52% (36)	0% (0)	6% (4)
Additional projects	32% (59)	90% (53)	2% (1)	3% (2)
When and how long to work	53% (97)	86% (83)	6% (6)	1% (1)
Payment method	80% (146)	86% (125)	4% (6)	0% (0)
Hiring and paying assistants	27% (49)	78% (38)	4% (2)	6% (3)
Part of regular business of hiring party	27% (50)	52% (26)	2% (1)	4% (2)
Hiring party in business	10% (18)	39% (7)	0% (0)	22% (4)
Employee benefits	73% (134)	84% (113)	6% (8)	1% (1)
Tax treatment	64% (118)	86% (102)	8% (9)	2% (2)
Label	64% (118)	89% (105)	8% (9)	2% (2)

Figure 7
Combined Antidiscrimination

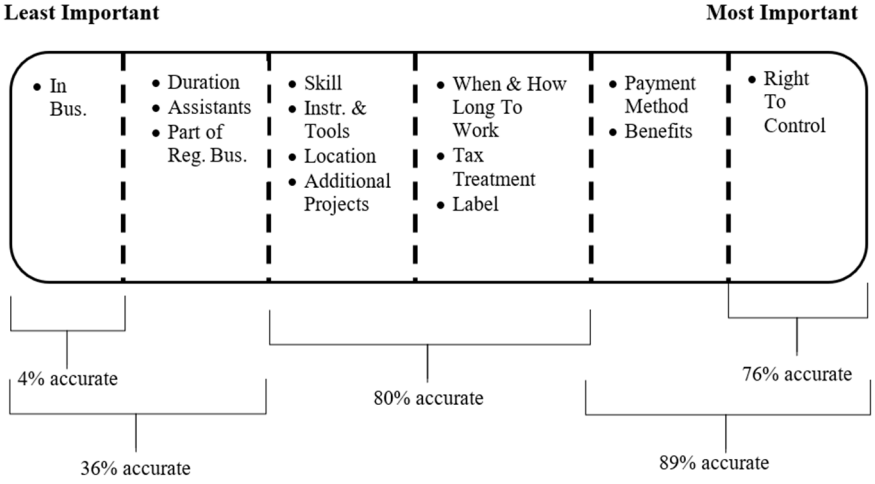


Table 8
Title VII
(April 22, 2003 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	84% (102)	89% (91)	40% (41)	0% (0)
Skill required	40% (48)	79% (38)	0% (0)	2% (1)
Source of instrumentalities and tools	55% (66)	68% (45)	2% (1)	2% (1)
Work location	57% (69)	62% (43)	0% (0)	1% (1)
Relationship duration	40% (48)	54% (26)	0% (0)	2% (1)
Additional projects	34% (41)	93% (38)	2% (1)	0% (0)
When and how long to work	50% (61)	82% (50)	3% (2)	0% (0)
Payment method	81% (98)	85% (83)	5% (5)	0% (0)
Hiring and paying assistants	24% (29)	79% (23)	0% (0)	3% (1)
Part of regular business of hiring party	29% (35)	51% (18)	0% (0)	3% (1)
Hiring party in business	9% (11)	55% (6)	0% (0)	18% (2)
Employee benefits	72% (87)	85% (74)	5% (4)	0% (0)
Tax treatment	64% (77)	86% (66)	6% (5)	0% (0)
Label	63% (76)	88% (67)	8% (6)	1% (1)

Figure 8
Title VII

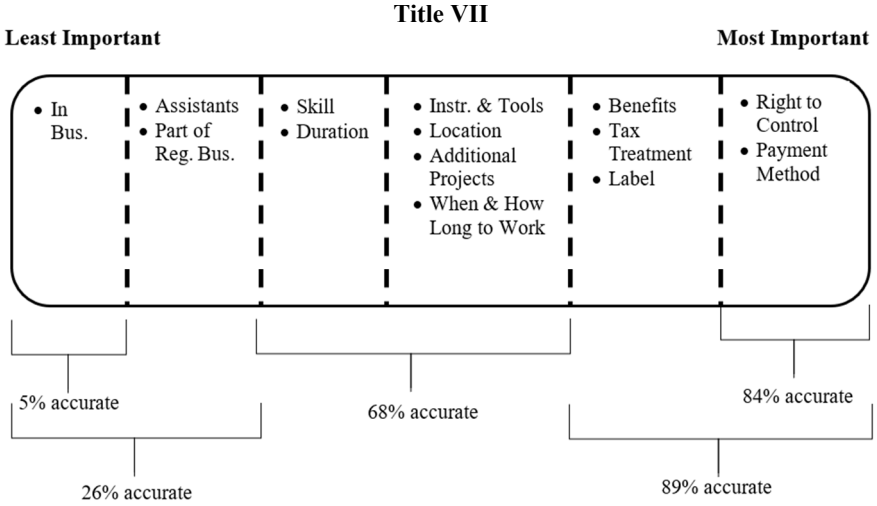


Table 9
ADA
(April 22, 2003 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	74% (25)	88% (22)	44% (11)	8% (2)
Skill required	32% (11)	91% (10)	0% (0)	18% (2)
Source of instrumentalities and tools	56% (19)	63% (12)	0% (0)	11% (2)
Work location	59% (20)	50% (10)	0% (0)	10% (2)
Relationship duration	32% (11)	55% (6)	0% (0)	18% (2)
Additional projects	18% (6)	100% (6)	0% (0)	0% (0)
When and how long to work	53% (18)	83% (15)	11% (2)	6% (1)
Payment method	76% (26)	92% (24)	0% (0)	0% (0)
Hiring and paying assistants	26% (9)	67% (6)	11% (1)	22% (2)
Part of regular business of hiring party	21% (7)	57% (4)	0% (0)	14% (1)
Hiring party in business	6% (2)	0% (0)	0% (0)	100% (2)
Employee benefits	76% (26)	77% (20)	12% (3)	4% (1)
Tax treatment	71% (24)	88% (21)	13% (3)	4% (1)
Label	71% (24)	92% (22)	13% (3)	4% (1)

Figure 9
ADA

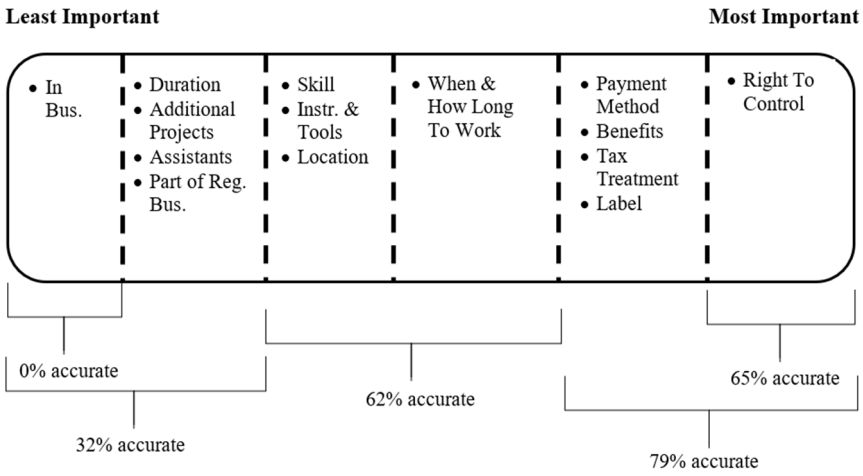
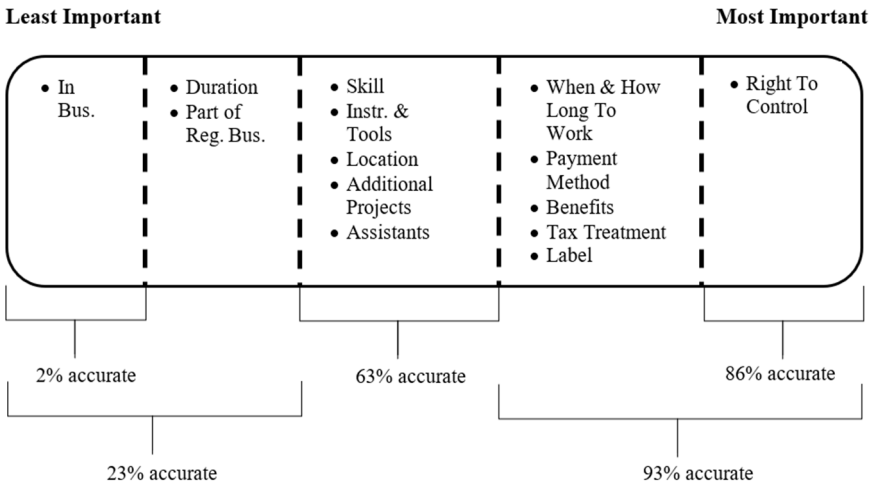


Table 10
ADEA
(April 22, 2003 – February 19, 2018)

Factor	Frequency	Consistency	Favored Weighting	Discounted Weighting
Right to control manner and means	88% (38)	97% (37)	50% (19)	3% (1)
Skill required	42% (18)	83% (15)	0% (0)	6% (1)
Source of instrumentalities and tools	63% (27)	67% (18)	7% (2)	11% (3)
Work location	65% (28)	61% (17)	4% (1)	11% (3)
Relationship duration	33% (14)	43% (6)	0% (0)	14% (2)
Additional projects	40% (17)	82% (14)	0% (0)	12% (2)
When and how long to work	63% (27)	93% (25)	7% (2)	4% (1)
Payment method	81% (35)	89% (31)	3% (1)	0% (0)
Hiring and paying assistants	42% (18)	83% (15)	6% (1)	6% (1)
Part of regular business of hiring party	30% (13)	38% (5)	8% (1)	8% (1)
Hiring party in business	14% (6)	17% (1)	0% (0)	17% (1)
Employee benefits	77% (33)	94% (31)	6% (2)	0% (0)
Tax treatment	72% (31)	94% (29)	6% (2)	3% (1)
Label	70% (30)	93% (28)	3% (1)	0% (0)

Figure 10
ADEA



Interestingly, there is less discounting in Title VII cases than in ADEA and ADA cases. Also of note is that for the hiring party's ability to control when and how long to work, this factor seems to be of greater importance under the ADEA than in Title VII or the ADA.

The ADA's unfavorable treatment of hiring and paying assistants is notable when compared to Title VII and the ADEA because it is less consistent (67% versus 79% and 83%) and discounted more (22% versus 3% and 6%). It is unclear why this is the case. The ADA also stands out because the courts discount the skill factor much more than they do under Title VII and the ADEA (18% versus 2% and 6%). One explanation could be that the ADA deals with disabilities, which may implicate the skills of the hired parties. If that explanation is correct, then this looks a lot like purposivism, which the Supreme Court has rejected.[281] Further investigation is warranted.

Finally, and perhaps most intriguing, is that the label the parties use to refer to their relationship is of relatively high importance in the antidiscrimination legislation when compared to other areas, such as the Copyright Act and ERISA. In a pre-*Wells* Title VII case, the Second Circuit discussed whether its decision in *Aymes v. Bonelli*,[282] which emphasized certain factors in the context of the Copyright Act's work-made-for-hire doctrine,[283] should apply to Title VII cases.[284] In rejecting *Aymes* for application to Title VII, the court explained that because copyright law was concerned with ownership of intellectual property, it made sense for the hiring and hired parties to be able to negotiate over these economic rights.[285] But the court rejected such an approach when the right at

281. *See, e.g.*, *Darden*, 503 U.S. at 324–27; *see also* Vacca, *supra* note 8, at 251.

282. 980 F.2d 857 (2d Cir. 1992).

283. *Aymes*, 980 F.2d at 860–61.

284. Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 115–17 (2d Cir. 2000).

285. *Id.* at 116 ("We interpret *Aymes* as standing for the proposition that a worker and a firm can enter into a contract that explicitly delineates who holds intellectual property rights to worker-created items, . . . and concomitantly a worker and a firm may by contract arrange the incidents of their particular

issue was "the right to be treated in a non-discriminatory manner."[286] These types of rights, the court explained, are "'public law' rights . . . vested in workers as a class by Congress, and they are not subject to waiver or sale by individuals."[287] The concern the court had was that hiring parties would be able to devise compensation schemes whereby they would be able to effectively "opt out of the anti-discrimination laws."[288]

The Second Circuit's reasoning makes sense. But the importance placed on the label factor in the antidiscrimination context in comparison to the economic rights areas of the Copyright Act and ERISA is entirely backwards. If the parties agree that they have an employee-employer relationship, then this may be more understandable if they are essentially bargaining over who owns a copyright or whether the hired party is eligible for particular retirement benefits. But if the right is one that cannot be bargained away, then it seems even more objectionable to permit the hiring party to simply write themselves out of the antidiscrimination statutes by labeling themselves as entering into an independent contractor arrangement. Although the courts in Copyright Act and ERISA cases may be correct in assigning the label factor little importance, it should follow that courts in antidiscrimination cases should be at least equally as hostile to this factor. These results show they are not.

IV. DISCUSSION

Having presented the results and noted the interesting aspects within each set of legislation, first, this Discussion takes a big-picture view of the results and continua to determine what this tells us about the common law test across legislation.[289] Then, this Discussion considers implications of these results for determining employee status in general and realizing the purposes of the laws.[290]

A. Cross-Legislation Comparisons

Looking at factors having a fairly consistent status across legislation, we immediately see that the hiring party being in business is the least important factor. What makes this remarkable is that when the American Law Institute published the *Restatement (Second) of Agency*, this was the only factor added to the original list of factors from the *Restatement (First) of Agency*.[291] It seems peculiar that the only factor the American Law Institute added is the one that is unimportant under every piece of legislation using this test.

Next, except for the Copyright Act and courts applying the NLRA, the right to control factor is the most important across the board. Even for courts applying the NLRA, this is a fairly strong factor. Given that this factor mostly duplicates the ultimate question

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relationship—whether benefits will be provided, how workers will be treated for tax purposes, *etc.*—in a way that substantially determines who holds the intellectual property rights to worker-created items." (citation omitted)).

286. *Id.*

287. *Id.*

288. *Id.* at 117.

289. *See infra* Part IV.A.

290. *See infra* Part IV.B.

291. *See supra* note 95 and accompanying text.

being addressed, it is no surprise that it plays such a prominent role.[292] But as commentators have previously noted, the other factors in the test are all ways of evidencing the hiring party's control.[293] Nonetheless, in their analyses, tribunals try to distinguish between control over the details of the work and control over the results.[294] This has been an elusive task.[295] As one employment law scholar described, tribunals appear to have arbitrarily drawn the line between control over the details of the work and the result.[296]

Even if the right to control factor were more definite, we can certainly question whether this factor is meaningful in distinguishing between employees and independent contractors. A lack of supervision or instructions could be attributable to the hired party's independence, but it could also be due to the hiring party's earned trust in the hired party based on past performance.[297] Or it could be attributable to the type of work. A worker hired to do sales may not be sufficiently supervised in the performance of customer visits because of the offsite nature of the work.[298] Does this lack of supervision tip in favor of independent contractor status? To a large extent, the distinction between supervising details and results necessarily depends on how the result is framed: broadly defined results tend to lead to more supervision whereas narrowly defined results tend to lead to less supervision.[299] So although the right to control factor appears to be important, its flexible and ill-defined nature inhibits its effectiveness.

Turning to a few other factors having a fairly consistent status across legislation, location of the work tends to float near the middle of the continua. Although in theory a hiring party whose worker performs on the hiring party's physical location exercises more control than a worker who does not,[300] this factor does not seem to carry overwhelming weight. It would be no surprise if the rise of telecommuting over the last decade or two has made this factor less important and will continue to do so in the future.[301]

The duration factor is steadily at the bottom of the continua. This is unsurprising. Although it appears to be a simple and objective factor, it is not clear that it should be a good proxy for distinguishing between employees and independent contractors.[302] Some types of tasks are long-term projects, which does not necessarily mean the hired party is an employee.[303] Similarly, it is not hard to imagine a hired party that is otherwise an employee serving only temporarily.[304]

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292. *See* Carlson, *supra* note 15, at 338–39; Vacca, *supra* note 8, at 222–23 n.256.
293. Carlson, *supra* note 15, at 339.
294. *Id.*
295. *See id.* at 339–40.
296. *Id.* at 340.
297. *Id.* at 340–41.
298. *Id.* at 341.
299. *Id.* at 339–40.
300. *Id.* at 347.
301. *Id.* at 347–48.
302. *Id.* at 344–45.
303. *Id.*
304. *Id.* at 345.

Another consistent factor is payment method. This factor has been described as being "nearly as old as the control test itself."[305] In his seminal work on employees and independent contractors, Richard Carlson concluded, "In the modern world, however, the method of compensation is rarely important in distinguishing employees from independent contractors."[306] The results of this study suggest otherwise. Payment method was near the top of all the continua. Perhaps the ease and objective nature of examining payroll records has made this factor stand out as important.

Finally, the work being part of the regular business of the hiring party is frequently near the bottom of the continua. This factor is justified under the belief that an independent contractor operates "a business that functions as a separate business rather than as a cog in the [hiring party's] machine."[307] Although this factor may have made sense during and in the aftermath of the industrial revolution, its usefulness to modern business is suspect.[308] Today, important functions of a business are frequently contracted out making it difficult to determine what is and is not a regular part of the business.[309]

The above-described factors maintain a fairly consistent status across legislation. The usefulness of some is questionable. The next few factors are scattered across the continua.

Employee benefits and tax treatment factors are always closely associated with each other[310] but are scattered across the continua. For example, for the NLRA, these factors are in the middle of the continua. For the Copyright Act, ERISA, and antidiscrimination cases, they are at or near the top. For OSHA, they are near the bottom. It is unclear why there is so much variation across legislation. This is particularly confusing given that these two factors are the two most objective of the group and easily analyzed by tribunals.

The other scattered factor is how the parties label their relationship or designate themselves. This is near the bottom of the continua for the NLRB, the Copyright Act, and ERISA. It is in the middle for OSHA and courts addressing the NLRA. But it is near the top for the antidiscrimination statutes. As described above, the importance of the label for antidiscrimination purposes, in contrast with the Copyright Act and ERISA, seems completely backwards.[311] What is unclear is why there is such variation across legislation. Further study is warranted.

For the rest of the factors, there seems to be fair consistency across the continua. For control over when and how long to work, this factor is mostly in the middle and occasionally near the top across the continua. Despite some consistency, it is easy to think of many examples where the hiring party's control over the timing and number of hours worked does not reflect the hired party's independence.[312] For example, full-time university professors have much discretion over their work schedule, but there is little

305. *Id.* at 346.

306. *Id.* at 347.

307. *Id.* at 348.

308. *See id.*

309. *Id.* at 348–49.

310. See *supra* Figures 1–10 showing that employee benefits and tax treatment are always in the same group (except for combined antidiscrimination cases).

311. *See supra* Part III.E.

312. *See* Carlson, *supra* note 15, at 346.

doubt they are employees of their university.[313] Likewise, an independent security guard would have their schedule set by the hiring party; she could not exercise discretion and vary when she worked.[314]

The ability to hire and pay for assistants has fair consistency. As Carlson explains, this factor should serve as "the most likely sign that a worker is not an employee" because the hired party "is in fact an *employer*."[315] One who hires another to do part of the work she was hired to do looks more independent than one who cannot.[316] Likewise, the hiring party seems to exercise less control over the work being done and the hired party bears the risks of labor costs.[317] It has been suggested that this factor may be the best proof of independence and that some courts have moved in this direction.[318] But the results of this study indicate otherwise. This factor is mostly near the bottom of the continua except for the NLRB, where it sits in the middle. Perhaps it *should* be more important in the analysis, but it currently is not.

The skill factor is mostly in the middle or near the bottom of the continua, except for the Copyright Act, where it is near the top. The importance of this factor seems to have diminished over the long history of distinguishing between employees and independent contractors because of changes in the corporate organization.[319] As firms have necessarily expanded to hire large numbers of highly skilled professionals, the antiquated notion that a professional could not be an employee has lost salience.[320]

Finally, it has been noted that supplying the tools and instrumentalities might be of little importance today as more professions depend on intellectual capital than physical tools.[321] This study indicates that this factor is not as weak as previously thought. The continua show that this factor sits near the top or middle. To be sure, there is some range across the continua, but it appears to be a fairly important factor for many areas (e.g., NLRA, Copyright Act, and OSHA).

Below, Table 11 illustrates how consistent the factors are across legislation. In sum, cross-legislation consistency is not absolutely disastrous, but this breakdown shows that the current approach is not a model of certainty and predictability by any means.

313. *Id.*
314. *See id.*
315. *Id.* at 352.
316. *Id.*
317. *Id.*
318. *See id.* at 353.
319. *Id.* at 349–50.
320. *Id.*
321. *Id.* at 351.

Table 11
Cross-Legislation Consistency

Consistent Factors	Location	Fairly Consistent Factors	Location	Inconsistent Factors	Location
Hiring Party in Business	Bottom	Right To Control	Top, Middle	Benefits	Scattered
Location	Middle	Assistants	Bottom, Middle	Tax Treatment	Scattered
Duration	Bottom	Skill	Middle/ Bottom, Top	Label	Scattered
Payment Method	Top	Tools	Top, Middle		
Regular Business	Bottom	Additional Projects	Middle, Bottom		
When & How Long To Work	Middle				

B. New Approaches to Employee Determinations

The Supreme Court promoted certainty and predictability as the key goals underlying adoption of the common law multifactor test. The charts, continua, and discussion above beg the question of whether certainty and predictability are being achieved. Given the number of factors, how differently they are treated across legislation, and how poorly many of them perform at accurately predicting the outcomes, the answer is undoubtedly no.

What can be done in light of the disarray from this test? One option could be to use a subset of the factors rather than the dozen or so currently in use. The difficulty is identifying those that would best do the job given the scattered importance described above. Matthew Bodie argued that based on the theory of the firm literature, a definition of employee based on participation, rather than control, is a better fit for the modern economy.[322] He suggested that the participation standard uses many of the Restatement factors, but the ones of most importance are (1) whether the hired party is engaged in a distinct occupation or business, (2) who supplies the instrumentalities and tools, (3) duration, (4) whether the work is part of the regular business of the hiring party, (5) whether the parties believe they are creating an employment relationship (i.e., label), and (6) whether the hiring party is in business.[323]

Although he was not suggesting that the participation approach was being used, the results of this study point to a wide discrepancy between his proposed important factors and how important they are today. Tribunals would need to completely reverse course on several factors, such as whether the hiring party is in business, whether the work is

322. Bodie, *supra* note 15, at 665–66, 705–06.

323. *Id.* at 707.

part of the regular business, and duration of the relationship, all of which are at or near the bottom across the continua. Although the focus would be narrowed, such an approach would be a major shift from the current emphases.

Another approach to narrowing the factors considered is to use the continua in this study to establish hierarchies. Tribunals could begin by looking only at the factors in the most important group or two. If these factors mostly pointed towards a certain outcome, then the tribunal could stop. But if the factors were split, then the tribunal would move to the factors in the next lower group or two to serve as a tiebreaker. Although not perfect, such a system might provide more certainty and predictability by narrowing the focus in the analysis.

A second option for handling the confusion over the current test could be adopting a purposive approach to interpreting the term "employee." The Restatement, which serves as the basis for the common law test, expressly recommended such an approach.[324] As described earlier, there may be instances of this occurring already.[325] Under current law, a worker filing a claim for copyright infringement might be classified as an employee under the work-made-for-hire doctrine. That same worker might then file a separate claim for discrimination under Title VII and be deemed an independent contractor. Even though the same worker does the same job and the court applies the same test, the results could differ. The different treatment of the factors makes this a possibility. Such a result does not further certainty and predictability and seems peculiar or even arbitrary without a purposive approach.

Taking a purposive approach would be one way of logically distinguishing different outcomes. There may be less certainty and predictability across legislation, but it could result in more consistency and predictability within a particular body of law if specific animating principles driving that law were available for tribunals to use. But this approach is unlikely to take hold. It would fly in the face of approximately seventy years of Congressional and Supreme Court authority to the contrary.[326]

A third option is to reduce or eliminate the need to distinguish between employees and independent contractors. Put succinctly, "[e]mployee status matters mainly because our employment laws make it matter."[327] However, this would not be an easy fix to the problems of inconsistency and unpredictability plaguing agencies, courts, companies, and individuals. Legislative action would be required and would be difficult to accomplish.

But such an approach may make the most sense as a matter of both achieving the underlying policy goals of the legislation and enhancing certainty and predictability. For example, if Title VII was designed to rid the U.S. of discrimination in the workplace,[328] why do we permit hiring parties to discriminate on the basis of race, color, religion, sex, national origin, age, and disability when it comes to independent contractors? Why is

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324. *See supra* notes 35–37 and accompanying text.

325. See *supra* Part III.B for a description of skill as important under copyright law and Part III.E for a discussion of skill as less important under the ADA.

326. See *supra* notes 96–102 and accompanying text discussing the rejection of purposivism in 1968 with the Supreme Court's holding in *NLRB v. United Insurance Co. of America*.

327. Carlson, *supra* note 15, at 368.

328. Davidson, *supra* note 11, at 203.

this okay against some people and not others? Similarly, why is a hiring party with fourteen employees allowed to discriminate with impunity, but one with fifteen may not? Why do we require hiring parties with employees to provide safe workplaces, but an identical hiring party with independent contractors can provide unsafe workplaces without government intervention? Is not everyone's safety equally important? Depending on what policy objective is sought, there might very well be better methods to further those policy goals than by distinguishing between employees and independent contractors.

For some acts, Congress did not give much thought to whether employee status was the best way to determine the law's applicability.[329] This appears to be what happened with respect to ERISA.[330] The problem and risk presented by employee benefit plans—losing anticipated retirement benefits and not receiving adequate disclosures[331]—are identical to those faced by independent contractors.[332] Why give some workers who are promised these benefits the protection of federal law but deny those same benefits to other workers who are promised the same benefits?

Employee status need not be the defining characteristic. In fact, ERISA protection already extends not just to employees but also employees' beneficiaries.[333] Amending ERISA to cover all workers who are provided retirement benefit packages would expand the scope of coverage but would not significantly increase the burden on employers.[334] In fact, due to ERISA's preemption provisions, having a single, uniform law might reduce the costs of compliance to hiring parties.[335] With such a change, the difficulties of distinguishing between employees and independent contractors that are imposed on courts, litigants, and parties negotiating benefits packages would vanish.

For the antidiscrimination statutes, there is nothing in the legislative history indicating why Congress chose to limit protection to employees rather than extend it to independent contractors.[336] Thus, it is not clear why focusing on employee status is a proper means of determining who can and cannot be lawfully discriminated against. Instead of drawing a distinction with no known purpose, perhaps a better solution to stopping discrimination on the basis of race, color, religion, sex, national origin, disability, and age would be, to paraphrase Chief Justice Roberts, to stop discriminating entirely on the basis of race, color, religion, sex, national origin, disability, and age.[337]

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329. *See, e.g.*, Carlson, *supra* note 15, at 359.

330. *See id.* ("Congress's choice of an employee basis for ERISA coverage appears to be a product of habit rather than necessity.").

331. 29 U.S.C. § 1001(a)–(b) (2018).

332. *See* Carlson, *supra* note 15, at 359.

333. 29 U.S.C. § 1002(7) (defining "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit").

334. Carlson, *supra* note 15, at 359–60.

335. *Cf. id.* at 360 (arguing that ERISA preempts other types of "claims that might be even more burdensome").

336. *See* Davidson, *supra* note 11, at 205–06.

337. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

In addition to affecting who can be a proper plaintiff, employee status impacts who can be a proper defendant. Title VII and the ADA only apply to employers with fifteen or more employees.[338] The ADEA only applies to employers with twenty or more employees.[339] Unlike the provisions limiting potential plaintiffs, the purpose of setting these thresholds for a proper defendant is apparent from the legislative history.[340] Congress did not want to burden small businesses.[341]

In some cases, it is not clear what the burden would be. For example, if a hiring party with ten employees fires a worker on the basis of race or gender, what burden are they relieved of other than the burden of not being discriminatory? If this is all that can be pointed to, then such a burden is not one that should be given any weight in balancing policy goals.

But for other cases, the burden is more apparent. For example, in a disability discrimination case, the hiring party might be required to make reasonable accommodations for the hired party.[342] Although the hiring party need not undergo undue hardship in making the reasonable accommodation,[343] such accommodations may cost money (e.g., installing ramps for wheelchair access), which is an additional burden on the hiring party.

But is the number of employees the best proxy for measuring whether the hiring party can or should bear this burden? If this burden is a real concern, why not use annual revenue or profit as a better guide?[344] A company with ten employees earning $10 million per year in profit is likely more able to absorb the burden of compliance than a company with twenty-five employees that is financially struggling. Besides being a better proxy for the ability to handle this burden, distinguishing between proper defendants on a profit basis is presumably easier than counting employees under the common law's multifactor right to control test.

Although legislative fixes would be an ideal way to better achieve the underlying goals of the legislation and reduce the uncertainty surrounding employee status, this is unlikely to occur given Congressional gridlock.[345] A purposive approach could justify the different treatment and inconsistent emphasis but is also unlikely given the history of the term "employee" in the statutes. If consistency and predictability are important concerns, then perhaps the most realistic approach is to create hierarchies based on the continua to narrow the factors used under the common law test. Because the Supreme Court has not given any guidance as to which factors are the most important, such an approach could be adopted by lower courts without running afoul of precedent.[346]

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338. 42 U.S.C. §§ 2000e(b), 12111(5) (2018).

339. 29 U.S.C. § 630(b) (2018).

340. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 229 (5th abr. ed. 2015).

341. *Id.*

342. 42 U.S.C. § 12112(b)(5).

343. ROTHSTEIN ET AL., *supra* note 340, at 323.

344. *See* Carlson, *supra* note 15, at 366 (arguing that gross revenue is a better predictor of size and capacity than the number of people a business employs).

345. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2 (2014).

346. In the event the Supreme Court rejected such an approach and mandated analyzing each factor, then a hierarchy approach would be inappropriate. Nonetheless, the continua in this Article would still be of value in helping attorneys and parties predict how courts might rule on the facts of their case.

CONCLUSION

Although tribunals use an identical multifactor test to interpret the term "employee" across many federal statutes, until now, there has been no study to measure which factors are the most and least important under each act and whether the factors are treated consistently across legislation. And despite the Supreme Court's insistence that this test is justified on the grounds of furthering certainty and predictability, this study illustrates that inconsistency and unpredictability abound, not only within a particular act, but also across legislation. Although weighting the factors differently depending on the purpose of the legislation could make sense if writing on a blank slate, the Supreme Court's repeated rejection of a purposive approach to understanding the term "employee" does not justify such an interpretation.

In light of these findings, what can be done? As discussed, relying on employee status to determine the applicability of legislation can be an imprecise proxy for achieving the goals of the statutes. Better and easier-to-apply measures can be used instead, but this would require Congressional action, which is unlikely to occur. Rather than relying on Congress, an alternative approach is to use the continua in this study to establish hierarchies of factors. Although inconsistencies would remain across legislation, certainty and predictability within legislation would likely improve.

Finally, the results of this study invite further research into how tribunals treat the factors. A closer examination of *why* certain factors are more or less important within the statutes is warranted. In addition, examining whether there is a geographic difference and whether and why agencies and courts treat the factors differently could provide interesting insights. Finally, exploring alternative approaches to distinguishing between employees and independent contractors, both at the state and federal level, and measuring their certainty and predictability could provide a nice comparison in evaluating the effectiveness of the tests.

APPENDIX A

Intercoder Reliability Results

Variable Name	Direction or Weight	Average Pairwise Percent Agreement	Fleiss' Kappa
Employee or independent contractor status	N/A	100%	1.000
Right to control	Direction	89%	0.795
	Weight	89%	0.778
Skill required	Direction	96%	0.929
	Weight	100%	undefined
Source of instrumentalities/tools	Direction	92%	0.874
	Weight	100%	undefined
Location of the work	Direction	89%	0.841
	Weight	98%	-0.011
Duration of the relationship	Direction	84%	0.751
	Weight	93%	-0.027
Right to assign additional projects	Direction	96%	0.924
	Weight	100%	undefined
Discretion over when and how long to work	Direction	89%	0.791
	Weight	96%	0.310
Method of payment	Direction	91%	0.809
	Weight	93%	-0.022
Hiring and paying assistants	Direction	87%	0.788
	Weight	100%	undefined
Part of regular business	Direction	91%	0.778
	Weight	100%	undefined
In business	Direction	100%	1.000
	Weight	100%	undefined
Benefits	Direction	93%	0.843
	Weight	96%	0.726
Tax treatment	Direction	91%	0.713
	Weight	96%	0.726
Label	Direction	89%	0.801
	Weight	91%	0.645

APPENDIX B

Codebook

When coding the cases, we care about what the tribunal *says* in the analysis, *not* what we think the correct analysis should be.

Employee or Independent Contractor: This field tracks the tribunal's ultimate decision on whether the hired party was an employee or independent contractor. If the tribunal states that the hired party was an employee, then enter 1. Otherwise, enter 0.

Note: If for some reason the tribunal does not make this determination, then the case was erroneously included.

Note: For cases involving determining whether a hired party is an employee of one party or another, be sure to keep an eye on which hiring party is being referred to in the analysis. For example, the tribunal may say the hired party is an employee of Company A, but in its analysis the tribunal is really focused on showing the hired party is really an independent contractor of Company B. The conclusion would be independent contractor (0), not employee (1) because the focus of the analysis is on the relationship with Company B.

Direction of each factor: These fields list the thirteen factors from *Reid*, plus a factor titled "Agreement Label," as well as "Other Factors" and "Other Factors2." For each factor, there are four possible codes:

- 0 if the tribunal does not address the factor.
- 1 if the tribunal states that the factor favors employee status.
- 2 if the tribunal states that the factor favors independent contractor status.
- 3 if the tribunal addresses the factor, but it cannot be determined from the tribunal's statements whether this factor favors employee or independent contractor status. Also, use this when the tribunal suggests the factor is neutral or irrelevant (i.e., it neither favors employee or independent contractor status).

Note: If the tribunal simply lists the factors, but does not apply them, then enter 0. With these fields, we are concerned about actual application, not just a statement of the law. Similarly, we don't care about the parties' arguments; we care about how the tribunal treats the factors.

Note: If the tribunal says the direction of a factor could be either neutral (or a similar statement, such as "in equipoise") or points towards employee or independent contractor, but doesn't definitively say, then code it as either a 1 or 2—depending on which direction the tribunal indicates the factor points. Do not code it as a 3. Treat the weight as you normally would (i.e., don't necessarily discount it just because the direction could be neutral).

Explanation of the Factors: Below is a description of the typical factors addressed under the common law test. In the event the tribunal says it is analyzing a particular factor, but seems to analyze it differently than what is described below, *use the tribunal's classification*. Use the descriptions below in the absence of a clear indication from the tribunal about what factor(s) it is applying.

(0) **hiring party's right to control the manner and means by which the product is accomplished** – Sometimes tribunals treat this as a factor, but sometimes they treat it as the ultimate question to be answered (and use the other factors below to answer that question). If the tribunal does not treat it as a factor, then you should not either. Look for language calling right to control a factor. This indicates it is being treated as one. If the tribunal only speaks of right to control as being the general standard to apply, then it should be coded as a 0 because it is not addressed *as a factor*. In such a scenario, the weight should also be a 0. But if listed *as a factor* and given weight or discounted, it is okay to use those weight codes. If the tribunal has a section or paragraph in the opinion, separate from the other factors, focusing solely on the right to control, then this suggests it is treating it as a factor.

Language suggesting employee status includes, but is not limited to, statements about the hiring party controlling how the job is done or supervising the hired party. Language suggesting independent contractor status includes, but is not limited to, statements about the hired party having discretion or freedom in how to work, or the hiring party having a lack of supervision over the hired party.

(1) **Skill required** – Focused on whether the work the hired party is hired to do involves skilled work (e.g., surgeon) or unskilled work (e.g., taxi driver).

(2) **Source of the instrumentalities and tools** – Looking at ownership of the instrumentalities or tools that are used in the work. If the hired party owns them, then this indicates independent contractor status. If the hiring party owns them, this indicates employee status.

(3) **Location of the work** – Looks at where the work takes place. Is it done on the hiring party's premises or where the hiring party directs (indicating employee status)? Or is it done elsewhere, such as the hired party's home (indicating independent contractor)? A clue to independent contractor status is that the hired party has a choice of where to work.

(4) **Duration of the relationship between the parties** – This is the length of time the parties work together. It is *not* how many hours per day, week, or month, which goes to factor #6.

(5) **Whether the hiring party has the right to assign additional projects to the hired party** – If the hiring party can demand that the hired party perform different tasks, responsibilities, or jobs, then this indicates employee status. If not, then this indicates independent contractor status. Unless the tribunal indicates otherwise, this factor does not include being able to work for others (which should be listed under "Other Factor" or "Other Factor2").

(6) **Extent of the hired party's discretion over when and how long to work** – This factor is focused on whether the hiring party can tell the hired party what time work begins and ends. If the hiring party tells the hired party to be at work at 8:00 AM and to work until 5:00 PM, then this indicates employee status. In contrast, if the hired party has discretion over when to work (i.e., can come and go as s/he chooses as long as the work is done), then this points towards independent contractor status. Working a lot of hours is not necessarily indicative—it is about how much choice there is in working the hours.

(7) **Method of payment** – This includes anything relating to payment to the hired party, but not tax and benefits, which are dealt with as separate factors. Keeping all the

income from a job (minus the costs of performing) usually indicates independent contractor status. Likewise, being paid a salary usually suggests employee status. Being paid on a per project basis typically indicates independent contractor status.

(8) **Hired party's role in hiring and paying assistants** – This includes hiring substitutes or replacements for the hired party. If the hired party can hire assistants or substitutes, then this suggests independent contractor status. If not, then it points towards employee status.

(9) **Whether the work is part of the regular business of the hiring party** – If the work is a core or regular part of the hiring party's business, then this indicates employee status. If the work is incidental to the hiring party's business, then this indicates independent contractor status.

(10) **Whether the hiring party is in business**.

(11) **The provision of employee benefits** – If the hired party provides benefits (e.g., health insurance, dental insurance, retirement contributions or pensions, disability insurance), then this suggests employee status. If no benefits are provided, then this suggests independent contractor status.

(12) **The tax treatment of the hired party** – If the hiring party pays taxes on behalf of the hired party (e.g., income, FICA, unemployment), then this indicates employee status. Issuing a W2 tax form indicates employee status. If taxes are not withheld and a 1099 tax form is used, then this indicates independent contractor status.

(13) **Label** – We are looking at how the parties labeled the hired party. For example, is there a contract that lists the hired party as "contractor" or "employee?" Or does the hired party or hiring party hold the hired party out as an employee or independent contractor? Sometimes the tribunal will talk about this in terms of intent. Wearing the hiring party's uniform or company logo is *not* included here. We are looking at how the parties referred to the hired party. Unless the tribunal refers to it separately from the tax status factor, do not include tax documents as part of the label analysis.

(14) **Other Factors and Other Factors2** – These are factors the tribunal considered that are not included in the other listed factors. If additional factors are listed, code them the same way as the other factors. Make sure to describe the factors as described below.

Description of other factors: If additional factors are listed, make sure to add a short description of the other factors in the fields marked "Description of Other Factors" and "Description of Other Factors2." If there are more than two additional factors, then add them to the "Notes" field at the end of the row. Before adding the factor to these fields, make sure that the application is not really just one of the other listed factors with a slightly different name.

Analogizing to other cases: If the tribunal discusses an analysis in another case and analogizes to the case you are coding, then treat the discussed factor(s) the same as the older case unless the tribunal indicates otherwise.

Weighting of each factor: These fields capture whether the tribunal weighted the factor at issue. For each of these fields there are three possible codes:

- 0 if the tribunal did not expressly weight the factor
- 1 if the tribunal expressly weighted the factor as important
- 2 if the tribunal expressly discounted the importance of the factor

Note: Coding these fields should be based on some express statement by the tribunal about particular factors being more or less important. This is to be distinguished from scenarios where there are some factors that point toward employee status and others that point toward independent contractor status, but the tribunal makes a determination about the hired party's ultimate status. In such a situation, the factors that are inconsistent with the ultimate result are not necessarily discounted. Nor are the factors that are consistent with the ultimate result necessarily weighted as important. What we are looking for is some affirmative statement by the tribunal (1) that, in the abstract, the factor generally is entitled to additional weights or should be generally discounted; or (2) during the application of the factor to the facts of the particular case that the factor weighs heavily or is of relative unimportance in the analysis.

Note: Relevant language for express weighting includes, but is not limited to: "highly suggestive," "creates a strong inference," "considered significant," "strong indicator," "high importance," "great weight," "additional weight," and "most important."

Note: Relevant language for discounting includes, but is not limited to: "carries little weight," "discount its important," "has only minimal impact," "has little influence," and "discount its effect."

Weights of particular case factors re: importance: If the tribunal, in its analysis of the factors, mentions that some factors are more or less important than others and cites to a case for this proposition, then list the cases that are cited and provide the citation. Otherwise, leave this field blank.

Note: For example, in the Copyright Act cases, courts will sometimes cite to *Aymes v. Bonelli* to say that (1) right to control, (2) skill required, (3) employee benefits, (4) tax treatment, and (5) the right to assign additional projects are the most important factors.

Notes Field: Use this field to note anything of importance that makes the case unusual or that requires a closer look.

Additional Thoughts to Keep in Mind as You Code the Cases:

1) Do not rely on your determination of employee or independent contractor status that you may have noted during the screening phase of the project. Look at the issue anew.

2) Keep an eye out to make sure the statute being interpreted is the correct one. For example, if you are reviewing an ERISA case, make sure that the tribunal's application of the common law multifactor test is really for a dispute over the ERISA statute, and not, say, over an IRS regulation dispute that refers to the common law test.

3) If you see a red flag in Westlaw indicating negative treatment of the case, then check to see if a higher authority reversed your case on the basis of the employee/independent contractor issue.

4) If you find a case that uses a subset of factors for distinguishing employees from employers (e.g., shareholders, partners, directors) or for the joint employer scenario, then do not include this case. This is mostly likely to be seen in the Title VII, ADA, and ADEA cases.

5) If a case has two (or more) separate applications to different people (or sets of people), then make two (or more) entries. That is, insert a row (or rows) below the case and code each analysis separately.

6) Be sure to check the footnotes. Sometimes additional analysis occurs there.

7) If the tribunal does not make a determination about one or more factors, but instead expressly assumes certain factors favor an outcome, code them according to the assumption. For example, the tribunal says the parties dispute which direction factors X and Y point. It then says that even if it assumed X and Y point toward employee status, it would still find that the party was an independent contractor. You should code the X and Y fields with a 1 for independent contractor.

APPENDIX C

Combined NLRA (Board and Court) Calculations

Table 1.A – Frequency (%)

Factor	Frequency
Source of instrumentalities/tools	75%
Payment method	72%
Right to control manner and means	67%
Tax treatment	64%
When and how long to work	63%
Employee benefits	55%
Hiring and paying assistants	52%
Label	46%
Additional projects	45%
Work location	38%
Part of regular business of hiring party	30%
Relationship duration	28%
Skill required	23%
Hiring party in business	3%

Table 1.B – Consistency (%)

Factor	Consistency
Hiring party in business	100%
Right to control manner and means	94%
Additional projects	84%
Work location	80%
Skill required	76%
Part of regular business of hiring party	73%
When and how long to work	72%
Hiring and paying assistants	70%
Source of instrumentalities/tools	69%
Payment method	69%
Relationship duration	63%
Label	62%
Employee benefits	59%
Tax treatment	54%

Table 1.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	16%
Payment method	6%
Part of regular business of hiring party	3%
Label	3%
Hiring and paying assistants	3%
Relationship duration	2%
When and how long to work	2%
Tax treatment	2%
Additional projects	1%
Employee benefits	1%
Source of instrumentalities/tools	1%
Skill required	0%
Work location	0%
Hiring party in business	0%

Table 1.D – Discounted Weighting (%)

Factor	Discounted Weighting
When and how long to work	6%
Hiring and paying assistants	6%
Source of instrumentalities/tools	5%
Label	4%
Employee benefits	4%
Relationship duration	4%
Payment method	3%
Additional projects	3%
Part of regular business of hiring party	3%
Work location	3%
Skill required	2%
Tax treatment	2%
Right to control manner and means	1%
Hiring party in business	0%

NLRA Board Calculations

Table 2.A – Frequency (%)

Factor	Frequency
Source of instrumentalities/tools	74%
Right to control manner and means	73%
Payment method	72%
Tax treatment	64%
When and how long to work	61%
Employee benefits	56%
Hiring and paying assistants	53%
Additional projects	44%
Label	44%
Work location	36%
Part of regular business of hiring party	31%
Relationship duration	26%
Skill required	21%
Hiring party in business	4%

Table 2.B – Consistency (%)

Factor	Consistency
Hiring party in business	100%
Right to control manner and means	94%
Work location	83%
Additional projects	80%
Part of regular business of hiring party	78%
Hiring and paying assistants	73%
Skill required	71%
When and how long to work	70%
Payment method	69%
Source of instrumentalities/tools	68%
Relationship duration	63%
Label	61%
Employee benefits	55%
Tax treatment	51%

Table 2.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	13%
Part of regular business of hiring party	4%
Payment method	3%
Label	3%
Relationship duration	2%
Hiring and paying assistants	2%
When and how long to work	2%
Additional projects	1%
Employee benefits	1%
Tax treatment	1%
Skill required	0%
Source of instrumentalities/tools	0%
Work location	0%
Hiring party in business	0%

Table 2.D – Discounted Weighting (%)

Factor	Discounted Weighting
Label	6%
Source of instrumentalities/tools	4%
When and how long to work	4%
Employee benefits	4%
Additional projects	3%
Skill required	3%
Payment method	2%
Hiring and paying assistants	2%
Relationship duration	2%
Tax treatment	2%
Right to control manner and means	1%
Work location	0%
Part of regular business of hiring party	0%
Hiring party in business	0%

NLRA Court Calculations

Table 3.A – Frequency (%)

Factor	Frequency
Source of instrumentalities/tools	76%
Payment method	71%
When and how long to work	69%
Tax treatment	67%
Employee benefits	53%
Label	53%
Hiring and paying assistants	49%
Additional projects	47%
Right to control manner and means	44%
Work location	44%
Relationship duration	38%
Part of regular business of hiring party	24%
Skill required	24%
Hiring party in business	0%

Table 3.B – Consistency (%)

Factor	Consistency
Additional projects	100%
Right to control manner and means	95%
Skill required	91%
When and how long to work	77%
Source of instrumentalities/tools	76%
Work location	75%
Employee benefits	67%
Relationship duration	65%
Hiring and paying assistants	64%
Payment method	63%
Tax treatment	60%
Label	58%
Part of regular business of hiring party	55%
Hiring party in business	undefined

Table 3.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	30%
Payment method	16%
Hiring and paying assistants	5%
Label	4%
Tax treatment	3%
Source of instrumentalities/tools	3%
When and how long to work	0%
Part of regular business of hiring party	0%
Relationship duration	0%
Additional projects	0%
Employee benefits	0%
Work location	0%
Skill required	0%
Hiring party in business	undefined

Table 3.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring and paying assistants	18%
Part of regular business of hiring party	18%
When and how long to work	13%
Work location	10%
Payment method	9%
Source of instrumentalities/tools	9%
Tax treatment	7%
Relationship duration	6%
Additional projects	5%
Employee benefits	4%
Label	0%
Right to control manner and means	0%
Skill required	0%
Hiring party in business	undefined

Copyright Calculations

Table 4.A – Frequency (%)

Factor	Frequency
Payment method	86%
Right to control manner and means	80%
Tax treatment	80%
Employee benefits	78%
Source of instrumentalities/tools	73%
Work location	73%
Additional projects	67%
When and how long to work	67%
Relationship duration	63%
Part of regular business of hiring party	63%
Skill required	55%
Hiring and paying assistants	37%
Label	20%
Hiring party in business	18%

Table 4.B – Consistency (%)

Factor	Consistency
Employee benefits	90%
Source of instrumentalities/tools	89%
Skill required	86%
Tax treatment	85%
Additional projects	85%
Part of regular business of hiring party	84%
Payment method	84%
When and how long to work	82%
Relationship duration	81%
Work location	76%
Hiring and paying assistants	74%
Right to control manner and means	59%
Label	50%
Hiring party in business	44%

Table 4.C – Favored Weighting (%)

Factor	Favored Weighting
Employee benefits	38%
Skill required	36%
Tax treatment	34%
Additional projects	26%
Right to control manner and means	17%
Payment method	14%
Label	10%
Relationship duration	6%
Source of instrumentalities/tools	5%
Part of regular business of hiring party	0%
Work location	0%
When and how long to work	0%
Hiring and paying assistants	0%
Hiring party in business	0%

Table 4.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring party in business	33%
Label	30%
Part of regular business of hiring party	13%
Right to control manner and means	12%
Hiring and paying assistants	11%
Work location	11%
Tax treatment	7%
Relationship duration	6%
When and how long to work	6%
Employee benefits	5%
Skill required	4%
Source of instrumentalities/tools	3%
Additional projects	3%
Payment method	2%

ERISA Calculations

Table 5.A – Frequency (%)

Factor	Frequency
Payment method	85%
Tax treatment	74%
Right to control manner and means	70%
Employee benefits	68%
Source of instrumentalities/tools	62%
When and how long to work	58%
Skill required	49%
Work location	49%
Relationship duration	47%
Label	45%
Additional projects	43%
Hiring and paying assistants	42%
Part of regular business of hiring party	42%
Hiring party in business	9%

Table 5.B – Consistency (%)

Factor	Consistency
Additional projects	100%
Right to control manner and means	92%
When and how long to work	87%
Payment method	87%
Source of instrumentalities/tools	85%
Tax treatment	85%
Employee benefits	83%
Hiring and paying assistants	73%
Skill required	69%
Label	67%
Work location	62%
Relationship duration	60%
Hiring party in business	60%
Part of regular business of hiring party	45%

Table 5.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	35%
Additional projects	9%
Label	8%
Tax treatment	8%
Skill required	8%
Payment method	7%
Employee benefits	6%
Part of regular business of hiring party	5%
Source of instrumentalities/tools	3%
Hiring and paying assistants	0%
When and how long to work	0%
Relationship duration	0%
Work location	0%
Hiring party in business	0%

Table 5.D – Discounted Weighting (%)

Factor	Discounted Weighting
Skill required	19%
When and how long to work	10%
Source of instrumentalities/tools	9%
Hiring and paying assistants	9%
Part of regular business of hiring party	9%
Employee benefits	6%
Relationship duration	4%
Additional projects	4%
Label	4%
Tax treatment	3%
Right to control manner and means	3%
Work location	0%
Payment method	0%
Hiring party in business	0%

OSHA Calculations

Table 6.A – Frequency (%)

Factor	Frequency
Payment method	88%
Source of instrumentalities/tools	82%
Right to control manner and means	80%
When and how long to work	68%
Additional projects	65%
Label	58%
Tax treatment	55%
Work location	53%
Employee benefits	53%
Part of regular business of hiring party	50%
Relationship duration	48%
Skill required	42%
Hiring and paying assistants	37%
Hiring party in business	27%

Table 6.B – Consistency (%)

Factor	Consistency
Right to control manner and means	96%
When and how long to work	93%
Additional projects	92%
Source of instrumentalities/tools	90%
Label	83%
Work location	78%
Payment method	75%
Skill required	72%
Relationship duration	72%
Part of regular business of hiring party	70%
Hiring party in business	63%
Hiring and paying assistants	59%
Employee benefits	53%
Tax treatment	42%

Table 6.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	69%
Source of instrumentalities/tools	4%
Work location	3%
Additional projects	3%
When and how long to work	2%
Relationship duration	0%
Payment method	0%
Skill required	0%
Hiring and paying assistants	0%
Part of regular business of hiring party	0%
Hiring party in business	0%
Employee benefits	0%
Tax treatment	0%
Label	0%

Table 6.D – Discounted Weighting (%)

Factor	Discounted Weighting
Employee benefits	19%
Tax treatment	15%
Hiring party in business	13%
Part of regular business of hiring party	10%
Payment method	9%
Work location	6%
Hiring and paying assistants	5%
Label	5%
Relationship duration	3%
Additional projects	0%
When and how long to work	0%
Right to control manner and means	0%
Skill required	0%
Source of instrumentalities/tools	0%

Combined Antidiscrimination Calculations

Table 7.A – Frequency (%)

Factor	Frequency
Right to control manner and means	84%
Payment method	80%
Employee benefits	73%
Tax treatment	64%
Label	64%
Work location	58%
Source of instrumentalities/tools	56%
When and how long to work	53%
Skill required	38%
Relationship duration	38%
Additional projects	32%
Hiring and paying assistants	27%
Part of regular business of hiring party	27%
Hiring party in business	10%

Table 7.B – Consistency (%)

Factor	Consistency
Right to control manner and means	91%
Additional projects	90%
Label	89%
Tax treatment	86%
When and how long to work	86%
Payment method	86%
Employee benefits	84%
Skill required	81%
Hiring and paying assistants	78%
Source of instrumentalities/tools	67%
Work location	58%
Relationship duration	52%
Part of regular business of hiring party	52%
Hiring party in business	39%

Table 7.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	44%
Tax treatment	8%
Label	8%
When and how long to work	6%
Employee benefits	6%
Payment method	4%
Hiring and paying assistants	4%
Source of instrumentalities/tools	3%
Additional projects	2%
Part of regular business of hiring party	2%
Work location	1%
Skill required	0%
Relationship duration	0%
Hiring party in business	0%

Table 7.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring party in business	22%
Relationship duration	6%
Hiring and paying assistants	6%
Work location	5%
Skill required	4%
Source of instrumentalities/tools	4%
Part of regular business of hiring party	4%
Additional projects	3%
Tax treatment	2%
Label	2%
When and how long to work	1%
Employee benefits	1%
Right to control manner and means	1%
Payment method	0%

Title VII Calculations

Table 8.A – Frequency (%)

Factor	Frequency
Right to control manner and means	84%
Payment method	81%
Employee benefits	72%
Tax treatment	64%
Label	63%
Work location	57%
Source of instrumentalities/tools	55%
When and how long to work	50%
Relationship duration	40%
Skill required	40%
Additional projects	34%
Part of regular business of hiring party	29%
Hiring and paying assistants	24%
Hiring party in business	9%

Table 8.B – Consistency (%)

Factor	Consistency
Additional projects	93%
Right to control manner and means	89%
Label	88%
Tax treatment	86%
Employee benefits	85%
Payment method	85%
When and how long to work	82%
Hiring and paying assistants	79%
Skill required	79%
Source of instrumentalities/tools	68%
Work location	62%
Hiring party in business	55%
Relationship duration	54%
Part of regular business of hiring party	51%

Table 8.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	40%
Label	8%
Tax treatment	6%
Employee benefits	5%
Payment method	5%
When and how long to work	3%
Additional projects	2%
Source of instrumentalities/tools	2%
Hiring and paying assistants	0%
Part of regular business of hiring party	0%
Work location	0%
Relationship duration	0%
Hiring party in business	0%
Skill required	0%

Table 8.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring party in business	18%
Hiring and paying assistants	3%
Part of regular business of hiring party	3%
Skill required	2%
Source of instrumentalities/tools	2%
Relationship duration	2%
Work location	1%
Label	1%
Payment method	0%
Additional projects	0%
Employee benefits	0%
Tax treatment	0%
Right to control manner and means	0%
When and how long to work	0%

ADA Calculations

Table 9.A – Frequency (%)

Factor	Frequency
Payment method	76%
Employee benefits	76%
Right to control manner and means	74%
Tax treatment	71%
Label	71%
Work location	59%
Source of instrumentalities/tools	56%
When and how long to work	53%
Relationship duration	32%
Skill required	32%
Hiring and paying assistants	26%
Part of regular business of hiring party	21%
Additional projects	18%
Hiring party in business	6%

Table 9.B – Consistency (%)

Factor	Consistency
Additional projects	100%
Payment method	92%
Label	92%
Skill required	91%
Right to control manner and means	88%
Tax treatment	88%
When and how long to work	83%
Employee benefits	77%
Hiring and paying assistants	67%
Source of instrumentalities/tools	63%
Part of regular business of hiring party	57%
Relationship duration	55%
Work location	50%
Hiring party in business	0%

Table 9.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	44%
Tax treatment	13%
Label	13%
Employee benefits	12%
Hiring and paying assistants	11%
When and how long to work	11%
Relationship duration	0%
Payment method	0%
Additional projects	0%
Part of regular business of hiring party	0%
Skill required	0%
Source of instrumentalities/tools	0%
Work location	0%
Hiring party in business	0%

Table 9.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring party in business	100%
Hiring and paying assistants	22%
Skill required	18%
Relationship duration	18%
Part of regular business of hiring party	14%
Source of instrumentalities/tools	11%
Work location	10%
Right to control manner and means	8%
When and how long to work	6%
Employee benefits	4%
Tax treatment	4%
Label	4%
Additional projects	0%
Payment method	0%

ADEA Calculations

Table 10.A – Frequency (%)

Factor	Frequency
Right to control manner and means	88%
Payment method	81%
Employee benefits	77%
Tax treatment	72%
Label	70%
Work location	65%
When and how long to work	63%
Source of instrumentalities/tools	63%
Hiring and paying assistants	42%
Skill required	42%
Additional projects	40%
Relationship duration	33%
Part of regular business of hiring party	30%
Hiring party in business	14%

Table 10.B – Consistency (%)

Factor	Consistency
Right to control manner and means	97%
Employee benefits	94%
Tax treatment	94%
Label	93%
When and how long to work	93%
Payment method	89%
Skill required	83%
Hiring and paying assistants	83%
Additional projects	82%
Source of instrumentalities/tools	67%
Work location	61%
Relationship duration	43%
Part of regular business of hiring party	38%
Hiring party in business	17%

Table 10.C – Favored Weighting (%)

Factor	Favored Weighting
Right to control manner and means	50%
Part of regular business of hiring party	8%
Source of instrumentalities/tools	7%
When and how long to work	7%
Employee benefits	6%
Tax treatment	6%
Hiring and paying assistants	6%
Work location	4%
Payment method	3%
Label	3%
Relationship duration	0%
Additional projects	0%
Skill required	0%
Hiring party in business	0%

Table 10.D – Discounted Weighting (%)

Factor	Discounted Weighting
Hiring party in business	17%
Relationship duration	14%
Additional projects	12%
Source of instrumentalities/tools	11%
Work location	11%
Part of regular business of hiring party	8%
Skill required	6%
Hiring and paying assistants	6%
When and how long to work	4%
Tax treatment	3%
Right to control manner and means	3%
Employee benefits	0%
Label	0%
Payment method	0%