What is an employee? The answer depends on the Federal law

In a legal context, the classification of a worker as either an employee or an independent contractor can have significant consequences

Charles J. Muhl

In the American workplace today, a full-time, 40-hour-a-week employee who stays with the same employer performing the same job over the course of an entire worklife would be viewed as a rarity, or at least as a person found in lesser proportion in the U.S. workforce than in decades past. Today's workplace includes a variety of workers in contingent arrangements—independent contractors, leased employees, temporary employees, on-call workers, and more—perceived to be a result of employers' desire to reduce labor costs and employees' desire to increase their flexibility, among other things. The Bureau of Labor Statistics recently reported that in February 2001 the contingent workforce, or those workers who do not have an implicit or explicit contract for ongoing employment and who do not expect their current job to last, totaled 5.4 million people, roughly 4 percent of the U.S. workforce.[1] According to the BLS survey, millions more were employed in alternative work arrangements:[2] 8.6 million independent contractors (representing 6.4 percent of total employment), 2.1 million on-call workers, 1.2 million temporary help agency workers, and 633,000 contract company workers. The Bureau treats these contingent workers and workers in alternative work arrangements as part of total U.S. employment, and although they are in a typical employment situation, most of the general public would probably consider them employees.

But how does Federal law treat workers in contingent and alternative work arrangements? That is, are such workers viewed as employees who are entitled to legal protections under Federal legislation? As is frequently the case with legal questions, the answer depends—in this case, on the Federal law at issue. In general, though, courts evaluate the totality of the circumstances surrounding a worker's employment, with a focus on who has the right—the employer or the employee—to control the work process.

The question "Is a worker an employee?" may seem like a simple one to answer on its surface. The dictionary definition of "employee" says succinctly that an employee is "a person who works for another in return for financial or other compensation."[3] Under that definition, independent contractors would appear to be employees. However, the legal definition of "employee" is concerned with more than the pay received by a worker for services provided. *Black's Law Dictionary* defines "employee" as "a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed."[4] In contrast, an "independent contractor" is one who, "in the exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product or final result of his work."[5] This legal distinction as to how a worker must be classified has broad implications—and potentially negative consequences for mischaracterization—for both employers and workers alike.

This article examines how the legal determination is made that a worker is either an employee or an independent contractor, beginning with a discussion of why the determination is important and then discussing the tests used by courts to

Charles J. Muhl is an attorney in the firm of Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, Illinois. E-mail: charles.muhl@goldbergkohn.com

make the determination and the laws pursuant to which each test applies.

Employee or independent contractor?

Employers have used independent contractors and other contingent workers more frequently in recent times for a variety of reasons, including reducing the costs associated with salaries, benefits, and employment taxes and increasing the flexibility of the workforce.[6] Under U.S. law, employers are required to pay the employer's share, and withhold the worker's share, of employment taxes for employees, but not for independent contractors. Employment taxes include those collected pursuant to the Federal Insurance Contributions Act (FICA)[7] for the U.S. Social Security system; those collected pursuant to the Federal Unemployment Tax Act (FUTA),[8] which pays unemployment benefits to displaced workers; and income tax withholding.[9]

U.S. law imposes other obligations on employers with respect to employees that are not imposed on independent contractors.[10] The Fair Labor Standards Act (FLSA)[11] requires employers to meet minimum-wage and overtime obligations toward their employees. Title VII of the Civil Rights Act of 1964[12] prohibits employers from discriminating against their employees on the basis of race, color, religion, sex, or national origin, while the Age Discrimination in Employment Act (ADEA)[13] prohibits employers from discriminating against employees on the basis of their age. The Employment Retirement Security Act (ERISA)[14] sets the parameters of qualified employee benefit plans, including the level of benefits and amount of service required for vesting of those benefits, typically in the context of retirement. The Americans with Disabilities Act (ADA)[15] prohibits employers from discriminating against qualified individuals who have disabilities. The Family and Medical Leave Act (FMLA)[16] requires employers to provide eligible employees with up to 12 weeks of unpaid leave per year when those employees are faced with certain critical life situations. The National Labor Relations Act (NLRA)[17] grants employees the right to organize and governs labor-management relations.

Clearly, then, some incentive exists for employers to classify their workers as independent contractors rather than employees, in order to reduce costs and various legal obligations. However, the failure of an employer to make the proper determination as to whether workers are employees or independent contractors can have dire consequences. Employers who are careless in their labeling of workers as independent contractors risk exposure to substantial liability in the future under Federal law if the workers are mischaracterized. The U.S. Government—in particular, the Internal Revenue Service (IRS)—can seek to recover back taxes and other contributions that should have been paid by the employer on the employee's behalf,[18] and the workers themselves can seek compensation for job benefits that the employer denied them on the basis of their supposed status as independent contractors.

One of the most striking examples of the danger of mischaracterizing workers as independent contractors rather than employees occurred in *Vizcaino* v. *Microsoft*,[19] a case in which the U.S. Court of Appeals for the Ninth Circuit held that a class of workers for the leading U.S. computer software company were employees who were entitled to participate in Microsoft's various pension and welfare plans, despite the fact that the workers had signed an agreement that labeled them as independent contractors.

Prior to 1990, Microsoft hired "freelancers" to perform various services for the company over a continuous period, in some cases extending in excess of 2 years. Upon joining Microsoft, the former freelancers executed agreements which specifically stated that they were independent contractors and not employees and that nothing contained in the agreement would be construed to create an employer-employee relationship. Despite the agreements, the workers were fully integrated into Microsoft's workforce, working under nearly identical circumstances as Microsoft's regular employees. The erstwhile freelancers worked the same core hours at the same location and shared the same supervisors as regular employees. The only distinction between the freelancers and regular employees was that the freelancers were hired for specific projects. Microsoft neither paid the employer's share, nor withheld the worker's share, of FICA taxes and did not allow the workers to participate in the company's pension plans, on the basis of the agreements the workers had signed stating that they were independent contractors.

The IRS investigated Microsoft and determined that the workers were employees, not independent contractors, and that Microsoft should have been withholding taxes for them.[20] Accepting the IRS' determination, Microsoft conferred employee status on certain of the workers, but dismissed others from employment. Those who were dismissed then filed a class-action suit seeking to have the court declare that they were eligible to participate in Microsoft's pension plans. The district court determined that the workers were employees, not independent contractors.[21] On appeal, Microsoft conceded that the workers were employees, but argued (1) that they had waived their right to participate in the company's pension plans by executing the agreements which specifically stated that they were independent contractors and not employees and (2) that nothing contained in the agreement could be construed to create an employer-employee relationship. The court of appeals rejected Microsoft's argument, finding that the company's pension plan administrator had acted arbitrarily and capriciously in denying the workers' claim that they were entitled to participate in the pension plans. The court found that the administrator should have focused on

the actual circumstances surrounding the freelancers' employment and not the labeling of the workers by the agreements. In December 2000, Microsoft settled the case for $97 million.

There are circumstances in which the classification of a worker as an independent contractor is detrimental to employers and beneficial to workers. When the services being performed result in a copyrightable work, employers may wish to establish that a worker is an employee in order to obtain authorship of the copyright. The U.S. Supreme Court, in *Community for Creative Non-Violence, et al.* v. *Reid*,[22] held that an employer is the owner of a copyright if the employer had contracted for a creative "work for hire"—that is, if work prepared by an employee is within the scope of employment. If the worker is an independent contractor, the worker, and not the employer, is the owner of the copyright for the work performed. Thus, in the context of intellectual property rights, employers are protected by establishing an employer-employee relationship with a worker.

Determining a worker's status

The potential benefits to both employers and workers of the proper characterization of the working relationship raises the question, How is the legal determination made as to whether a worker is an employee or an independent contractor? Generally, the totality of the circumstances—that is, all the conditions under which a person is working—governs the characterization of that person as an employee or an independent contractor; the label a company places on the worker has no bearing on the matter. Again generally, a person is an employee if the employer has the right to control the person's work process, whereas a worker is classified as an independent contractor if the employer does not control the process, but dictates only the end result or product of the work. Note that the employer does not actually have to control the work process: the mere *ability* of the employer to take control is sufficient to create an employer-employee relationship.

The courts have developed three tests to be used in determining a worker's status: the common-law test, the economic realities test, and a hybrid test that incorporates various elements of both of those tests. Because the tests have been applied to different Federal statutes, the characterization of a worker as an employee or an independent contractor can vary, depending on which statute is being applied. As a result, the same person can be classified as an employee under one test and the relevant Federal laws to which that test is applied, but as an independent contractor under another test and its relevant Federal laws. Furthermore, different tests are applied to the same Federal law, depending on which jurisdiction a case is heard in. However, because each of the tests evaluates the totality of the circumstances behind the employment relationship, the overlap in the tests is substantial. Exhibit 1 offers a brief summary of the three tests.

Common-law test. The common-law test was developed on the basis of the traditional legal concept of agency, which, in an employment context, consists of a relationship wherein one person (the employee) acts for or represents another (the employer) by the employer's authority.[23] The common-law test involves the evaluation of 10 factors to determine whether a worker is an employee, with no one factor dispositive, but with the determination centering on who has the right to control the work process. Exhibit 2 shows the 10 factors used in the common-law test.

The IRS uses a derivation of the common-law test in assessing whether a worker is an employee, taking into account some of the common-law test's factors as part of the IRS's own 20-factor test.[24] In addition to evaluating employment tax obligations under the Federal income tax law, FICA, and FUTA, the common-law/IRS test has been applied to the National Labor Relations Act, which governs labor-management relations and collective bargaining for unionized employers, and to the Immigration Reform and Control Act. Furthermore, in *Nationwide Mutual Insurance Co.* v. *Darden*,[25] the U.S. Supreme Court ruled that, for Federal laws that do not contain a clear definition of "employee," the relationship between employer and worker should be evaluated on the basis of the common-law test, focusing on who had the right to control the worker.

In a vast number of cases throughout the U.S. Federal court system, some going back several decades, the common-law test has been applied to determine whether workers are employees or contractors. For example, in *Walker* v. *Altmeyer*,[26] decided in 1943, the U.S. Court of Appeals for the Second Circuit found that an attorney who was given office space at $100 per month in return for services performed was an employee pursuant to the Social Security Act, because his landlord, another attorney, had the right to control what the worker did and to supervise the method used to complete the work. John E. Walker rented office space from another attorney, Pliny Williamson, beginning in 1927 and was also hired by Williamson to perform legal services for a fixed monthly salary. In April 1938, the two attorneys established a new compensation arrangement under which Walker would pay his rent by providing legal services and would receive additional compensation when his services were valued at more than $100 per month. Upon reaching the age of 65 in 1938, Walker applied for Social Security benefits, including monthly insurance benefits, under the Social Security Act. Although the Social Security Administration initially paid Walker the insurance benefits on the basis of his representation that he was not an employee making more than $15 per month, the Agency subsequently ceased payments upon learning of Walker's arrangement with Williamson. The court found Walker to be an employee because, despite the change in the manner of

Exhibit 1. Tests for determining whether a worker is an employee

Test	Description	Laws under which test has been applied by courts
Common-law test (used by Internal Revenue Service (IRS))	Employment relationship exists if employer has right to control work process, as determined by evaluating totality of the circumstances and specific factors	Federal Insurance Contributions Act Federal Unemployment Tax Act Income tax withholding Employment Retirement and Income Security Act National Labor Relations Act Immigration Reform and Control Act (IRS test)
Economic realities test	Employment relationship exists if individual is economically dependent on a business for continued employment	Fair Labor Standards Act Title VII Age Discrimination in Employment Act Americans with Disabilities Act Family and Medical Leave Act (likely to apply)
Hybrid test	Employment relationship is evaluated under both common-law and economic reality test factors, with a focus on who has the right to control the means and manner of a worker's performance	Title VII Age Discrimination in Employment Act Americans with Disabilities Act

compensation beginning in 1938, the kind of work that Walker did for Williamson did not change at all. Walker still performed work as an attorney at the direction of Williamson. That right to control was dispositive for the court.

Similarly, in *United States* v. *Polk*,[27] the U.S. Court of Appeals for the Ninth Circuit found that an employer could be convicted of a criminal offense for failure to pay FICA employment taxes, despite the employer's declaration that its workers were all subcontractors. Polk was notified by an IRS agent that he was required to establish a separate bank account to be used to deposit employees' tax withholdings. Prior to receiving this notice, Polk paid his workers on an hourly or weekly basis, had them work fixed hours, supervised the workers, and supplied them with the tools and materials necessary to perform their work. Furthermore, with the exception of one individual, all of the workers worked exclusively for Polk. These conditions did not change after the IRS served Polk with notice that his workers were employees, but thereafter, Polk represented to the IRS that he no longer had employees and employed only subcontractors. Polk was convicted of a criminal offense for failure to withhold wages to pay FICA taxes. The appeals court sustained Polk's conviction, finding that the jury had properly considered, under the common-law test, the totality of the circumstances of the working relationship between Polk and his workers and also had properly focused on Polk's right to control the workers, both with respect to the product of the work and the means by which the product was produced.

To summarize, then, under the common-law test, an employee is a worker whose work process and work product are controlled by the employer. In determining who has the right to control in a particular case, courts look to such factors as supervision, skill level, method of payment, whether the relationship is ongoing, who supplies the tools and materials for the work, whether the relationship between the worker and the employer is exclusive, and the parties' intent, as well as other, related factors.

Economic realities test. The economic realities test, which is most significantly applied in the context of the Fair Labor Standards Act[28] governing minimum-wage and overtime obligations, focuses on the economic relationship between the

worker and the employer. A worker is an employee under the test if the worker is economically dependent upon the employer for continued employment. The test examines the nature of the relationship in light of the fact that independent contractors would typically not rely on a sole employer for continued employment at any one time, but would work for, and be compensated by, many different employers, whereas most employees hold a single job and rely on that one employer for continued employment and for their primary source of income. The economic reality test is generally applied to laws whose purpose is to protect or benefit a worker, because courts view the protection of a worker who is financially dependent on a particular employer as important.[29] Because of its broader scope, the economic reality test has a greater likelihood of finding workers to be employees than does the common-law test. Accordingly, a worker could be classified as an employee for the purposes of dealing with one Federal law, such as the Fair Labor Standards Act, but as an independent contractor under another, like FICA. In evaluating whether a worker is an employee under the economic realities test, courts look to the factors listed in exhibit 3, some of which are similar to those considered under the common-law test.

In *Donovan* v. *DialAmerica Marketing, Inc.*,[30] the Third Circuit Court of Appeals demonstrated the precise application of the economic realities test, as well as the different results that can be reached regarding workers of the same corporation, even when just one legal test is applied. DialAmerica's principal business was the sale of magazine renewal subscriptions by telephone to persons whose subscriptions had expired or were nearing expiration. In pursuit of renewing subscriptions, the company hired workers to locate subscribers' phone numbers by looking names up in telephone books and calling directory assistance operators. In certain years, DialAmerica operated a program in which these workers were permitted to work from their homes. When they were hired, DialAmerica made the workers, called "home researchers," sign an "independent contractor's agreement" that supposedly established their status as independent contractors. A worker would be given a box of 500 cards with names to be researched, and the company expected the cards to be returned within 1 week. The home researchers were free to choose the weeks and hours they worked; DialAmerica had little supervision over the workers, but placed certain conditions on how the work process was to be conducted, including stipulating the method for reporting back the results on each card and the ink to be used when doing so.

Exhibit 2. Factors used to determine a worker's status under the common-law test

Factor	Worker is an employee if—	Worker is an independent contractor if—
Right to control	Employer controls details of the work	Worker controls details of the work
Type of business	Worker is not engaged in business or occupation distinct from employer's	Worker operates in business that is distinct from employer's business
Supervision	Employer supervises worker	Work is done without supervision
Skill level	Skill level need not be high or unique	Skill level is specialized, is unique, or requires substantial training
Tools and materials	Employer provides instrumentalities, tools, and location of workplace	Worker provides instrumentalities and tools of workplace and works at a site other than the employer's
Continuing relationship	Worker is employed for extended, continuous period	Worker is employed for specific project or for limited time
Method of payment	Worker is paid by the hour, or other computation based on time worked is used to determine pay	Worker is paid by the project
Integration	Work is part of employer's regular business	Work is not part of employer's regular business
Intent	Employer and worker intend to create an employer-employee relationship	Employer and worker do not intend to create an employer-employee relationship
Employment by more than one firm	Worker provides services only to one employer	Worker provides services to more than one business

Exhibit 3. Factors used to determine a worker's status under the economic realities test

Factor	Worker is an employee if—	Worker is an independent contractor if—
Integration	Worker provides services that are a part of the employer's regular business	Worker provides services outside the regular business of the employer
Investment in facilities	Worker has no investment in the work facilities and equipment	Worker has a substantial investment in the work facilities and equipment
Right to control	Management retains a certain type and degree of control over the work	Management has no right to control the work process of the worker
Risk	Worker does not have the opportunity to make a profit or incur a loss	Worker has the opportunity to make a profit or incur a loss from the job
Skill	Work does not require any special or unique skills or judgment	Work requires a special skill, judgment, or initiative
Continuing relationship	Worker has a permanent or extended relationship with the business	Work relationship is for one project or a limited duration

DialAmerica also employed workers as "distributors," persons who gave the cards with names to the home researchers. The Department of Labor sued DialAmerica for paying the home researchers and distributors less than the minimum wage for the work they did, arguing that they were employees under the Fair Labor Standards Act.

The court of appeals ruled that, under the economic realities test, the home researchers were employees. First, the court found that the workers did not make a great investment in their work, they had little opportunity for profit or loss, and the work required little skill. Second, the court ruled that DialAmerica's lack of control over the manner in which the home researchers did their work did not support a finding that they were independent contractors, because the very nature of home work dictated that the times worked would be determined by the workers and they would be subjected to very little supervision when working. The fact that a person works from home does not, on its own, determine whether the person is an employee under the Fair Labor Standards Act, the court said. Third, the court found that the home researchers had a continuous working relationship with DialAmerica under which they did not work for other employers. Finally, the court held that the home researchers were an integral part of DialAmerica's business because they did the very work—locating phone numbers—that was essential to DialAmerica's ability to renew subscriptions, despite the fact that they located only approximately 4 percent to 5 percent of the number of phone numbers the company sought to be retrieved. After analyzing these factors, the court ruled that the home researchers were economically dependent on DialAmerica for continued employment and, therefore, were employees under the economic realities test.

In contrast, the appellate court held that the distributors of the research work were independent contractors under the Fair Labor Standards Act. The court found that DialAmerica exhibited minimal control over the distributors' work providing cards to the home researchers, because the distributors maintained records of the work and were permitted to recruit home researchers. The court also noted that the distributors risked financial loss if they did not manage the distribution network properly, because their transportation expenses could exceed their revenue. The transportation expenses also required the distributors to make an investment in the business, the court found. Finally, the distributors required somewhat specialized managerial skills in operating the distribution network, according to the court. Although the distributors were typically employed for a long period, the Court found that factor insufficient to overcome the weight of the remaining circumstances indicating that the distributors were independent contractors.

In *Brock* v. *Superior Care, Inc.*,[31] the U.S. Court of Appeals for the Second Circuit found that an employer had violated the Fair Labor Standard Act's overtime-pay protections by not paying overtime to nurses who were employees under the Act. Superior Care referred nurses for temporary assignments to hospitals, nursing homes, and individual patients. The company would assign nurses as work opportunities became available, and the nurses were free to refuse an assignment for any reason. If a nurse accepted an assignment, the nurse reported directly to the patient, and Superior Care provided minimal supervision through visits to job sites ap-

proximately once or twice a month. Patients contracted directly with Superior Care, which paid them an hourly wage. The nurses could hold other jobs, including jobs with other health care providers.

The court found that the nurses were employees under the economic realities test. As a preliminary matter, the court rejected the company's contention that the trial court had used evidence outside of the six factors that make up the test. Superior Care had two sets of payrolls, one for taxed employees and one for nontaxed employees, despite the fact that the nurses on both payrolls did exactly the same work. The workers on the nontaxed payroll did not receive overtime pay for their work. The trial court relied in part on that evidence in finding that those workers were not independent contractors. The appeals court noted that the factors of the economic reality test are not exclusive and that *any* relevant evidence can be considered as part of the totality of the circumstances surrounding the employment relationship. The court also stated that an employer's "self-serving" labeling of workers as independent contractors is not controlling. Turning to the application of the economic reality factors, the court found that (1) the nurses had no opportunity for profit or loss, because Superior Care set their wages and prohibited them from entering into privately paying contracts with patients, (2) the nursing services that were provided were the most integral part of Superior Care's business of providing health care personnel on request, and (3) despite a quantitatively calculated lack of visits by Superior Care supervisors, the company retained the right to supervise the nurses and exerted control over them in that regard. Although the nurses obviously were skilled workers and also had the opportunity to work for other health care employers besides Superior Care, the court found those factors nondispositive. According to the court, the weight of the evidence indicated that when all the circumstances of the employment relationship were considered, the nurses were employees and not independent contractors.

In *Brock* v. *Mr. W Fireworks, Inc.*,[32] the Court of Appeals for the Fifth Circuit found that operators of fireworks stands in south Texas were employees under the economic realities test, subject to the protections of the Fair Labor Standards Act, because (1) Mr. W controlled the method of selling fireworks and made a substantial investment in the business operations, (2) the operators lacked skill and independent initiative, and (3) the duration of the employment relationship was lengthy. According to the parties' testimony, Mr. W acquired land for fireworks stands, procured materials to build the stands, hired workers to construct the stands at its warehouse, recruited operators to run the stands during the two short periods in each year that Texas permits the sale of fireworks, employed workers to supply the stands with fireworks, and advertised the sale of fireworks through the stands. Mr. W paid the operators of the stands on a commission basis.

The appeals court rejected the trial court's finding that the operators were independent contractors, ruling that Mr. W exerted control over the operators by determining the location and size of the stands, by suggesting the retail price of the fireworks and preprinting price tags, by requiring operators to attend to the stands for 24 hours a day to avoid the loss of inventory, by providing display instructions that were almost uniformly followed by the operators, by supplying a substantial portion of advertising, and by determining how the operators would be paid. The court also found that the operators had little opportunity to determine their own profit or loss, because the commission for the sale of the fireworks was set by Mr. W; that the operators made little or no investment in the operation of the stands, whose construction was always financed by Mr. W; and that the operators, while good salespersons, did not exhibit a degree of independent skill or initiative sufficient to conclude that they were independent contractors. Finally, the fact that the fireworks stands were seasonal was simply an operational characteristic unique to the particular business, and the permanency of an employment relationship could accordingly be determined by whether the operators worked for the entire operative period of a particular season. Because the operators were economically dependent on Mr. W for their continued employment as sellers of fireworks, the operators were deemed employees under the economic realities test, entitled to the protections of the Fair Labor Standards Act.

In conclusion, the economic realities test, while similar to the common-law test, focuses on the ultimate concern of whether the economic reality, as illuminated by several factors, is that a worker depends on someone else's business for his or her continued employment, in which case the worker is an employee. If a worker operates an independent business, the worker is classified as an independent contractor under the economic realities test.

Hybrid test. The hybrid test combines elements of the common-law test and the economic realities test, in keeping with the accepted view of all courts that the totality of the circumstances surrounding the relationship between worker and employer should be examined to determine whether the worker is an employee or an independent contractor. In practice, the hybrid test considers the economic realities of the work relationship as a critical factor in the determination, but focuses on the employer's right to control the work process as a determinative factor.

The hybrid test is applied frequently in cases brought under Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. For example, in *Diggs* v. *Harris Hospital—Methodist, Inc.*,[33] the U.S. Court of Appeals for the Fifth Circuit held that Jacqulyn Diggs, a black female physician, could not sustain a claim under Title VII for discrimination on the basis of race or sex or in retalia-

tion for a prior charge of discrimination against the hospital. The court found that, although she was appointed to the hospital's provisional medical staff and enjoyed the privileges associated with that appointment, including the ability to treat patients through hospital facilities, Diggs was an independent contractor, not an employee, of the hospital under the hybrid test.

Noting first that the hybrid test takes into account both the economic realities of the working relationship and the extent to which the employer is able to control the details and means of the work being done, the court then specified additional factors to be considered under the test. Certain of those factors, including supervision, skill level, method of payment, who supplies the tools and materials, the duration of the employment relationship, the extent to which the work is integrated into the employer's business, and the intention of the parties, are considered under both the common-law test and the economic realities test. Beyond these factors, the court also considered the manner in which the work relationship was terminated (that is, by one or both parties and with or without notice or explanation), whether annual leave was provided to the workers, whether retirement benefits were provided to them, and whether the employer paid Social Security taxes for the workers.

In concluding that Diggs was not an employee, the court found that physicians' privileges at Harris Hospital were not necessary to Diggs' practice; that is, if Diggs were denied those privileges, her ability to obtain them at other area hospitals would not have been restricted. Focusing on the control factor, the court also found that, although the hospital both supplied the tools and materials to make it possible for Diggs to provide medical care and imposed standards of care upon those with privileges, the hospital did not, in fact, direct the manner or means by which medical care was to be provided by the physician. Diggs treated patients without direct supervision and merely required the presence of a sponsor during surgical procedures to attest to the physician's qualifications. Furthermore, the hospital did not pay a salary to Diggs, nor did it pay her licensing fees, professional dues, insurance premiums, taxes, or retirement benefits. These considerations cemented the court's conclusion that Diggs was an independent contractor who was not protected by Title VII.

The hybrid test seeks to combine the general and specific factors of both the common-law test and the economic realities test, recognizing that, in each legal determination of whether a worker is an employee or an independent contractor, a court may consider each and every circumstance of the employment relationship.

THE PROPER CLASSIFICATION OF A WORKER as an employee or independent contractor at the beginning of an employment relationship is important to both employers and workers with respect to their obligations and protections under Federal law. Although the classification does depend on the Federal law being applied, the overriding factor is who has the "right to control" the work process, and the relationship is based upon all of its characteristics, regardless of what label the employer applies to the worker.[34] □

Notes

[1] The figures reported are for the broadest of the Bureau's three measurements of the contingent workforce. For additional information, see the BLS news release, "Contingent and Alternative Work Arrangements," February 2001.

[2] By the criteria of the survey, a worker may be in both a contingent and an alternative work arrangement, but is not automatically so, because contingent work is defined separately from alternative work arrangements.

[3] *American Heritage Dictionary of the English Language,* 1978.

[4] Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN, West Publishing Co, 1991), p. 363.

[5] *Ibid.*, p. 530.

[6] See, for example, Mark Diana and Robin H. Rome, "Beyond Traditional Employment: The Contingent Workforce," 196 APR N.J. Law 8, *9 (April 1999).

[7] 26 U.S.C. 3101 *et seq.*

[8] 26 U.S.C. 3301 *et seq.*

[9] 26 U.S.C. 3401 *et seq.*

[10] In many cases, an independent contractor's true employer is the contracting agency, which would be subject to these Federal laws. In addition to the Federal laws that protect employees, additional State laws, including those which provide workers' compensation benefits, typically protect employees, but not independent contractors.

[11] 29 U.S.C. 201 *et seq.*

[12] 42 U.S.C. 2000(e) *et seq.*

[13] 29 U.S.C. 621 *et seq.*

[14] 29 U.S.C. 1001 *et seq.*

[15] 42 U.S.C. 12101 *et seq.*

[16] 29 U.S.C. 2601 *et seq.*

[17] 29 U.S.C. 151 *et seq.*

[18] Federal law provides employers with a safe-harbor provision to avoid a retroactive IRS reclassification of workers as employees where an employer had a "reasonable basis" for treating a worker as an independent contractor. An employer's good faith in making the determination is required for the safe harbor to apply.

[19] The case has an extensive procedural history throughout the 1990s. For the opinion of the Ninth Circuit Court of Appeals regarding the status of the Microsoft workers focused on in this article, see 120 F.3d 1006.

[20] The IRS used its "20-factor test" in making its determination regarding the employees' status. (For details of the test, see next section in the text.)

[21] The District Court used the "common-law test" in making its determination regarding the employees' status. (For details of the test, see next section in the text.)

[22] 490 U.S. 730 (1989).

[23] *Black's Law Dictionary*, p. 62.

[24] See IRS Revenue Ruling 87–41; see also "Summary of IRS 20-Factor Test," from HRnext.com, on the Internet at **http://www.hrnext.com/tools/view.cfm?articles_id=1470&tools_id=2.**

[25] 112 S.Ct. 1344, 1348–49 (1992).

[26] 137 F.2d 531 (2nd Circuit 1943).

[27] 550 F.2d 566 (9th Cir. 1977).

[28] The Fair Labor Standards Act uses the following uninformative definition of "employee" in the statutory language: "any individual employed by an employer." However, Congress and the courts have recognized that, because of its primary focus on protecting workers, the definition of "employee" under the Act is the broadest one used pursuant to the economic realities test.

[29] See Myra H. Barron, "Who's an Independent Contractor? Who's an Employee?" 14 Lab. Law 457, 460 (winter/spring 1999).

[30] 757 F.2d 1376 (3rd Cir. 1985).

[31] 840 F.2d 1054 (2nd Cir. 1988).

[32] 814 F.2d 1042 (5th Cir. 1987).

[33] 847 F.2d 270 (9th Cir. 1988).

[34] For additional discussions of the classification of workers as employees or independent contractors and the ramifications for employers, see John C. Fox, *Is That Worker an Independent Contractor or Your Employee?* (Palo Alto, CA, Fenwick and West, March 1997); Barron, "Who's an Independent Contractor?" Diana and Rome, *Beyond Traditional Employment*; and William D. Frumkin and Elliot D. Bernak, "Cost Savings from Hiring Contingent Workers May Be Lost if Their Status Is Challenged," *New York State Bar Journal*, special edition on labor and employment law, New York State Bar Association, September–October 1999.