INDEPENDENT CONTRACTOR STATUS: CONTROL VERSUS ECONOMIC REALITIES

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I. INTRODUCTION

Traditional business law textbooks typically address the distinction between employees and independent contractors in great detail, often giving case examples and quoting the Restatement (Second) of Agency[1]. This topic is typically covered in the chapter on agency law, where types of employment relationships are addressed as a prelude to a discussion of the important tort concept known as *respondeat superior*, a form of vicarious liability by which an employer can be held liable for the unauthorized tortious conduct of its employees, but, as a rule, not those of its independent contractors.[2] The discussion tends to focus on the famous "right to control" test, which comes from the common law and memorialized in the Restatement. Many colleges of business have moved away from the traditional business law textbook, however, adopting legal environment of business texts that provide more of an overview of legal issues than their business law cousins. The topic of agency is either missing altogether in these newer texts, or it is incorporated into a chapter on employment law. Some texts obliquely touch on this topic in their torts chapter, where they must address the concept of *respondeat superior*.[3]

As a legal topic in the college of business, employee versus independent contractor may not be getting the proper amount of attention it deserves, because as discussed below, agencies such as the EEOC consider this topic a "threshold issue."[4] The issue is one that is constantly being litigated in a variety of contexts.[5] The stakes involved can be quite considerable over a wide variety of contexts.[6] Unfortunately, the definition of employee also seems to vary over a wide variety of contexts. This paper will attempt to address the evolving courtroom and regulatory debates over this topic and its continuing relevance as a teaching topic in the business classroom.

II. RESPONDEAT SUPERIOR

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[1]*See* Henry R. Cheeseman, Business Law 573 (5th ed. 2004). "Section 2 of the Restatement (Second) of Agency defines an independent contractor as 'A person who contracts with another to do something for him who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.'" *Id.*

[2]*See* Roger E. Meiners, Al H. Ringleb & Frances L. Edwards, The Legal Environment of Business 392 (9th ed. 2006). "As a rule, the employer is not liable for the torts of an independent contractor." *Id.* at 391.

[3]*See* O. Lee Reed, Peter J. Shedd, Jere W. Morehead, & Robert N. Corley, The Legal & Regulatory Environment of Business 274 (13th ed. 2005). Interestingly, the concept of respondeat superior is discussed for more than half a page, but the impact of independent contractor status is not addressed at all. In fact, that term cannot be found anywhere in the index to that text.

[4]*See* note 43 *infra*.

[5]Nationwide Insurance Co. v. Darden, 503 U.S. 318, 322 (1992). "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Id.* at 322.

[6]John J. Moran, Employment Law 5 (2nd ed. 2002). "Employers prefer the independent contractor status because there is no paid vacation, sick time, or personal leave as well as any life, health, and unemployment insurance involved. In addition, pension benefits do not have to be paid' there are no workers' compensation suits; taxes do not have to be withheld' there are no minimum wages, maximum hours, or overtime, and there is minimal or no tort liability for the actions of the independent contractor." *Id.*

The Supreme Court admits that the common law standards used to distinguish an employee from an independent contractor, generally referred to as the "control test", are not simple, uniform or easily applicable.[7] This is true within the limited field of vicarious liability in tort; but, becomes more so when the field is expanded to include all the possible applications of the distinction.[8] Black's Law Dictionary defines "vicarious liability" as "indirect legal liability" as in "the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent."[9] This imposition of liability on employers has been justified on a variety of grounds. An employer has the right to control how its employee performs his or her work and the precautions that are undertaken in the course of that work; therefore by imposing liability on the employer, it is more likely that the employer will take a proactive stance to prevent accidents by exercising considerable control over employees in order to avoid such liability.[10] On a practical level, it is unlikely that the employee will have sufficient financial resources to pay off a judgment, whereas the employer will presumably have deeper pockets, and probably insurance.

An important part of the test is whether the employee is acting within the "scope of employment,"[11] an issue that has been addressed by courts many times. The U.S. Supreme Court has essentially stated that it would be impossible to reconcile the conflicting ways courts have construed that term.[12]

III. THE NEW DEAL CHALLENGES OLD VIEWS

The Supreme Court has lamented problems associated with this issue for years. Since employee status is a common law determination, it was to be ascertained with reference to state

[7]N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 121 (1944).

[8]*Id.* at 121, fn 19. Those other applications principally relate to new statutory rights accruing to employees that were not available under common law doctrines, such as Title VII, the minimum wage, etc.

[9]Black's Law Dictionary 1404 (5th ed. 1979).

[10]*See* Roger E. Meiners, Al H. Ringleb & Frances L. Edwards, The Legal Environment of Business 392 (9th ed. 2006). "The rule of law imposing vicarious liability upon an innocent principal is known as respondeat superior (let the master answer). This doctrine has been justified on the grounds that the principal is in a better position to protect the public from such torts, by controlling the actions of its agents, and to compensate those injured." *Id*. *See also* National Convenience Stores, Inc. v. Fantauzzi, 584 P.2d 689, 691 (Nev. 1978). *See also* Sykes, *The Economics of Vicarious Liability*, 93 Yale L. J. 1231, 1236 (1984).

[11]Faragher v. City of Boca Raton, 524 U.S. 775 (1998). "A 'master is subject to liability for the torts of his servants committed while acting in the scope of their employment.' Restatement [(Second) of Agency] §219(1). This doctrine has traditionally defined the 'scope of employment' as including conduct 'of the kind [a servant] is employed to perform,' occurring 'substantially within the authorized time and space limits,' and 'actuated, at least in part, by a purpose to serve the master,' but as excluding an intentional use of force 'unexpectable by the master.' *Id.*, at §228(1)." *Id.* at 793.

[12]*Id.* at 796-97. "As one eminent authority has observed, the 'highly indefinite phrase' is 'devoid of meaning in itself' and is 'obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.' W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keaton on the Law of Torts 502 (5th ed. 1984); see also Seavey, Speculations as to "Respondeat Superior," in Studies in Agency 129, 155 (1949) ('The liability of a master to a third person for the torts of a servant has been widely extended by aid of the elastic phrase 'scope of the employment' which may be used to include all which the court wishes to put into it'). Older cases, for example, treated smoking by an employee during working hours as an act outside the scope of employment, but more recently courts have generally held smoking on the job to fall within the scope. Prosser & Keeton, *supra*, at 504, and n. 23. It is not that employers formerly did not authorize smoking but have now begun to do so, or that employees previously smoked for their own purposes but now do so to serve the employer. We simply understand smoking differently now and have revised the old judgments about what ought to be done about it. The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, *see, e.g.*, §§219, 228, 229, but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view." *Id.*

and not federal case law. Thus, the expansion of federal power that emanated from New Deal legislation, such as the Wagner Act (National Labor Relations Act)[13], which gave extraordinary new protections to "employees,"[14] was threatened. According to the Supreme Court in the New Deal-era case of *National Labor Relations Board v. Hearst Publications, Inc.*: "Few 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 clearly one of independent entrepreneurial dealing."[15] In *Hearst*, "newsboys," people who sold newspapers and magazines from stands on the street,[16] claimed collective bargaining rights under the Wagner Act from Hearst Publications, who under common law principles refused to bargain with them due to their independent contractor status. The NLRB held for the newsboys and the Supreme Court affirmed.[17] The Court held that "[T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leave no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."[18]

This departure from common law principles, along with a widely-perceived pro-union bias of the Wagner Act and the Supreme Court
and growing public concern over perceived abuses by big labor,[19] greatly upset employers, who aggressively lobbied Congress for relief.[20] They succeeded when a newly elected Republican majority Congress[21] overrode the veto of President Truman[22] and effectively overruled the Court[23]

[13]29 USC §152.
[14]NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.
[15]*Id*. at 121.
[16] Sometimes portrayed in period movies as shouting "Extra, extra, read all about it!"
[17]*Id*. at 131-132. "In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act,' the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion. "*Id.*
[18]*Id*. at 129.
[19]*See* Julius G. Getman & John D. Blackburn, Labor Relations 31 (2nd ed. 1983). "[T]he period following World War II was marked by a significant number of important strikes in major industries. This led to growing public concern about the power of labor, concern already mounting as a result of strikes in the mines called by John L. Lewis during World War II. The problem was exacerbated by a number of jurisdictional strikes in which services were shut down because of disputes between rival labor groups." *Id.*
[20]*See* Dawn D. Bennett-Alexander & Laura P. Hartman, Employment Law for Business 648 (4th ed. 2004). *See also* Getman & Blackburn, note 15 *supra*, at 31. "After World War II, management groups directed their political activity not to repealing the Wagner Act but toward 'limiting the power of big labor', an approach which turned out to have potent political appeal." *Id.*
[21]Steven Wagner, *How Did the Taft-Hartley Act Come About?* available online from The History News Network at http://hnn.us/articles/1036.html. "In the mid-term elections of 1946, the Republican Party won control of the upcoming Eighteith Congress, gaining majorities in both houses for the first time since 1931. The "Class of 1946," as the first-term Republicans were called, was dominated by members of the conservative "old guard": John Bricker of Ohio, William Jenner of Indiana, William Knowland of California, George Malone of Nevada, Joseph McCarthy of Wisconsin, Arthur Watkins of Utah, John Williams of Delaware, Richard Nixon of California, Karl Mundt of South Dakota, and Charles Kersten of Wisconsin. These freshmen congressmen were eager to overturn as much New Deal legislation as possible and one of their first priorities was to amend the Wagner Act. On June 23, 1947, the Republican-controlled Congress passed, over President Truman's veto, the Labor-Management Relations Act of 1947 (The Taft-Hartley Act, co-sponsored by Republican Senators Robert

in 1947's Taft-Hartley Act, which now excluded from the definition of "employee" anyone employed as an independent contractor.[24] Senator Taft, explained in 1947 that "The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency."[25]

IV. THE FAIR LABOR STANDARDS ACT---THE "ECONOMIC REALITIES" TEST

If the Supreme Court created a new standard, temporarily at least, when it defined employee in the *Hearst* case by looking at "underlying economic facts rather than technically and exclusively by previously established legal classifications," then it went a step further in its interpretation of the term employee under the Fair Labor Standards Act.[26] According to the circular reasoning of that Act, an employee is defined as "any individual who is employed by an employer."[27] The Act further states that "employ includes to suffer or permit to work."[28] In interpreting this vague definition, the Supreme Court has applied a test that focuses on the "whole activity" surrounding the employment relationship in determining whether the workers are employees for the purposes of the Act.[29] This "economic realities test"[30] considers whether the workers are economically dependent on the business for which they work. This inquiry is highly fact-dependent and requires an analysis of the entire employment relationship. In *Rutherford Food Corp. v. McComb*[31], the

Taft of Ohio and Fred Hartley of New Jersey). The Taft-Hartley Act retained the features of the earlier Wagner Act but added to it in ways widely interpreted as anti-labor. Labor leaders dubbed it a "slave labor" bill and twenty-eight Democratic members of Congress declared it a "new guarantee of industrial slavery." *Id.*
[22]Douglas L. Leslie, Cases and Materials on Labor Law: Process and Policy 10 (1979).
[23]*See* Bernard D. Meltzer, Labor Law 587 (2nd ed. 1977), quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947). "[I]n . . . National Labor Relations Board v. Hearst Publications, Inc., the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passes the act, not new meanings that, nine years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' . . . It is inconceivable that Congress, when it passes 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.'" *Id.*
[24]29 U.S.C. § 152(3): The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, 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, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C. §§ 151-169.
[25]93 Cong. Rec. 6599 (June 5, 1947).
[26]29 U.S.C. §§ 201-219 (1994).
[27]29 U.S.C. § 203 (e). *See also* Nationwide Insurance Co. v. Darden, 503 U.S. 318, 319 (1992), where the Court pointed out that the similar definition of employee under the ERISA statute ("any individual employed by an employer") "is completely circular and explains nothing."
[28]29 U.S.C. § 203(g).
[29]*See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
[30]Bartels v. Birmingham, 332 U.S. 126, 130 (1947). Under this test, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Id.*
[31]Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

Supreme Court interpreted the definition of employee to be quite broad under the Act, stating that "this Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[32] The definition of employee under the Act deserves such broad construction because "the Act concerns itself with the correction of economic evils through remedies that were unknown at common law."[33] One of the remedies sought to be redressed by the Act was fair pay for overtime, so while the meat boners were "specialists" and labeled as independent contractors, the Court found their work was "part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."[34]

V. Federal Withholding and Benefits

As most small businesses are aware, employees can be more expensive than independent contractors.[35] Incorrect classification of workers can subject an employer to tremendous penalties relating to federal withholding and fringe benefits. In December of 2000, Microsoft announced that a $97 million settlement had been reached with its long-term temporary employees who claimed that they had been improperly denied benefits due employees, including benefits they would have been entitled to under the company's stock purchase plan.[36] The case was filed against Microsoft by the Seattle-based law firm of Bendich, Stobaugh & Strong. According to the firm's announcement the settlement stated:

> Since 1997, Microsoft has made important changes in its staffing and worker classification practices. In its most recent fiscal year, Microsoft hired over 3,000 Class Members as its W-2 employees entitled to participate in its employee benefit plans and programs. It has adopted practices to ensure the proper classification of independent contractors, temporary agency employees, and other staff, including a comprehensive review of practices regarding independent contractor classifications which took place in 1997. It has conducted reviews of ongoing work and has instituted practices designed to limit the length of temporary agency employees' assignments for Microsoft.
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> The Microsoft "temp" case has received nationwide and even international attention since it was filed in December, 1992. The class action lawsuit challenged the widespread employer practice of paying workers through "temp" agencies to avoid paying benefits such as pensions and health insurance. This practice expanded rapidly during the 1990s after the IRS cracked down on employers who were treating workers as "independent contractors."
>
> It is estimated that 8,000 to 12,000 class members could receive payments in the settlement. The amounts that class members receive will depend on when they worked, the duration of their "permatemp" status, and the total number of employees who file claims under the settlement.[37]

[32] *Id.* at 728-29.
[33] *Id*. at 727.
[34] *Id*. at 729.
[35] *See* note 6 *supra*.
[36] Dawn D. Bennett-Alexander & Laura P. Hartman, Employment Law for Business 50 (4th ed. 2004).
[37] Available online at http://www.prnewswire.com/cgibin/stories.pl?ACCT=104&STORY=/www/story/12-12-2000/0001385307&EDATE=. The firm's Web site address is www.bs-s.com.

The IRS utilizes a 20-factor analysis; however, in its own training material the IRS emphasizes this analytical tool is not the legal test used to determine worker status.[38] Detailed information is contained in Publication 15-A, Employer's Supplemental Tax Guide issued in January 2003 and available at the IRS Web site.[39] Since the consequences of misclassification can be significant, the IRS provides a Form SS-8 titled, "Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding."[40] Despite the apparent helpfulness of the IRS and its emphasis that its test is not meant to supplant the traditional common law control test, there are skeptics who feel that the Service has waged war with small businesses that try to control costs by relying on independent contractors instead of employees.[41]

VI. Title VII

Title VII only applies to employees, not independent contractors.[42] The EEOC, which is charged with enforcing Title VII and the other employment discrimination laws,

[38] Dawn D. Bennett-Alexander & Laura P. Hartman, Employment Law for Business at 54 (4th ed. 2004).
[39] At www.irs.gov. *See also* Dawn D. Bennett-Alexander & Laura P. Hartman, Employment Law for Business 54-56 (4th ed. 2004).
[40] Available online at http://www.irs.gov/pub/irs-pdf/fss8.pdf (Rev. 6-2003) (last visited on 31 October 2005).
[41] *See* Roger E. Meiners, Al H. Ringleb, & Frances L. Edwards, The Legal Environment of Business 395 (5th ed. 1994). "ISSUE: Why Are Businesses Hiring So Many Independent Contractors?": "In 1992 the IRS forced businesses to reclassify 90,000 independent contractors as employees. The businesses were forced to pay $131 million in additional taxes and penalties." The ISSUE excerpts a portion of a 1993 Wall Street Journal article by James Bovard, titled, "Regulatory Chokehold: The IRS vs. The Self-Employed": "The Internal Revenue Service is carrying out a sweeping campaign to slash the number of Americans permitted to be self-employed – and to punish companies that contract with them." *Id.*
[42] Dawn D. Bennett-Alexander & Laura P. Hartman, Employment Law for Business 48 (4th ed. 2004).

offers guidance on how to distinguish between the categories.[43] The recent First Circuit case of *Alberty-Velez v. Corporacion De Puerto Rico*[44] illustrates the continuing debate over the method of determining employee status. In this case an actress who hosted a local television program on WIPR sued her employer for sex discrimination, alleging her employment relationship was improperly terminated due to her pregnancy. The television station denied that she was an employee, despite the fact that the Puerto Rico Department of Labor granted her unemployment insurance as an employee. The First Circuit disagreed with the Department of Labor and the lower court, finding Alberty-Velez to be a highly-skilled professional who supplied her own clothing and hair stylist. In addition she signed a new contract for each episode of the program, reported her income as professional services rendered on her income tax return, received no benefits, and did not receive a W-2 form from her employer. In a last-ditch argument, Alberty-Velez attempted to rely on the fact that while on the television program she was under the control of the employer's "director." The Court dismissed this assertion also.[45]

Unable to qualify under the common law control test, Alberty-Velez emphasized additional facts which she claimed favored granting her employee status. First, she argued that, as a matter of economic reality, she was an employee of WIPR because this is the entity from which she derived most of her income. According to the Court, "Some courts have applied an 'economic reality test' to determine employee status under Title VII,"[46] while "[o]ther courts have applied a so-called 'hybrid test' in which employee status is determined by measuring the economic reality of the

[43]Threshold Issues: "In most circumstances, an individual is only protected if s/he was an 'employee' at the time of the alleged discrimination, rather than an independent contractor, partner, or other non-employee. An 'employee' is 'an individual employed by an employer.' An individual may have more than one employer. The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following:
The employer has the right to control when, where, and how the worker performs the job.
The work does not require a high level of skill or expertise.
The employer furnishes the tools, materials, and equipment.
The work is performed on the employer's premises.
There is a continuing relationship between the worker and the employer.
The employer has the right to assign additional projects to the worker.
The employer sets the hours of work and the duration of the job.
The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
The worker does not hire and pay assistants.
The work performed by the worker is part of the regular business of the employer.
The employer is in business.
The worker is not engaged in his/her own distinct occupation or business.
The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
The employer can discharge the worker.
The worker and the employer believe that they are creating an employer-employee relationship.
This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship." Available online EEOC Compliance Manual, www.eeoc.gov/ policy/docs/threshold.html#2-III-A-1 (last visited 1 April 2005). Author retains copies.
[44]Alberty-Velez v. Corporacion De Puerto Rico, 361 F.3d 1, 6 (1st Cir. 2004).
[45]*Id*. at 10. "While 'control' over the manner, location, and hours of work is often critical to the independent contractor/employee analysis, it must be considered in light of the work performed and the industry at issue. *See* Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 260 (4th Cir. 1997). Considering the tasks that an actor performs, we do not believe that the sort of control identified by Alberty necessarily indicates employee status." *Id.* at 9.
[46]*Id*., citing, Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983).

relationship as well as the common law factors."[47] The Court declined to apply either of these tests, instead focusing solely on the common law test, stating that "[b]ecause the common law test does not consider 'economic reality' to be an indicator of employee status, the fact that Alberty's income derived primarily from WIPR does not weigh heavily in favor of employee status."[48]

VII. Age Discrimination

The First Circuit has been particularly active in this debate, recently discussing the problem in the context of an age discrimination suit brought by a 70 year-old harbor pilot against a port authority that claimed that he was an independent contractor and thus it was not his employer.[49] In the case of *Camacho v. Puerto Rico Ports Authority*[50] the Authority revoked Camacho's pilot's license, acting pursuant to a local statute that provided that pilot licenses shall automatically expire on the date in which the pilot reaches seventy years of age. The trial magistrate judge rejected the Authority's position, "[e]xamining the relationship between the Authority and the harbor pilots through the prism of common law agency, he concluded that although 'harbor pilots are not employees in the typical sense,' the statutory scheme gives the Authority such 'wide latitude to control the daily activities of harbor pilots' as to make the Authority the pilots' employer for ADEA purposes."[51] Noting, as many courts have in the past, that the statutory definition of an employee as "an individual employed by any employer," is circular and, thus, affords scant guidance in an attempt to answer this question, it turned to the comfort of the common law agency test, which it said "is familiar."[52]

Citing "the opacity of the statutory text,"[53] the Court stated that "courts have been forced to develop their own approaches to determining whether an entity is acting as an employer within the purview of the ADEA."[54] Some courts have attempted to answer that question by a hybrid test that marries traditional common law agency principles with the economic realities of a particular relationship.[55] The First Circuit, citing *Alberty-Velez*[56] rejected that approach and chose to apply common law agency principles "simpliciter in determining when an employment relationship exists for purposes of the ADEA."[57] The Court also pointed out that they are not alone in adopting this approach, citing similar holdings from the Sixth and Ninth Circuits.[58]

VIII. Employee Status in Arbitration

[47]*Id*., citing Nowlin v. Resolution Trust Corp., 33 F.3d 498, 505-06 (5th Cir. 1994).
[48]*Id.*, citing its own case of Speen v. Crown Clothing Corporation, 102 F.3d 625, 632 (1st Cir.1997).
[49]The ADEA statute defines an employer as a "person engaged in an industry affecting commerce who has twenty or more employees."
[50]Camacho v. Puerto Rico Ports Authority, 369 F.3d 570 (1st Cir. 2004).
[51]*Id*. at 577.
[52]*Id*. at 574.
[53]*Id*. at 573.
[54]*Id*. at 574.
[55]*Id*., citing Mangram v. Gen. Motors Corp., 108 F.3d 61, 62-63 (4th Cir. 1997); Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992); Fields v. Hallsville Independent School District, 906 F.2d 1017, 1019 (5th Cir. 1990) (*per curiam*).
[56]*Id.*, citing Alberty-Velez v. Corporacion De Puerto Rico, 361 F.3d 1,6 (1st Cir. 2004).
[57]Camacho v. Puerto Rico Ports Authority, 369 F.3d 570, 574 (1st Cir. 2004).
[58]*See, e.g.*, Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004); Barnhart v. N.Y. Life Ins. Co., 141 F.3d 1310, 1313 (9th Cir. 1998); Frankel v. Bailey, Inc., 987 F.2d 86, 90 (2d Cir. 1993).

In the recent First Circuit case of *Labor Relations Division of Construction Industries of Massachusetts, Inc. v. Teamsters Local 379,*[59] the Teamsters filed grievances against eight Boston Harbor Project employers on behalf of certain truck drivers on the project who own and drive their own trucks and are engaged in the transportation and removal of fill from the construction site. The Teamsters argued that those drivers were entitled to receive the same fringe benefit payments received by other project employees. The subject of the dispute was whether the owner-operators qualify as "independent contractors" or "employees" under the Labor Management Relations Act (LMRA).[60] The dispute was sent to arbitration, where the arbitrator concluded that the owner-operators were "employees." The district court reversed this finding, ruling that the owner-operators were "independent contractors." The First Circuit affirmed the district court.

According to the Court, the arbitrator made a thorough review of case law and agency doctrine, and applied a multi-factored test which incorporated common law agency principles and an "economic realities" test to determine that the truck owner- operators are significantly similar to other employees on the project. Citing *Nationwide Mutual Insurance,* the court focused on the employer's right to control the manner and means by which the product is accomplished, noting that, in applying this multi-factored test, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.[61] The Court, unlike the arbitrator, was not impressed with the fact that the employer controlled the result to be achieved on the project, because that is true whether an employer-employee or independent contractor relationship exists. The difference in agency status lies in whether the manager controls the means of obtaining that result. The project managers in this case only controlled the results, not the means by which they were achieved.[62]

IX. Workers' Compensation

In the recent Second Circuit case of *Makarova v. U.S.*[63], a former star ballerina was barred from suing the Kennedy Center for injuries she sustained in a fall. The United States asserted that Makarova was an employee of the Kennedy Center at the time of her accident, and, thus, her exclusive remedy against her employer was for workers' compensation benefits. The district court dismissed Makarova's complaint, finding that: (1) she was indeed an employee of the Kennedy Center under governing New York law; and (2) as an employee, her complaint against the United States was barred because the District of Columbia Workers' Compensation Act was her sole remedy. Makarova argued that she was not an employee of the Kennedy Center, principally because she was a "star," which somehow apparently made her something less of an employee. The Circuit Court disagreed.[64]

X. Contractual Immunity from Litigation

In the case of *Campbell v. Washington County Technical College*,[65] Shirley Campbell sued WCTC, a subdivision of the State of Maine, when she slipped and fell on a patch of ice on the campus of the College. The Campbell's operated a restaurant on the College campus and lived in one of the residence halls. They operated under a contract with the College that stated, in part that the "parties hereto agree that the Contractor, and any agents and employees of the Contractor, in the performance of this agreement, shall act in an independent capacity and not as officers,

[59]Labor Relations Division of Construction Industries of Massachusetts, Inc. v. Teamsters Local 379, 156 F.3d 13 (1st Cir.1998).
[60]29 U.S.C. § 141, *et seq*.
[61]156 F.3d at 19.
[62]*Id*. at 20-21.
[63]Makarova v. U.S, 201 F.3d 110 (2d Cir. 2000).
[64]*Id*. at 116.
[65]Campbell v. Washington County Technical College, 219 F.3d 3 (1st Cir. 2000).

employees or agents of MTCS."[66] The College claimed that the contract should be disregarded and the Campbell's deemed to be employees unable to sue under the governmental immunity provisions of the Maine Tort Claims Act. The Court disregarded the terms of the contract and applied Maine's historic eight-factor test established by *Murray's Case*,[67] to determine that the individual defendants were employees. The factors of the test are as follows:

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to the final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; [and] (8) whether the work is part of the regular business of the employer.[68]

XI. First Amendment

Are employees subject to more First Amendment protection than independent contractors? This issue was answered in the negative by the Supreme Court in the case of *O'Hare Truck Service, Inc. v. City of Northlake*[69], where it was alleged that an independent contractor was denied work because it refused to contribute to the mayor's reelection campaign. The City argued that an independent contractor's First Amendment rights, unlike a public employee's, must yield to the government's asserted countervailing interest in sustaining a patronage system. The Court stated that it could not accept the proposition that those who perform the government's work outside the formal employment relationship are subject to the direct and specific abridgment of First Amendment rights described in petitioners' complaint.[70] The government may not coerce support in the manner petitioners allege, unless it has some justification beyond dislike of the individual's political association. As respondents offer no other justification for their actions, the complaint states a First Amendment claim. Allowing the constitutional claim to turn on a distinction between employees and independent contractors would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs.[71]

XII. Copyright Act

In the case of *Community for Creative Non Violence v. Reid*,[72] a sculptor and a nonprofit organization each claimed ownership of the copyright on a statue the organization had commissioned from the sculptor. Under the copyright law, the statue would belong to the organization if it was "prepared by an employee within the scope of his or her employment."[73] The copyright statute, however, does not define employee. According to the Court: "In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by the common law agency doctrine."[74]

[66]*Id*. at 7.
[67]Murray's Case, 154 A. 352 (Me. 1931).
[68]*Id*. at 354.
[69]O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996).
[70]*Id*. at 722.
[71]*Id*. at 716-720.
[72]Community for Creative Non Violence v. Reid, 490 U.S. 730 (1989).
[73]*Id*. at 738.
[74]*Id.* at 751.

XIII. CONCLUSION

The common law "right-to-control test" was developed at a time when there were not any statutory obligations on employers. Many statutes either impose greater obligations on employers with respect to their employees or bestow greater rights on employees than existed under common law. In many cases today the issue of employee versus independent contractor is the threshold that must be crossed before liability can be imposed. Business law teachers and textbook writers may be doing business students a disservice by inadequately addressing this hotly contested issue. The many conflicts that exist among the Circuits demonstrate that there is still much to discuss and this issue may not be the "dead letter" many of us have been lulled into believing.