

RESPONSE TO WORKING GROUP ON CHAPTER 1 OF THE
PROPOSED RESTATEMENT OF EMPLOYMENT LAW: ON
PURPOSELESS RESTATEMENT

BY
ALAN HYDE*

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I. INTRODUCTION

What is employment law? Why does employment law exist as a distinct subject? What is the point of having distinct rules for relations of employment? Why aren't they just a subset of the general law of contracts? Why does employment law include so many statutes setting minimum and specified contractual terms, unlike other economic relations that are conceptualized as contractual?

Most people, asked to define "employee" or "employment relation," would start with questions of this type. It has been said that any law student, after a month of law school, knows that the answer to the question "Define X," is: "For what purpose are we defining this term?"

The draft for a proposed *Restatement (Third) of Employment Law* does not start from these questions. Chapter 1 seeks to define relations of employment without any reference to any purpose of employment law.

This is an infallible method for arbitrary rules. It is no secret that cases divide on the classification of individuals as employees or independent contractors.¹ The status of truck drivers, taxi cab drivers, real estate and

* Professor and Sidney Reitman Scholar, Rutgers University School of Law, Newark.

1. The line between employees and independent contractors is a textbook example of indeterminacy. As the United States Supreme Court noted, in permitting an independent contractor to sue alleging that his contract to haul trash for the county was terminated in retaliation for speech protected by the First Amendment:

The bright-line rule proposed by the [county] and the dissent would give the government *carte blanche* to terminate contractors for exercising First Amendment rights. And that bright-line rule would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract a contract of employment or a

insurance sales people, and computer programmers, to pick only a few of the most frequently litigated, is difficult to predict. No *Restatement* can conceivably rationalize all the cases. Nor would there be any point to a *Restatement* in which every section read: "Each jurisdiction should rely on its own precedents." Restaters must pick and choose among reported cases. Those cases permit a very broad definition of employee – everyone who has ever been found to be an employee, and others who are like them. Reported cases permit a narrow definition of employee: only individuals who would indisputably be found to be employees, in any context, in any American jurisdiction. Or a definition somewhere in between could be adopted. In any of these cases, one should ask: for what purpose are we defining employee? How else could one decide whether to draw a broad or narrow defining line?

That purpose is wider for chapter 1 than for any of the other sections of the proposed *Restatement*. Subsequent chapters, purporting to state the law of employment relationships, are addressed to common law courts that are free to accept or reject the *Restatement* formulations.

Chapter 1 is different. If adopted, it will govern federal court interpretation of federal employment statutes. It will not simply make recommendations to common law courts. It will be the most important chapter of the proposed *Restatement*.

This is because the United States Supreme Court has repeatedly held that a federal statute using the term "employee," and providing no more specific definition, must be construed as adopting a common law meaning of the term "employee."² Moreover, the *Restatement (Third) of Agency* has been invoked as a source for this common law definition.³ Should there ever be a *Restatement (Third) of Employment Law*, it will presumably replace the *Restatement (Third) of Agency* as the definitive common law definition of employee, and thus bind federal courts in their construction of basic federal statutes of employment law. A narrow definition of employee in the *Restatement* will thus narrow the scope of protection of federal

contract for services, a distinction which is at best a very poor proxy for the interests at stake. Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, is an exercise that we have consistently eschewed.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 678-79 (1996) (citations omitted). This is purposive interpretation. Unfortunately, despite these fine words, the line between employee and independent contractor, indeed manipulable at the will of employers, is an equally poor proxy for determining protection from illegal discrimination or entitlement to minimum standards of compensation or a safe and healthy working environment.

2. See *Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318 (1992); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968).

3. *Darden*, 503 U.S. at 324; *Reid*, 490 U.S. at 740.

employment statutes. A wider definition will bring more individuals under statutory protection. How should the proposed *Restatement* choose between the two?

Lawmakers and legal scholars all over the world struggle with this definition, typically examining similar criteria, including the hiring party's ability to control the hired party and the hired party's ability to take on other customers.⁴ In every country of which I am aware, other than the United States federal government, this determination is made against a background understanding that the purpose of employment law is something like the protection of individuals who need it.⁵ As the working group correctly points out, individual states, by contrast, may, and do, adopt such a purposive approach to the construction of their state statutes and the corresponding definition of employee.⁶

The draft *Restatement* can, and should, adopt such a purposive approach to the definition of employee. Chapter 1 should recognize expressly that its definitions will be employed to determine the scope of federal employment legislation and that such legislation is typically adopted when market failures prevent atomized markets from reaching efficient results. Typical reasons for these market failures include inelasticity in the supply of labor; collective action problems among workers; low trust and opportunism that prevent the formation of efficient long-term contracts; and information asymmetries.⁷ Taking account of factors like these would strengthen the sense that the draft *Restatement's* boundaries of the employment relationship are principled, not arbitrary.

II. HOW THE DRAFT RESTATEMENT CURRENTLY DEFINES EMPLOYEE

The current draft version of chapter 1 starts with a broad definition of

4. See generally BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille eds., 2006); International Labour Conference, 91st Sess., *Report V: The Scope of the Employment Relationship* (2003), available at <<http://www.ilo.org/public/english/standards/reln/ilc/ilc91/pdf/rep-v.pdf>>.

5. As a result, the traditional definition of employment is often attacked as too narrow, excluding individuals from social programs or benefits who need protection. See generally ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001) (an official report for the European Union urging revision of the understanding of the concept of employment in light of changes in work). The Supiot Report might be regarded as a kind of European analog to the proposed *Restatement*, though incomparably more sophisticated in philosophical acuity and empirical reference.

6. See, e.g., *D'Annunzio v. Prudential Ins. Co.*, 927 A.2d 113 (N.J. 2007) (definition of employee under state whistleblower statute must reflect purpose of the statute and thus may include individuals who are independent contractors for other purposes).

7. See Alan Hyde, *What Is Labour Law?*, in BOUNDARIES AND FRONTIERS, *supra* note 4, at 37, 54-60.

employee, with a narrow exclusion for independent contractors.⁸ This is the best section by far in the current draft. Its adoption would clear up a great deal of legal confusion. In the draft *Restatement*, an individual would be excluded from employment law only if he or she “render[s] the services as an independent business.”⁹ This is a narrower exclusion than some formulations of independent contractor; it requires not merely control of the means and manner of work, but also entrepreneurial control over hiring, purchasing, and expansion, and an ability to use the business to serve the individual’s interests.¹⁰ Adoption of this section alone would disapprove some questionable decisions that have excluded from the concept of employment individuals who are in no meaningful sense independent business owners, for example migrant farm laborers¹¹ or couriers.¹² Certainly the proposed *Restatement* could be more helpful on these issues. Avoiding circular definitions or definitions that beg the question would help.¹³

Future drafts of the *Restatement* should include a categorical inclusion of individuals working despite a lack of authorization under immigration law. Such individuals are nevertheless employees for statutory and common law purposes, though their immigration status may limit remedies for violation of their rights.¹⁴

8. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Council Draft No. 3, 2008). All references to the draft or proposed *Restatement* are to this document, which, as of this writing, has not been considered by the Council or the ALI.

9. *Id.* § 1.01(1)(c).

10. *Id.* §§ 1.01(2), (3).

11. Section 1.01, Illustration 2 specifically includes migrant farm laborers as employees, following *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) and presumably, though ambiguously, disapproving *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984), given a “but cf.” in Comment c.

12. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (5th Cir. 1998) (finding drivers for a package delivery service to be independent contractors not entitled to overtime pay). The court relied entirely on the fact that the drivers could set their own hours, could reject deliveries, were paid on commission, and tended to work for short periods. These factors outweighed such conceded indicia of employee status as the fact that they had no other work and the drivers’ low investment and skills. *Id.* at 303-06. I believe that such drivers do not have “entrepreneurial control” over an “independent business,” in proposed *Restatement* terminology, see RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 illus. 13, though the point is obscure.

It is curious that the *Restatement* nowhere adverts to the two leading books on the subject of defining employment in U.S. law, MARC LINDER, *FAREWELL TO THE SELF-EMPLOYED: DECONSTRUCTING A SOCIOECONOMIC AND LEGAL SOLIPSISM* (1992), and MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* (1989).

13. See for example, Illustration 4, in which a lawyer is not an employee because he makes litigation and staffing decisions. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 illus. 4. Presumably this would not apply to a lawyer carried on the payroll of the insurance company client as an employee and who receives a salary reported to the government on a form W-2. The illustration should specify, not merely assume, that the lawyer operates a law firm as an independent business.

14. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 889-91 (1984) (undocumented workers are statutory

This section is then followed by three categorical exclusions from the concept of employee. The draft *Restatement* would have it that volunteers,¹⁵ prisoners,¹⁶ and people with ownership interests¹⁷ are not employees. None of these categorical exclusions is supported as such by case law.¹⁸ Volunteers,¹⁹ prisoners,²⁰ and owners sometimes are and sometimes are not employees. It all depends. One has to do the analysis.

III. RESTATEMENT WITH PURPOSE

How are we to evaluate the current draft chapter 1, with its one broad inclusion and three categorical exclusions?

If the *Restatement* is supposed to implement some principled position, such as, to give one example, that employment law arises to solve market failures, we would be forced to be unhappy with the current draft chapter 1, with its attempted categorical exclusions of individuals, some of whom are unquestionably subject to exploitation and abuse. We would demand that the *Restatement* attempt to state a principled position by which it has decided when to include and when to exclude working people. Without some principle, there is no way of evaluating whether to be inclusive or exclusive.²¹

If the *Restatement* is supposed to add up cases and decide the majority position, we have no real assurance that the current draft performs that

employees under NLRA); *Zavala v. Wal-Mart Stores*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (undocumented workers may recover under Fair Labor Standards Act for minimum wage and overtime violations for work actually performed); *Reyes v. Van Elk Ltd.*, 56 Cal. Rptr. 3d 68 (App. 2007) (interpreting state law).

15. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02.

16. *Id.* § 1.02 cmt. e.

17. *Id.* § 1.03.

18. See Dennis R. Nolan et al., *Working Group on Chapter 1 of the Proposed Restatement of Employment Law: Existence of Employment Relationship*, 13 EMP. RTS. & EMP. POL'Y J. 93 (2009), with which I agree entirely. I also agree with the observation, expressed throughout this Symposium, that the current draft is simply a sloppy piece of work, full of cases mis-cited and cited for the opposite of their holdings, reliance on cases that have been repudiated, instances that ignore obvious counterexamples, and the like.

19. In addition to cases cited in Nolan et al., *supra* note 18, see *Pietras v. Board of Fire Commissioners*, 180 F.3d 468 (2d Cir 1999); *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir 1993) (applying state employment law to volunteers who received some benefit); *Harmony Volunteer Fire Department v. Pa. Human Rights Commission* 459 A.2d 439 (Pa. Commw. 1983) (volunteers receiving no benefit are employees).

20. *Baker v. McNeil Island Corrections Ctr.*, 859 F.2d 124 (9th Cir. 1988), on prisoners as employees, has been frequently cited. Parenthetically, a section on volunteers is a peculiar place for a discussion of the employment status of prisoners.

21. I have made just such an argument, Hyde, *supra* note 7, arguing for an expansive vision of the purpose of labor and employment law as the set of techniques for intervention in markets that realize distinct kinds of market failure, and therefore an expanded definition of employee.

function. Both the broad inclusion, and the categorical exclusion, are consistent with some cases and reject others.

If the *Restatement* should instead accurately reflect divisions in the area, each section should be replaced with an observation that cases divide on these issues. There would be no point in having such a *Restatement* at all.

If the *Restatement* is supposed to advance policy goals, such as economic growth, it would have to adopt the language of policy. It would have to examine economic literature to see whether the definition of employee, and exclusions from that concept, have any relationship to job creation, economic growth, or other desirable policy goals.²²

If the *Restatement* is supposed to craft some kind of compromise or deal among competing interests, we might expect a document containing, oh, broad inclusions followed by unprincipled exclusions. Such a deal might be adopted some day. But there would be little reason for anyone to feel a sense of obligation to it.

22. I cannot examine that literature here. There is little consensus among professional economists on these questions.