

WORKING GROUP ON CHAPTER 1 OF THE PROPOSED
RESTATEMENT OF EMPLOYMENT LAW: EXISTENCE OF
EMPLOYMENT RELATIONSHIP

BY

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I. INTRODUCTION

This article presents a critique of chapter 1 of the Proposed Restatement of Employment Law. The critique is organized to follow the organization of the proposed Restatement, which begins with a provision of black letter law, a series of comments and illustrations explaining the meaning and application of the black letter law, and the reporters' notes providing support for the black letter law and the commentary. This critique will follow that structure, with each part focusing on a section of the chapter: the introductory note; section 1.01; section 1.02; section 1.03; and section 1.04. The subdivisions of the parts will, likewise, generally follow the subdivisions of the sections in the chapter, although sometimes a critique of the reporters' notes will be its own subpart, and sometimes it will be discussed in the subsections analyzing the comments.

II. INTRODUCTORY NOTE

A. *Scope*

The Proposed Restatement's Introductory Note alludes to the fact that much of the law defining who is an employee consists of judicial and administrative interpretations of various employment and labor relations statutes. The Restatement should state specifically that these definitions can vary from statute to statute, even when the interpretations claim to be relying on common-law usage, and that statutory definitions may also vary from the common law.

The definition of "employee," when used to define the coverage of a

statute, might vary depending on the purpose of the legislation at issue.¹ The common-law definition thus makes more sense when used in wage and hour laws than in civil rights legislation. We recognize, however, that in certain instances, because of long-established judicial interpretations, any major modification of the traditional distinction between “employee” and “independent contractor” would probably require amendatory legislation.

More broadly, the Introductory Note should explain that employment law has been in ferment during the last few decades, especially regarding employment at will, and the Restatement’s formulation of existing law should not foreclose desirable future common-law or statutory developments.

B. Terminology

The Introductory Note correctly observes that the purpose of “employment law” is to “set the rights and duties of the parties to the employment relationship rather than to set the bounds of enterprise vicarious liability to third parties.”² Later, the Reporters’ Notes to section 1.01 point out that the distinction between employees and independent contractors originated in the “early, seminal English cases” designed to “protect consumers or purchasers from vicarious liability for the acts of service providers they could not control.”³ The Note should emphasize at the outset that this derivation of the definition of “employee” could lead to an inappropriate *limitation* on the scope of the term in situations where the very opposite – broad coverage – should be the goal, as in employee-protection statutes and antidiscrimination legislation.

III. SECTION 1.01⁴

A. Text of the Provision and Critique

§ 1.01 General Conditions for Existence of Employment Relationship

- (1) Unless otherwise provided by law or by §1.02 or §1.03, an individual renders services as an employee of an employer if**
- (a) the individual acts, at least in part, to serve the interests of**

1. See, e.g., *D’Annunzio v. Prudential Ins. Co.*, 927 A.2d 113 (N.J. 2007) (a worker who might be classified as an independent contractor at common law may qualify as an employee under a whistleblower statute).

2. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, ch. 1, at 1-2 (Council Draft No. 3, 2008).

3. *Id.* § 1.01 reporters’ notes, cmt. a, at 19.

4. This critique of section 1.01 was written by Theodore J. St. Antoine and Joseph E. Slater.

the employer,

(b) the employer consents to receive the individual's services, and

(c) the individual does not render the services as an independent business.

(2) An individual renders service as an independent business when the individual exercises entrepreneurial control over the manner and means by which the services are performed in order to serve his or her own interests.

(3) Entrepreneurial control over the manner and means by which services are performed is control over important business decisions, including whether to hire assistants and where to assign them, whether to purchase and where to deploy equipment, and whether to service other customers.

We are generally satisfied that the proposed black-letter language of section 1.01 effectively captures the essence of the employment relationship as distinguished from that of an independent contractor providing services to a consumer or other purchaser. Over time the courts have used such tests as the “right to control” and the “economic reality of dependence” to draw the distinction. Other industrialized societies have applied similar tests to distinguish between an employee and one who provides services as an independent business. But the United States appears more reluctant than most countries to depart from common-law agency principles and to adopt broadly an emphasis on statutory purposes.⁵

B. Comments on Section 1.01 – Critique

1. Overview

In Comment a, the authors note that one of the common law tests for the existence of an employment relationship, the right-to-control test, was originally developed for the purpose of determining when it is appropriate to hold a principal liable in *respondeat superior* for the torts of its agent.⁶ In discussing the test, the authors describe sections 220 of the *Restatement (Second) of Agency* and 7.07 of the *Restatement (Third) of Agency*.⁷ However, those sections seem to serve quite different purposes. Section 220 reads like a true definitional provision, as its title, “Definition of

5. See, e.g., Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 365-73 (2002).

6. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. a.

7. *Id.*

Servant,” indicates.⁸ Section 7.07, in contrast, is entitled, “Employee Acting Within Scope of Employment.”⁹ Comment f to section 7.07 does refer to the factors cited in section 220 as a test for employment status, including the degree of control the principal has over the methods the agent applies to her work, whether the agent supplies her own tools and materials, and whether the work the agent performs is customarily performed under the supervision of the principal.¹⁰ But Comment f to section 7.07 is not cited in the text of Comment a to section 1.01 of *Restatement (Third) of Employment Law*.¹¹ To avoid confusion, Comment f to section 7.07 should be cited there. What is significant is that section 7.07, like section 220 in actual effect, is meant to help determine when one person is responsible, under the doctrine of *respondeat superior*, for the acts of another person providing services to the former. Even though courts have relied on these factors in determining who is an employee in other contexts, this is not the best way to go about defining “employee” in any general sense. The issue is sufficiently important to be treated directly. At the very least, the *Restatement* should candidly acknowledge that section 1.01 of the *Restatement (Third) of Employment Law* is based to a considerable extent on the indirect treatment of employees and servants in sections 7.07 and 220 of the *Restatements (Third) and (Second) of Agency*, respectively.

This of course reiterates the concern expressed earlier about an excessively narrow definition of “employee” when used in certain worker-protection and antidiscrimination statutes. Even the Reporters’ Notes dealing with Comment a to section 1.01 recognize that the precedent-making English cases developed the right-to-control test for the purpose of *protecting* consumers and purchasers from vicarious liability “for the acts of service providers.”¹² That seems quite contrary to the approach that ought to be taken in considering the coverage of employee-protection statutes.

2. Illustrations

Illustration 16 to Comment f should be omitted. Comment f concerns the requirement in any employment relationship that the employer consent to receiving the employee’s services.¹³ Illustration 16 provides the

8. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

9. RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

10. *Id.* § 7.07 cmt. f.

11. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. a.

12. *Id.* § 1.01 reporters’ notes, cmt. a, at 19.

13. *Id.* § 1.01 cmt. f.

example of a union “salt” situation, in an attempt to illustrate the point that “[c]onsent is not negated by an employee’s misrepresentations.”¹⁴ It is inappropriate to equate union salting with a “misrepresentation.” First, in the Illustration itself, the employees make no representation, let alone a misrepresentation. They simply withhold from the employer the fact that they are union organizers.¹⁵ Moreover, under Federal law, the employer may not discriminate against them because of their status as union organizers.¹⁶ The Supreme Court has held that union salts are employees within the meaning of the National Labor Relations Act (NLRA), recognizing the statute’s policy to protect union organizing from employer interference.¹⁷ Neither the Illustration nor the Reporters’ Notes reflect that point, which leaves the impression that seeking employment with a union-organizing objective is somehow improper. Such a notion is manifestly incorrect.

C. Reporters’ Notes – Critique

The Reporters’ Notes to Comment a state that courts often use a multi-factor analysis to determine whether a person is an employee under employee-protection statutes, including workers’ compensation statutes that originally relied on a “narrow, one factor right-to-control test.”¹⁸ However, all of the cases cited in support of that proposition come from the far western United States (Alaska, Arizona, California, etc.).¹⁹ To make clear that this is not simply a regional aberration, it would be well to substitute or add decisions from elsewhere.²⁰

14. *Id.* § 1.01 cmt. f. illus. 16.

15. *Id.*

16. 29 U.S.C. § 158(a)(3) (2000).

17. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995).

18. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 reporters’ notes cmt. a, at 22. The authors cite ARTHUR LARSON, *THE LAW OF WORKMEN’S COMPENSATION* (1976) as general support for the treatment of the issue in workers’ compensation statutes. This reference should be replaced by appropriate references to the current version, of the looseleaf treatise, LARSON’S WORKERS’ COMP. LAW (MB). More than 340 libraries hold the latter; neither the University of Michigan’s Law Library nor any of its peers any longer carry the 1976 edition (even its title – *Workmen’s Compensation* – is an anachronism). We would suggest citing *Contractor Distinction: Relative Nature of Work*, 3 LARSON’S WORKERS’ COMP. LAW 62.1;62.2, § 62.01 (May 1999) (“The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service” and “[T]he control test is in practice giving way to the relative-nature-of-the-work test . . . [The reasons include] the logical irrelevance of the tort-connected test of control of the objectives of social legislation generally”); § 62.06 (June 2007).

19. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01, reporters’ notes cmt. a, at 22.

20. For example, the authors could include *Arkansas Transit Homes, Inc. v. Aetna Life and Cas.*, 16 S.W.3d 545, 547-48 (Ark. 2000) and *Re/Max v. Wausau Ins. Co.*, 744 A.2d 154, 157 (N.J. 2000) as central and eastern examples.

The Reporters' Notes to Comment c assert that in the case of unskilled workers, the multi-factor test used in determining who is an employee for purposes of worker-protection laws, is often unnecessary because of the close control typically exerted over such employees.²¹ In support of the proposition, the authors cite *Secretary of Labor v. Lauritzen*.²² However, the notion that a multi-factor analysis is not necessary appears to be much more the position of concurring Judge Easterbrook than that of the majority in the *Lauritzen* case.²³ We recommend that the authors cite directly to the concurring opinion to avoid suggesting that the majority holding supports this proposition. In addition, although the notes assert that the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA),²⁴ was also at issue in *Lauritzen*,²⁵ we cannot find any reference to that statute in either the trial or appellate decisions that are reported. The Fair Labor Standards Act (FLSA) seems the only statute involved. The MSAWPA is relied on, as well as the FLSA, in a couple of the other decisions reported in this same paragraph in Comment c.

The Reporters' Notes to Comment d state that both the NLRA and the Social Security Act were amended to exclude independent contractors from the definition of "employee."²⁶ While the notes are correct that the language of the NLRA explicitly excludes independent contractors from the definition,²⁷ the Social Security Act currently defines an "employee" as a person who would be considered an employee at common law.²⁸ We would infer from the context that the reference may be to an older version of this section. If so, the text should say so and the citation should provide the date.²⁹

21. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 reporters' notes cmt. c, at 23.

22. *Id.* (citing *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987)).

23. *See Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

24. 29 U.S.C. § 1823 (2000).

25. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 reporters' notes cmt. c, at 23.

26. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 reporters' notes cmt. d.

27. 29 U.S.C. § 152(3) (2000).

28. 42 U.S.C. § 410(j) (2000).

29. The comments, illustrations, and reporters' notes also contain a number of typographical and minor citation errors which the reporters will wish to correct in future drafts.

IV. SECTION 1.02³⁰*A. Text of the Provision and Critique***Section 1.02 Volunteers Are Not Employees for Purposes of Laws Governing Employment Relationship.**

Unless otherwise provided by law, for purposes of laws governing protections, benefits, and obligations in the employment relationship, an individual is a volunteer and not an employee if the individual renders uncoerced services without being offered a material inducement.

This default rule for interpreting the identified category of laws does two things. First, it declares who the law should characterize as a volunteer. Second, it declares what should be the consequence of that status with respect to employment legislation.

B. Comments on Section 1.02 – Critique

The rule's criteria for defining those excluded from the protections and responsibilities of employment laws are discussed in Comments b, c, e, and f which respectively are titled "material inducement,"³¹ "promises of future material gain,"³² "volunteers perform uncoerced services,"³³ and "employer pressure."³⁴ The rule's proclamation that volunteers are excluded from employment legislation is rationalized in Comment a, and the purported support for that proposition is presented throughout the Comments and Reporters' Notes.

1. Comment a – Relevance of Agency Principles

Comment a contains two propositions. The first asserts that volunteers are not treated as employees for purposes of laws governing employee protections and obligations³⁵ – an assertion that has no direct connection to the comment's title. The sole rationale offered in support of that proposition is that volunteers do not make the same commitment to an employer as do employees and, therefore, are not treated as employees for

30. Alvin Goldman authored the critiques of sections 1.02 through 1.04.

31. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 cmt. b.

32. *Id.* cmt. c.

33. *Id.* cmt. e.

34. *Id.* cmt. f.

35. *Id.* cmt. a.

the purposes of such protections and obligations.³⁶ The logic of that assertion has some cogency with respect to those laws whose protections are based on long term commitments, such as pension benefits or family and medical leave. However, there is a want of reasons to connect long term commitment to other sorts of protections like those involving work related exposure to injury or illness or protection from status discrimination or from retaliation based on exercising significant legal privileges or obligations including whistle-blowing.

Furthermore, the assumption underlying the rationale that long term commitment to the employer is an appropriate prerequisite to the protections offered by employment laws is not self-evident. Except where short term employees are expressly excluded from certain statutory regimes, the law does not exclude temporary or casual workers from employee rights or obligations.³⁷ Moreover, the activities that most often attract volunteers (distribution of food to the needy, assisting in hospitals, nursing homes, and day care centers; leading youth organizations, teaching religious school, surrogate sisters and brothers, building homes for the underprivileged, charitable fund raising, and the like) typically do so because of the volunteer's emotional or ideological dedication to the enterprise mission. Volunteers, therefore, often take great pride in that activity and their rigorous participation often persists for decades. The Reporters offer no case decisions in support of the offered "commitment" rationale for the declared rule,³⁸ and, as discussed below, a number of decisions extend some employee protections to volunteers.³⁹

Comment a observes that, as stated in the *Restatement (Third) of Agency*, beneficiaries of volunteer services can be held vicariously liable for a volunteer's misconduct,⁴⁰ but it goes on to declare, without explanation or cited authority, that suitability for such tort liability is not determinative of employee status. Nevertheless, more careful analysis suggests that the same reasons that justify holding a principal vicariously liable for a volunteer's conduct may also justify construing some types of employee protective laws to encompass some who perform services on

36. *Id.*

37. *See, e.g.*, 29 U.S.C. § 152(3) (2000) (not defining employee by the duration of employment or identity of employer for purposes of the NLRA); 29 U.S.C. § 203(e) (2000) (excluding under the FLSA public agency and non-profit food bank volunteers from definition of "employee," but not seasonal or short term workers).

38. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 reporters' notes cmt. a.

39. *See Acts Outside Regular Duties*, 2 LARSON'S WORKERS' COMP. LAW (MB) § 27.03(4)(b) (June 2008).

40. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 cmt. a (citing RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(b) (2006)).

what ordinarily would be considered a volunteer basis. For example, the principal's superior ability to prevent a mishap, or to spread the financial burdens of unavoidable risks among those who benefit from the work, justifies extending the protection of safety and health regulations and injury and illness insurance benefits to all who perform the work regardless of whether they are treated as employees for other purposes. Indeed, as discussed below, some courts construe such legislation in this manner. Accordingly, the Reporters have not provided support for the black letter declaration of the stated default interpretive rule either in the form of clear doctrinal analysis or a clear consensus of authority.

Of less importance, but worth noting, is an inconsistent use of descriptive language in this portion of the Draft. Comment a characterizes the recipient of volunteer services as an employer,⁴¹ and later in the same paragraph characterizes the recipient as a principal.⁴² Because there is no "employer" if the voluntary service does not result in an employment relationship, the first term is inappropriate. The term "principal," indicating an agency relationship, may be appropriate for third party claim purposes but does not accurately depict a voluntary relationship for other purposes, such as the obligations or privileges between the immediate parties. It is suggested, therefore, that the phrase "beneficiary of the services" would be a more neutral characterization for use throughout the paragraph.

Finally, Comment a uses the term "true volunteer" without defining it. Are there "untrue" volunteers? If so, what is the significance of the true volunteer status?

2. Comment b – Material Inducement

Comment b expands on the black letter rule's assertion that being offered a material inducement removes one from the status of volunteer. It explains that an "individual may be induced or motivated to work by the promise of any type of material gain, whether in the form of monetary compensation, some special benefit such as insurance, or an in-kind payment."⁴³ Comment b, however, does not accurately reflect the full scope of modern contract doctrine respecting consideration because it

41. The second sentence of comment a reads, "Individuals who render services to an entity without coercion and without material inducement have not been extended the same kind of commitment from an employer as those who work for material gain," RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 cmt. a.

42. The last sentence of the first paragraph in comment a reads, "Volunteers, however, may have certain protections from or obligations toward their principals that do not depend on employee status," *Id.*

43. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 cmt. b.

ignores consideration in the form of material gain to third persons or parties to whom the individual has a legal obligation or emotional tie.⁴⁴ Additionally, it fails to recognize consideration in the form of a forbearance or the creation, modification, or destruction of a legal relationship.⁴⁵ No explanation is given for using a more narrow concept of inducement for employment contracts than for other contracts or for creating this inconsistency between this and the *Restatement (Third) of Contracts*. If the Reporters intend the term “material inducement” to be as broad a concept as that used in describing contractual enforceability, clarification would best be accomplished if the black letter rule itself cross-referenced the companion Restatement.

The broader *Restatement (Third) of Contracts* perspective of what material inducement includes and thus who is an employee would, of course, expand the scope of coverage of employee protective laws. The net financial impact of a broadened or narrowed perception of employment is not examined in the Comments. Absent such guidance for a policy choice one might turn to the goal of equal justice. Under that standard is it not doubtful whether the appropriate presumption is that the legislature would favor placing greater risks and burdens on those who, without deriving personal benefit from their work, perform the same services and generate the same social or economic values as those whose work is remunerated?

The Reporters’ Notes cite an article by Mitchell Rubinstein without analysis or discussion. The article offers an additional reason for construing employee protective statutes as covering volunteers:⁴⁶

It is . . . important to understand the legal rights of volunteers since there is potential for abuse. Specifically, some volunteers may be exploited by employers looking for a source of inexpensive – or worse, free – labor. Given that this nation wants to, and needs to, encourage volunteerism, it must curb the exploitation of volunteers.⁴⁷

Moreover, the Rubinstein article demonstrates that there is a

44. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. e. (1981).

45. *Id.* § 71(3); see also *Arriaga v. County of Alameda*, 892 P.2d 150 Cal. 1995 (worker’s compensation available to claimant who was injured while doing community service in lieu of being subject to other penalties); *Whitlock v. State Indus. Accident Comm’n*, 377 P.2d 148 (Ore. 1962) (building owner’s workers’ compensation insurance liable for the volunteer’s claim where nonprofit organization was paid to paint a building and volunteer suffered lead poisoning while doing that work).

The Reporters’ Notes to Comment e cite *Arriaga* as an example of a coerced “volunteer.” Although that element removed the worker from the status of “volunteer,” the beneficiary government agency’s responsibility to provide workers’ compensation benefits was still dependent on establishing an employment relationship. That relationship was supported by the agency being a third party beneficiary of the prosecutor’s offer to do community service in lieu of a less desirable legal obligation.

46. Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

47. *Id.* at 150-51.

disconnect between the unsettled state of the case law on the subject and the Reporters' unqualified black letter statement of section 1.02 respecting the relationship between volunteer status and employment protections.⁴⁸

The Reporters' Notes assert that volunteers are not treated as employees if they do not receive pay or significant benefits and cite three cases in support of that proposition.⁴⁹ Those cases do not support that broad proposition; rather, as discussed below, they support the more narrow proposition that courts have interpreted specific legislative protections of employees as expressly limiting their application to claimants who are remunerated for their services or have excluded volunteers for other reasons tied to the text of the statute being invoked.

Thus, the rejection of sex discrimination claims by volunteer firefighters in *City of Calhoun v. Collins*⁵⁰ was not based on the broad principle that remuneration or significant benefits are required for a person to be protected by an employment law statute. Rather, the decision was explained on the grounds that the conduct of the members of the volunteer group was not under the direction of the government entity being sued,⁵¹ that the statutes under which the claims were made are designed to remedy employment type discriminatory practices and not other types of discrimination,⁵² and that restoration of membership in a voluntary group is not the sort of remedy anticipated by anti-discrimination statutes that protect employees.⁵³

Mendoza v. Town of Ross,⁵⁴ also cited for the broad proposition that a volunteer must be remunerated to receive employee protections, denied a disability discrimination claim by a quadriplegic volunteer whose traffic assistance and crime watch position had been eliminated.⁵⁵ That decision

48. *Id.* at 171-73.

[I]n order to determine whether the purported volunteers are employees under employment discrimination statutes, courts have applied the primary purpose test, the economic reality test, and the hybrid test. Other courts have focused exclusively on whether the individual in question received any remuneration and examined what constitutes remuneration. Additionally, others have adopted a two-step approach requiring that the putative employer control the work and that the purported volunteer be hired.

Id. at 171.

49. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 reporters' notes cmt. b. (citing *Tawes v. Frankfort Volunteer Fire Co.*, 16 Am. Disabilities Cas. (BNA) 660 (D. Del. 2005); *Mendoza v. Town of Ross*, 27 Cal. Rptr. 3d 452 (Ct. App. 2005); *City of Fort Calhoun v. Collins*, 500 N.W.2d 822 (Neb. 1993)).

50. 500 N.W.2d at 825-27.

51. *Id.* at 827; *id.* at 828 (Caporale, J, concurring).

52. *Id.* at 826 (citing *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987)).

53. *See id.* at 826-27.

54. The case is incorrectly cited in the Reporters' Notes. The correct citation is *Mendoza v. Town of Ross*, 27 Cal. Rptr.3d 452 (Ct. App. 2005).

55. *Id.* at 454-55

turned not on the absence of pay or benefits but rather on the fact that the claimant never held the volunteer position because he had not been appointed to it by the town authorities as required by the governing regulations.⁵⁶

Finally, in *Tawes v. Frankford Volunteer Fire Co.*,⁵⁷ the trial court was not addressing a broad proposition respecting the status of volunteers under employee protective legislation; rather it was focusing on the tests other courts have used in applying particular statutes protecting workers from employment discrimination.⁵⁸ Borrowing, out of context, language from a Supreme Court decision concerning the responsibility of fishing boat owners for the captain's and crew's social security and unemployment insurance tax contributions, the district court adopted as its guiding proposition that in "the application of social legislation[,] employees are those who as a matter of economic reality are dependent upon the business to which they render service."⁵⁹ Based on that proposition, without further analysis, the district court cited lower court statements that a volunteer who does not receive compensation is not protected by laws banning employment discrimination.⁶⁰

In contrast, at least in the case of volunteer emergency responders, several state legislatures (including those of jurisdictions involved in some of the cases cited in the Reporters' Notes) as well as some state courts,⁶¹ and some federal statutes,⁶² adopt the principle that volunteers should receive at least some indemnity protections and benefits given to employees. Similarly, a few state courts, emphasizing the purpose of the legislation, have provided workers' compensation benefits to volunteer workers even in the absence of explicit statutory coverage for such persons.⁶³

56. *Id.* at 457-58.

57. 16 Am. Disabilities Cas. (BNA) 660 (D. Del. 2005).

58. *Id.*

59. *Id.* (citing *U.S. v. W. M. Webb, Inc.*, 397 U.S. 179, 185 (1970)). The Court in *Webb* held that maritime law should govern whether for such purposes the fishing vessel's captain and crew, whose remuneration was based on defined shares of the value of the catch, should be treated as employees of the boat's owner. 397 U.S. at 189-94. On remand it was held that the owner had an employer's responsibilities to make payroll deductions. *W. M. Webb, Inc. v. U.S.*, 424 F.2d 1070, 1071 (5th Cir. 1970).

60. *Tawes*, 16 Am. Disabilities Cas. (BNA) at 660.

61. Conflicting case authorities respecting the treatment of emergency responders, and statutory references, can be found at *Acts Outside Regular Duties*, 2 LARSON'S WORKERS' COMP. LAW (MB) § 27.03(4)(b) (June 2008).

62. For example, 16 U.S.C. § 558c (2000) includes forest service volunteers as employees for purposes of tort claims, workers' compensation claims, and claims for lost personal property.

63. *See, e.g.*, *Matthews v. County of Nassau*, 562 N.Y.S.2d 771 (App. Div. 1990) (county museum volunteer covered by workers' compensation); *Orphant v. St. Louis State Hosp.*, 441 S.W.2d

3. Comment d – Interns and Student Assistants

This Comment uses the term “intern” without defining it. A possible definition would be:

An intern is someone whose uncompensated efforts primarily provide that person with tutelage and experience that are transferable in serving other persons or entities and do not to a material degree give value to the source of the tutelage or the source of the opportunity for experience that is greater than is the value of the intern’s enhanced learning.

This definition would have the virtue of being consistent with the way the California legislature in its Higher Education Employer-Employee Relations Act defines when students are to be considered employees rather than student interns at the University of California.⁶⁴ It is consistent, too, with the draft’s apparent effort to distinguish between student work for purposes of training and student work that substitutes for hiring additional staff.

Comment d states this last proposition as follows: “[S]tudents who render uncompensated services to satisfy bona fide education or training requirements . . . generally are not treated as employees.”⁶⁵ In contrast, the California courts have granted workers’ compensation protection to students who, without pay, work “shoulder to shoulder with paid workers . . . in an established business or institution” and render “services that are of economic benefit to the third party.”⁶⁶ While there is a division of authority on this point, other courts have issued similar decisions including requiring that apprentice wages be paid to students whose intern or extern activities generate significant value.⁶⁷ The Reporters’ Comments do not adequately reflect this division of authority nor assess the merits of the competing approaches.

The Reporters’ Notes appear to have a heading missing inasmuch as they treat issues raised under Comment d in the notes headed “Comment

355 (Mo. 1969) (volunteer dance therapist at mental hospital was entitled to workers’ compensation benefits where the statute defined employee as “every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election”); *Pruit v. Harker*, 43 S.W.2d 769 (Mo. 1931) (holding an uncompensated child working for his parent to be an employee within the meaning of Missouri’s workers’ compensation statute).

64. CAL. GOV’T CODE § 3562e (West 2009).

65. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §1.02 cmt. d.

66. *Land v. Workers’ Comp. App. Bd.*, 125 Cal. Rptr. 2d 432, 435-36 (Ct. App. 2002).

67. *See, e.g., Betts v. Ann Arbor Pub. Sch.*, 271 N.W.2d 498, 500-01 (Mich. 1978) (holding student teacher fulfilling a degree requirement without pay to be an employee for purposes of workers’ compensation in part because defendant school benefited from student teacher’s services); *Heget v. Christ Hosp.*, 58 A.2d 615, 616-17 (N.J. Ct. C.P. Hudson County 1948) (holding unremunerated student nurse fulfilling certificate requirement was employee of defendant hospital for purposes of workers’ compensation because hospital benefited from student nurse’s services).

c.” One of those notes addresses the issue of the status of student athletes and offers as the default rule the assertion that courts find no employment relationship even in the case of financial aid in exchange for participating in money-generating athletic programs.⁶⁸ Because this issue has not been extensively litigated, it is misleading to present it as a settled principle. Thus, the notes cite but two case decisions of questionable persuasiveness in support of the statement, one of which has been overruled with respect to what it had characterized as the primary consideration for determining whether an employment relationship exists.⁶⁹ Moreover, as discussed below, this default rule is inconsistent with the approach many courts take in distinguishing volunteer status from employment status based on the commercial value of the work efforts and on the monetary and other valued inducements for participation. Nor does this default rule reflect the economic realities of the commercialization of certain athletic programs on many campuses.

The older of the student-athlete cases cited in the Reporters’ Notes emphasized the absence of proof that either side intended to create an employment relationship, the governing athletic association’s regulations prohibiting pay for participation, and the required continuation of financial aid irrespective of the athlete’s contribution to the team’s success.⁷⁰ This led the court to conclude that the student athlete was “first and foremost a student.”⁷¹ However, the court did not discuss factors that may distinguish the lives of those recruited to campus as athletes from the lives of other students, including those receiving other types of scholarships, or the frequency with which student athletes graduate from the particular institution as contrasted with other recipients of financial aid.

The second case cited in support of the statement that courts find no employment relationship even where student athletes on scholarship play in a money-generating sport is a Texas appellate decision that rejected an athlete’s workers’ compensation claim brought in 1991 based on a paralyzing injury he suffered playing college football in 1974.⁷² The court’s decision emphasized the compensation act’s explicit requirement that there be “a contract of hire” and found that a jury could conclude that his letter of intent and financial aid agreement did not constitute a contract

68. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 reporters’ notes cmt. c.

69. *Id.* (citing *Rensing v. Ind. State Univ. Bd. of Tr.*, 444 N.E.2d 1170 (Ind. 1983), *overruled by* *GKN Co. v. Magness*, 744 N.E.2d 397, 402-03 (Ind. 2001); *Waldrep v. Tex. Employer’s Ins. Ass’n*, 21 S.W.2d 692 (Tex. App. 2000).

70. *Rensing*, 444 N.E.2d at 1170-73.

71. *Id.* at 1173.

72. *Waldrep*, 21 S.W.2d at 692.

of hire because the NCAA regulations under which the athlete undertook to play expressly prohibited taking pay in exchange for playing and did not permit cancellation of the athlete's grant-in-aid based on his athletic ability or his contribution to the team's success, or in certain circumstances, even if he quit.⁷³ However, the Texas court cautioned: "Our decision today is based on facts and circumstances as they existed almost twenty-six years ago. We express no opinion as to whether our decision would be the same in an analogous situation arising today; therefore, our opinion should not be read too broadly."⁷⁴

Although the Texas court did not explain why it offered its concluding remark, a caution ignored by the Reporters' Notes, there are ample reasons to ask whether, at least in those revenue-generating intercollegiate football and basketball programs that dominate media attention, the players are integral to the educational program or integral to a financially lucrative auxiliary activity. Facts relevant to assessing whether the services in question are obtained in the course of an economic enterprise rather than an educational program would include comparing the budgets, remuneration levels, and work expectations of the coaching staff with those of other institutional departments; examining the integration or separation of the athletic department's governance system in relation to that of the rest of the campus; the degree of regimentation of the lives of student-athletes in comparison with those of other students; and the graduation rates for "student"-athletes as contrasted with those of other financially aided students. Thus, the Larson treatise on workers' compensation questions the relevance in these situations of the parties' "proven intentions" that the athletes are present as students, not workers, and observes that generally in workers' compensation cases courts find employment even though the expressed intention of the parties was to establish an independent contractor relationship.⁷⁵ Citing the widespread public controversy respecting lax enforcement or widespread disobedience of NCAA regulations, the Larson treatise observes: "[T]here is something faintly naïve about the repeated contention that the claimant could not have been playing for pay because the NCAA forbids it."⁷⁶

73. *Id.* at 702.

74. *Id.* at 707.

75. *Recreational and Social Activities*, 2 LARSON'S WORKERS' COMP. LAW (MB) § 22.04(1)(c) (June 2007).

76. *Id.*

An enormous cast of participants harvests a wealth of riches from major college sports. Universities derive enormous revenues and other indirect, but vital, benefits from successful athletic programs. . . . The NCAA supports itself entirely by revenues generated from selling broadcasting rights of its members' games. Many coaches are compensated lavishly for

The Reporters' Notes acknowledge a competing view to the extent of offering a "but see" citation to an older Colorado decision that allowed a workers' compensation claim on behalf of an injured athlete.⁷⁷ However, the notes provide an incomplete summary of the case. There the student athlete had several campus jobs which could have been held by non-students.⁷⁸ The Colorado court was quite clear that these university jobs, which provided him with free lodging, meals, and spending money, were dependent on his playing football and, therefore, concluded that when the student was injured during Spring practice, the injury arose out of his employment.⁷⁹ The Colorado decision can, of course, be distinguished from the other two cases based on the absence of an athletic association regulation preserving the student's in-kind aid and income in the event he could not play.⁸⁰ On the other hand, as previously discussed, an effort to accurately characterize the nature of the relationship should also look at the extent to which the athletic program and lives of the athletes were similar to or different from the rest of the campus.

Given the weakness of the rationale of the cited decisions, the Texas court's words of caution, and the failure to explore a number of grounds for finding that the relationship with the school was not primarily academic, it is inaccurate to present the law in this area as settled. Moreover, this is an area where, consistent with ALI traditions, the Reporters could offer guidance to a more progressive path to justice.

4. Comment e – Volunteers Perform Uncoerced Services

Comment e states: "Coerced individuals are employees if their work

producing successful programs. Media enterprises generate rich advertising revenues by airing college athletic events. Indeed, college sports constitute a \$60 billion industry.

Amy McCormick & Robert McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496-97 (2008).

77. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §1.02 reporters' notes cmt. c (citing *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953)).

78. *Nemeth*, 257 P.2d at 424 (athletes were paid monthly, other students were paid hourly).

79. *Nemeth*, 257 P.2d at 426.

80. *See id.* Shortly after the Colorado court decided *Nemeth*, it rejected the workers' compensation claim of another college football player who died from a playing injury. In a decision not included in the Reporters' Notes, *State Compensation Ins. Fund v. Indus. Comm'n*, 314 P.2d 288 (Colo 1957), the court explained that unlike the earlier case, the evidence did not show that the athlete would not have attended the school absent the grant-in-aid provided by the football team. Also, his campus jobs and tuition scholarship were available to students who did not participate in athletic programs. Thus, the court found he primarily was on campus as a student, a finding that may have been further influenced by the fact that the school for which the decedent played, Fort Lewis A & M College, did not have the type of program that demanded widespread media attention or generated significant revenue. The fact that the school carried accident insurance for its football players, additionally may have persuaded the court that the school and athlete had accepted an alternative method of protecting the athlete's interests. *Id.* at 289-90.

serves the interests of an employer who consents to receive their services.”⁸¹ This statement is followed by the observation that “This may not be the case for prisoners who are forced to do work in a prison for purposes of punishment or rehabilitation rather than to serve the interests of an employer.”⁸² While the phrasing of that sentence is pregnant with the opportunity to find that under various circumstances inmate workers have employment protections, it is narrowed by the Reporters’ Notes which state: “Presumably the purposes of employment laws do not extend to work done under a prison’s control pursuant to a penal sentence.”⁸³ Neither the notes nor comment offer a rationale for this rule and, therefore, the Draft provides no guidance regarding the resolution of this difficult issue. Potentially affected by the stated exclusion of prison work from employment protections are the roughly 2.3 million persons incarcerated in the U.S.⁸⁴ As explained below, courts are in need of thoughtful guidance respecting this area of the law of work. Thus, the lack of such guidance in the Draft is a significant gap in the document.

One category of prison labor is prison housework.⁸⁵ It involves maintaining the facility or meeting the needs of other inmates through jobs such as cooking, baking, laundering, dishwashing, grounds keeping, carpentry, painting, and nursing assistance. Because such work is otherwise performed by hired civilian workers, the terms and conditions of prison housework has a significant market impact as well as an impact on the conditions of incarceration. The other category of prison labor is work in prison industries.⁸⁶ Such work involves producing products or services sold by the prison system; work that otherwise would be performed by free labor. Indeed, was it not for the comparative severity of U.S. prison sentences,⁸⁷ a significant portion of those who are incarcerated would be active participants in the free labor market. Therefore, because prisons generally require medically able inmates to work, the terms and conditions of such employment has a significant competitive impact on portions of the labor market including the market for prison staff.⁸⁸

81. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §1.02 cmt. e.

82. *Id.*

83. *Id.* § 1.02 reporters notes cmt. e.

84. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SUMMARY FINDINGS (2007), at <<http://www.ojp.usdoj.gov/bjs/prisons.htm>>.

85. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 870 (2008).

86. See *id.* at 869.

87. See PATRICK A. LANGAN & DAVID P. FARRINGTON, BUREAU OF JUSTICE STATISTICS, CRIME AND JUSTICE IN THE UNITED STATES AND IN ENGLAND AND WALES, 1981-96, at 30 (1998), available at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/cjusew96.pdf>>.

88. It has been estimated that “well over 600,000, and probably close to a million, inmates are

Most prison inmates perform some prison housework and a significant portion work in prison industries that produce goods or services sold to government agencies⁸⁹ or private consumers. For example, in 2002 it was reported that the Federal Prison Industries, operated by the Federal Bureau of Prisons, employed approximately 23,000 inmates out of a total of 157,000 prisoners and that about 65,000 inmates were employed in state operated prison industries.⁹⁰ Although only a small portion of prisoners currently are estimated to do contract work for the private sector, there is reason to expect this number to grow.⁹¹

A recent study by Professor Noah Zatz found that since the mid 1980s, federal courts have acknowledged that with respect to some labor protective statutes such as the FLSA, prison workers employed by private contractors fulfill the definition of “employee” where they perform that work outside the prison premises.⁹² It has also been held that work-release prisoners are employees who may participate in an NLRB election.⁹³ These decisions turn not on any finding that prisoners inherently can or cannot be employees but rather on the purpose of the particular statute.

On the other hand, courts generally deny relief for inmates employed by prison industries or in prison housework either because such assignments are presumed to be an aspect of penal rehabilitation (an assumption most often made with little or no attention to the functional realities), because such activity is not an economic relationship, or because the government defendant enjoys sovereign immunity from monetary liability.⁹⁴ This leaves an inmate-worker in a significantly less protected situation than someone performing identical work in a non-inmate capacity. For example, under general tort law, absent intentional infliction of injury or deliberate indifference to prisoner safety, courts do not require prisons to compensate their prisoner-employees for work-related injuries.⁹⁵ Thus, if

working full time in jails and prisons throughout the United States.” Zatz, *supra* note 85, at 868.

89. The Federal Prison Industries Act provides for the sale of such goods to government agencies. 18 U.S.C. § 4122 (2000).

90. ROBERT D. ATKINSON, PROGRESSIVE POLICY INSTITUTE POLICY REPORT, PRISON LABOR: IT’S MORE THAN BREAKING ROCKS 1 (2002), available at <http://www.ppionline.org/documents/prison_labor_502.pdf>.

91. A Forbes.com article estimated the number at 6000 nationally. Maureen Farrell, *Putting Prisoners To Work* (Aug. 19, 2008), <http://www.forbes.com/2008/08/18/prison-small-business-ent-manage-cx_mf_0818prisonlabor.html>. This estimate appears to not include work performed by those incarcerated in privately operated prisons. Such prisons, which have been growing in number, hold over 6.7 percent of the total prison population. See Rachel Antonuccio, Comment, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 582 (2008).

92. Zatz, *supra* note 85, at 875-78, 893-95.

93. *Speedrack Prods. Group v. NLRB*, 114 F.3d 1276 (D.C. Cir. 1997).

94. Zatz, *supra* note 85, at nn.101-04.

95. Colleen Dougherty, Comment: *The Cruel and Unusual Irony of Prisoner Work Related*

an oven were to explode in a prison kitchen permanently injuring a non-inmate baker and an inmate baker's helper, only the former would be eligible for disability benefits.⁹⁶

The decisions respecting the FLSA's application to prison labor largely ignore history's lessons respecting the social as well as economic realities of the role prison labor can and has played in using inmates as a cheap alternative source for a work force to perform particularly onerous tasks, like road gangs and swamp drainage; a role that perverts the corrective and rehabilitative functions of incarceration and undermines the employee welfare goals of labor protective legislation.⁹⁷ In addition, as Professor Zatz observes, penological goals are probably better served by granting prison labor the same status as other workers.⁹⁸ Thus, careful analysis of the status of inmate labor that gives greater attention to the history of abuse of such labor and the potential rehabilitative role of prison work could lead to the conclusion that the goals of labor protective laws and the penological process are better served when courts include prisoners within those laws.

Although the Department of Labor and some judicial decisions point to prisoner dependency as a justification for excluding them from the FLSA, the Department of Labor has rejected such a justification with respect to patient-workers, such as those in mental institutions. Rather, its regulations grant employment protections to patients who perform work within the institution if it "is of any consequential economic benefit to the institution."⁹⁹ The inconsistency of excluding internal prison labor from the FLSA while giving such protection to confined patients deserves at least some mention in a document designed to guide courts to improved justice.

In contrast with judicially shaped decisions respecting minimum wages and tort liability, twelve states plus the federal government provide some workers' compensation benefits to prisoners injured in the course of doing assigned duties other than personal housekeeping.¹⁰⁰ Over forty

Injuries in the United States, 10 U. PA. J. BUS. & EMP. L. 483, 484-85 (2008).

96. At the same time, if the explosion was caused by the negligence of a well-healed inmate maintenance worker who was serving time for tax fraud, the non-inmate baker and the inmate helper might be eligible for a substantial tort recovery against the negligent inmate depending on the jurisdiction's approach to the fellow-servant doctrine and co-worker immunity. *See, e.g.*, *Buckley v. New York*, 437 N.E.2d 1088 (1982). Five jurisdictions do not extend workers' compensation immunity to co-workers and limit the scope of that immunity. *Who are "Third Persons": Types of Statutes*, 6 LARSON'S WORKERS' COMP. LAW (MB) §§ 111.02(1), 111.03(1) (June 2008).

97. Zatz, *supra* note 85, at 886-96.

98. *Id.* at 908, 910, 932.

99. 29 CFR § 525.4 (2008).

100. *Necessity for "Contract of Hire"*, 3 LARSON'S WORKERS' COMP. LAW (MB) § 64.03(6) (June 2008).

years ago the Council of State Governments recommended such a reform.¹⁰¹ A governmental advantage to this approach is that it provides a shield against potentially more generous tort liability for such injuries.¹⁰²

Normative protective standards respecting prison labor have been proposed by the International Labour Organization (ILO) which adopts conventions intended to ensure social justice and humane treatment of workers. The ILO's Forced Labour Convention of 1930 prohibits all forced labor, but at Article 2, paragraph 2(c), excludes from the definition of prohibited forced or compelled labor

any work or service exacted from any person as a consequence of a conviction in a court of law, *provided* that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.¹⁰³

The original Convention's seeming rejection of all private contracting of prison labor was modified in the 2007 Report of the ILO's Committee of Experts on the Application of Conventions and Recommendations.¹⁰⁴ That document addressed the issue of when prison labor for a non government entity is permitted regardless of whether the non-government entity is an employer that brings its work into the prison, whether the prisoners are released to work outside the prison, or whether work is performed for a privately operated prison.¹⁰⁵ The 2007 Report asserts that, under ILO principles, in such situations the prison labor must be subject to government supervision and control that is effective, systematic, and regular, including oversight by those government officers who normally inspect working conditions. In addition, prison labor for nongovernment entities must be voluntary, as evidenced by a written statement of consent, and the prisoner must not be subjected to pressure or the prospect of any penalty, such as loss of a right or privilege, for refusing the opportunity to engage in such work or having the refusal taken into account in deciding

101. *Id.* (citing COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 23 (1963)).

102. *See, e.g.,* Drake v. Essex County Corr. Ctr., 469 A.2d 512 (N.J. Super. 1983) (holding that action of injured prisoner under Tort Claims Act is possible because workers' compensation benefits unavailable to prisoner).

103. International Labour Organization [ILO], *Convention Concerning Forced Labour* Art. 2, ILO C29 (May 1, 1932), available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (scroll down to C29 and click) (emphasis added).

104. ILO Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), *Report III (Part 1B): General Survey Concerning the Forced Labor Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, 96th Sess., U.N. Doc. ILC96-III(1B)-2007-02-0014-1-En, available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_089199.pdf>.

105. *Id.* at 24-27.

matters concerning reduction of sentence.¹⁰⁶

Finally, the ILO Guidelines call for such labor to be performed under conditions that approximate a free labor relationship including a comparable level of wages (allowing for reasonable deductions for the cost of housing and food and taking into account differences in productivity and costs of training and supervision), social security benefits, and the occupational health and safety protections afforded free workers.¹⁰⁷ If a Restatement were to guide federal and state courts based on such international norms, its analysis of statutory protections might more readily recognize the appropriateness of extending to prison inmates statutory worker safety and health protective regimes, as well as minimum wage benefits.

V. SECTION 1.03

A. Text of the Provision and Critique

Section 1.03 Owners Are Not Employees For Purposes of Laws Governing Employment Relationship

Unless otherwise provided by law, for purposes of laws governing protections, benefits, and obligations in the employment relationship, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or a significant part of the enterprise.

This section is concerned with situations in which employees have ownership interests in the entity in which they are employed. Strangely, the stated black letter rule focuses on the individual's ownership attributes as contrasted with the employment attributes. Nevertheless, it is the latter that is the focus of the core authorities that guide judicial interpretation of statutory protections, benefits, and obligations of employment. Therefore, it is puzzling why the focus of a draft *Restatement (Third) of Employment* is on ownership attributes rather than upon employment attributes.

The impact of employee ownership interests on employee protective legislation was addressed by the U.S. Supreme Court in *Goldberg v. Whitaker House Cooperative, Inc.*, where the Court upheld FLSA regulations prohibiting home manufacture of goods made by members of a producer cooperative.¹⁰⁸ The Court reached this result because it found that

106. *Id.* at 24-31.

107. *Id.* at 30-31.

108. 366 U.S. 28 (1961).

those performing the work were vulnerable to employee risks and explained:

There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would “suffer or permit” them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative.¹⁰⁹

Instead of looking to the ownership characteristics of the co-op members, the Court examined the economic realities of their work efforts and observed:

The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers.¹¹⁰

Accordingly, the black letter rule should examine the individual’s attributes as an employee. Moreover, as explained below, including in a leading case cited by the Reporters, courts have found ownership control to be irrelevant to an individual’s rights under some employment statutes.

B. Comments on Section 1.03 – Critique

1. Comment a – Overview

Comment a asserts that as a general matter employment protections and obligations do not apply to employees who through their ownership interest control their own remuneration and activities on behalf of the enterprise.¹¹¹ This test is inconsistent with the black letter rule stated in section 1.03 which recites the test as whether “the individual through an ownership interest controls all or a significant part of the enterprise.”¹¹² For example, partners control their own remuneration and activities on behalf of the enterprise if they individually attract their own clients or patients,

109. *Id.* at 32.

110. *Id.* at 32-33.

111. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.03 cmt. a.

112. *Id.* § 1.03.

exercise professional prerogatives in providing counsel or treatment, and retain a share of the resulting fees – the Comment a test for not including an individual as an employee. Nevertheless, that individual may have little or no control over such core enterprise decisions as the purchase or disposal of property, the hiring or dismissal of professional and support staff, the expansion or contraction of the enterprise’s areas of specialization, the location or amenities of its facilities, the schedule of fees for services, and the like – factors that are essential to applying the test recited in the black letter rule stated in section 1.03.

When courts and counsel reference an adopted ALI Restatement principle, often they do not go beyond the black letter assertion. Therefore, the rule itself should accurately reflect any critical qualifications. In this instance the Reporters have presented two conceptually different approaches to resolving the question of whether an individual is primarily an owner or an employee. Therefore, the first step in accomplishing its task under section 1.03 will be for the Reporters to decide whether the guidance should be based on the black letter rule stated in section 1.03 or the tests described in Comment a. On the other hand, as discussed below, neither of those tests accurately reflects either a prevailing approach or an approach best suited to carry out legislative goals. Accordingly, both the black letter rule and the Comment a approach should be reconsidered.

The Reporters’ Notes for this Comment indicate that the Supreme Court decision in *Clackamas Gastroenterology Associates P.C. v. Wells*¹¹³ is the primary source for the stated section 1.03 test of whether ownership status defeats treating an individual as an employee for purposes of employee protective legislation.¹¹⁴ In *Clackamas*, the issue was whether a professional corporation’s shareholder should be included in determining if the enterprise had the threshold number of employees needed to trigger its coverage under the Americans with Disabilities Act (ADA).¹¹⁵ The *Clackamas* Court expressly rejected a proposed test that the question to be answered was whether the shareholder-director appeared to be the functional equivalent of a partner.¹¹⁶ Rather than focus on the institutional role of the person in question, the Court looked to the extent to which the individual had the characteristics of an employee who is dependent on the entrepreneurial decisions of others.¹¹⁷ In approaching its task, the Court declared that with respect to terms such as “employee,”

113. 538 U.S. 440 (2003).

114. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.03 reporters’ notes cmt. a.

115. *Clackamas*, 538 U.S. at 441.

116. *Id.* at 446.

117. *Id.* at 448.

congressional silence *often reflects* an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law. Congress has overridden judicial decisions that went beyond the common law in an effort to correct “the mischief” at which a statute was aimed.¹¹⁸

Putting aside that statement’s ambiguity regarding the default rule for construing federal legislation,¹¹⁹ the Court announced that the common law should be the guide in identifying who is an employee under the ADA and called for the fact finder on remand to weigh six factors (with no one factor being decisive¹²⁰ and with other factors possibly being relevant as well¹²¹) to determine if the shareholder should be counted as an employee. Although the Comment a test of whether the individuals in question control their own remuneration and activities on behalf of the enterprise is relevant to several of the six factors listed by the Court, the Comment a test does not reach other factors the Court listed as matters to be weighed such as: whether the organization can hire or fire the individual, the extent to which the individual is able to influence the organization, and whether the individual shares in the organization’s profits, losses and liabilities.¹²²

Moreover, as the Reporters’ Notes to Comment c reveal, there is a lack of consistency in the U.S. Supreme Court’s approach to construing who is a covered employee when that term is undefined in a federal statute. Thus, while the *Clackamas* decision says that “the mischief at which the legislation is aimed” is not a factor to be considered in construing who is an employee,¹²³ a year later in *Yates v. Hendon*, the Court relied on “textual clues” to find guidance concerning the legislature’s intent respecting the scope of the Employee Retirement Income Security Act’s protections.¹²⁴ As a result, without consulting a common law test of employment, it treated a working owner as a protected pension plan participant.¹²⁵

If the Reporters have concluded that a particular default rule is best

118. *Id.* at 447 (emphasis added) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-25 (1992)).

119. As discussed *infra*, the Court often has found that a statute reflects a legislative expectation that some other test or tests will be used in determining whether one is an employee.

120. *Clackamas*, 538 U.S. at 451.

121. *Id.* at 450 n.10.

122. *Id.* at 440.

123. *Id.* at 447.

124. 541 U.S. 1, 12 (2004).

125. In *Clackamas* the Court did not examine either the textual clues respecting the scope of what Congress sought to do when it adopted the ADA or any clues in the Act’s legislative history respecting the purpose of the fifteen employee threshold. 538 U.S. at 440. Had it done so, it may have been persuaded to use a test that reaches more broadly in counting employees inasmuch as the Act contains such textual statements of purpose as “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” 42 U.S.C. § 12101(b)(1) (2000).

sued to doing justice, they have neither identified that rule with clarity nor offered a fully explicated doctrinal analysis and defense of their choice. Furthermore, to the extent the Comment finds any support in the *Clackamas* decision, it is important to note that the Supreme Court was applying its rule for construing federal legislation. Thus, *Clackamas* does not control the rule to be applied when interpreting a state statute, and state courts, as discussed below under Comment c, are apt to give weight to the legislative goal of extending social welfare benefits to all workers who are vulnerable to economic misfortunes or abuses of managerial control. The proffered black letter rule stated in section 1.03, however, does not reveal this competing approach to construing such legislation.

2. Comment c – Statutory Variation

Comment c references a number of situations in which the black letter rule stated in section 1.03 does not reflect the approach courts have adopted in construing employee-related legislation and the Reporters' Notes cite some state case decisions respecting the availability of owner-worker claims under workers' compensation legislation. However, because there is no discussion or analysis of the doctrinal grounds for these variations, the stated rule and Comments provide no real guidance in assessing the wisdom of selecting a particular approach. Moreover, so as to not mislead, the black letter rule itself should reflect that it is not a consensus standard.

In addition, Comment c and the Reporters' Notes fail to observe that state courts have adopted alternative default rules in construing who is an employee protected by other categories of statutory or common law claims for relief. As the guardians of the common law, state courts can, as previously observed, determine that the common law definition of employee goes beyond the Supreme Court's *Clackamas* approach and that the default rule should include giving weight to the mischief that is being remedied. Thus, even where state courts seek guidance from federal judicial approaches to construing statutes, often they append their own perceptions respecting the best approach to carrying out legislative intent.

For example, in *Feldman v. Hunterdon Radiological Associates*,¹²⁶ while taking guidance from *Clackamas*, the New Jersey court observed that in *Clackamas* the Supreme Court "did not require its own six particularized prongs to be the sole standards; and opened the door to consideration of all factors relevant to power and control."¹²⁷ The New Jersey court,

126. 901 A.2d 322 (N.J. 2006).

127. *Id.* at 247.

accordingly, applied its own default definition of employment by taking principal guidance from the statute's goals, explaining:

Given [the statute]'s broad remedial purpose of protecting workers whose whistle-blowing is of benefit to the health, safety and welfare of the public, in applying the fourth *Clackamas* factor courts should ask whether, because of a shareholder-director's inability to influence an organization, he or she is "within the class of people that the statute was designed to protect."¹²⁸

The broad range of common law tests of employment used by state courts, as well as alternative tests adopted by federal courts, is discussed more fully under section 1.04, below.

The Reporters' Notes to Comment c reference the Supreme Court's *NLRB v. Bell Aerospace Co.* decision.¹²⁹ That decision, however, said nothing about when a worker-owner is precluded from employee status under legislation that provides employee protections or obligations. *Bell Aerospace* did not examine the question of what should be the default definition of employment in construing federal statutes; rather, the Court examined the Labor Management Relations Act's legislative history to discern Congress' intent respecting the class of employees protected by that Act and concluded that employees who exercise core managerial responsibilities are not among those employees Congress intended to protect. Therefore, *Bell Aerospace* offers no guidance respecting the subject of section 1.03. Similarly irrelevant is Comment c's reference to the explicit FLSA exclusion of bona fide executive, administrative, and professional employees from federal minimum wage and overtime pay requirements,¹³⁰ because these exclusions have nothing to do with ownership or control but, rather, define the legislature's perception of which employees need the protection of minimum and premium pay legislation.

The Reporters' Notes correctly observe that the NLRB has treated the collective authority of employee-shareholders who have "effective voice in the formulation and determination of corporate policy," as removing them from the NLRA's protections. This proposition, however, is far from settled. The result was reached by a three member NLRB panel and has

128. *Id.* at 248; *see also* *D'Annunzio v. Prudential Ins. Co.*, 927 A.2d 113 (N.J. 2007) (holding that when deciding if someone is protected as an employee under the state whistleblower statute, the core question is whether that person's work is integral to the employer's business interests). In *D'Annunzio*, the court stated that when dealing with specialized work, questions to be examined are: "Is the work continuous and required for the employer's business? Is the professional regularly at the employer's disposal? Is the professional required to perform routine or administrative activities? If so, an employer-employee relationship more likely has been established." *Id.* at 114.

129. 416 U.S. 267 (1974).

130. 29 U.S.C. §§ 177.06(c), (d), (e) (2000).

been questioned by one Board member who observed that the rule has never been fully explored.¹³¹ Moreover, while there is doctrinal support for this approach in representation proceedings, based on the proposition that employee-shareholders who collectively wield such authority are managers and, as such, are not eligible to elect a certified bargaining representative,¹³² it is inconsistent with the doctrine that the exercise of individual, as contrasted with collective, rights under the NLRA cannot be waived by the collective.¹³³ If the collective cannot waive individual NLRA rights, then the potential authority of the collective employee-shareholders to have an effective voice in corporate policy should be irrelevant to an individual shareholder-employee who asserts an individual statutory claim for relief. Thus, this portion of the Reporters' Notes should be deleted so as to not enshrine the dubious proposition that worker-shareholders who have a voice in corporate affairs thereby lose their protections under section 7 of the NLRA.

VI. SECTION 1.04

A. Text of Provision and Critique

Section 1.04 Employees of Two or More Employers at the Same Time

An individual is an employee of two or more employers if the employee and each of the employers meet the conditions of an employment relationship set forth in § 1.01 either

(a) through the employee's service to each employer in separate courses of conduct, or

(b) through the employee's service to each employer in one course of conduct.

On its face, this section incorporates the black letter rule stated in section 1.01 as the basis for determining whether there is an employment relationship. However, as seen below, the Comments to section 1.04 state an approach that is more limiting than that stated in section 1.01 and that has been adopted by many courts. In addition, as discussed below, the

131. *Citywide Corp. Transp.*, 338 N.L.R.B. 444, 445 (2002) (Liebman, concurring). Member Liebman further noted that any restriction based on the worker-shareholders' collective authority to effectively shape management policy should be limited to those situations in which the employee-shareholders are not only heard but can also modify terms and conditions of employment in face of divergent interests of other shareholders or managers who have entrenched positions of power. *Id.* at 445-46.

132. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

133. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

Reporters' description of the test for applying the proposed black letter rule stated in section 1.04 is marked by inconsistency and lack of clarity.

Furthermore, different policy considerations apply to the question of whether a person is an employee or an independent contractor, the subject of section 1.01, than apply to the question of which of a group of possible employers stand in an employment relationship to a worker, the subject of section 1.04. In the first instance, independent contractors are (at least in theory) able to protect themselves. In contrast, where the issue is whether particular parties are responsible for providing employee protections or obligations, a misguided rule may leave the employee, as an economically disadvantaged person, with no protections. For example, someone who is not an employee might lack any redress against an entity's racial, gender, religious, age, or disability discrimination. To implement the legislature's goal of protecting weaker parties and ensuring that market decisions are based on merit, not prejudice, courts should reach for a broad definition of employment unless the legislation specifies otherwise or provides alternative avenues for carrying out its goals under such circumstances. The same is true with respect to whether a worker is within or beyond a welfare insurance plan such as unemployment or workers' compensation.

In some situations the issue is not whether the worker will receive any protection but rather which scheme of protection applies. For example, if a worker was tortiously injured and all possible employers are governed by the same statutory scheme, the employment decision controls whether a tort or an insurance benefit will be available and which employer or employers must pay for the remedy, at least in the first instance. In the long run, according to market theory, the actual cost often is passed along to employees collectively in the form of lower remuneration. On the other hand, if an injury was due to a worker's own carelessness or to unforeseeable or unpreventable cause, differences in employee protection schemes¹³⁴ may leave the victim without any benefit or with substantially reduced benefits depending on the resolution of the question of which employer or employers are proper respondents. Thus, the underlying (and not always enunciated) policy focus respecting the ability to bear and spread the risks, and availability of alternative remedial structures, do not lead to identical results in all multi-employer situations – a consideration not reflected in the Reporters' analysis or pronouncements respecting the correct tests of employment. Accordingly, the separate policy considerations respecting the multiple employer issue justify tests of

134. An example would be the contrast between the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2000) and Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (2000).

employment status that are more inclusive than those adopted in section 1.01 and the policy considerations for allocating legal responsibilities among possible employers, the subject of section 1.04, may differ depending on the nature of the particular protections or obligations.

B. Comments on Section 1.04 – Critique

1. Comment a – Overview

Comment a asserts that persons working for more than one employer most often do so in different time slots or periods.¹³⁵ Is there an empirical basis for that statement? Additionally, what is its significance, even if accurate, and what is the difference between “time slots” and “periods”?

The Reporters’ Notes for Comment a speak of protecting “*servants* or *employees*.”¹³⁶ How does a servant differ from an employee? What is the justification for resorting to the outmoded term “servant”?

2. Comment b – Working for Two or More Employers through Separate Courses of Conduct

Comment b again refers to time slots and shifts. What is the difference and what is the empirical basis or significance for the assertion that it is rarer for workers to provide services to more than one employer during a general time period than to provide them at separate times? Crane operators, security guards, goods transfer handlers, and traffic monitors at construction sites and transportation hubs and terminals probably are more common examples of providers of such services than the ones offered.

3. Comment c – Working for Two or More Employers through a Single Course of Conduct

Comment c includes tests of whether there is an employment relationship. In addition to referencing section 1.01, Comment c treats as settled law the contention that *actual control* over the manner and means of performance, plus *actual control* over payment of the worker, are the criteria for determining the employment law responsibilities of lenders and borrowers of employee services.¹³⁷ The statement does not explain what result follows if but one of those two factors is present.

In contrast, the last sentence in the same paragraph of Comment c is

135. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.04 cmt. a.

136. *Id.* reporters’ notes cmt. a (emphasis added).

137. *Id.* cmt. c, at 53 (emphasis added).

inconsistent with this statement. The last sentence asserts that the test of an employment relationship is whether the user has the *power* to direct work or set compensation.¹³⁸ That is, the first statement looks to actual exercise of authority whereas the last sentence describes formal authority.

As with the first statement, it is unclear whether under the test stated in the last sentence there must be the power to control both work performance and pay. A possible implicit resolution of this conflict is presented by Illustration 4 to Comment c which says that employer responsibility is established based either on power to control compensation or on power to control work performance.¹³⁹ However, that does not clarify the previously noted discrepancies in Comment c, respecting authority to control as contrasted with actual control.

Adding to the confusion, Illustration 6 to Comment c explains its result in terms of factors beyond those of control of compensation or work performance (for example, the lending employer's dependence on the assignments received from the borrower)¹⁴⁰ even though the former are the sole factors listed in Comment c.

Putting aside for a moment Comment c's lack of consistency, it uses a very narrow test of employer responsibility in borrowed employee situations – a test that focuses only on performance and compensation control. Although the text of the black letter rule stated in section 1.04 explicitly references the definition of employment set forth in section 1.01, the criteria in Comment c to section 1.04 are inconsistent with the section 1.01 criteria for distinguishing employment from independent contractor status.

Section 1.01 distinguishes contractor independence from employment on the basis of authority over the various aspects of the relationship including the source of instrumentalities and tools, the duration of the relationship, the method of payment, the location of the work, and the ability to retain assistants. Control over the means and method of performance is just one factor to be weighed and is not of itself determinative. Unlike the section 1.01 approach, the test (or tests) in Comment c to section 1.04, by using much more limited criteria of employment, readily allows for evasion of employer responsibilities imposed by the legislature. Thus, in this age of marginalized and contingent workers, telecommuting, and reliance on employee innovation, creativity, and professional discretion, the section 1.01 standard would generally

138. *Id.* (emphasis added).

139. *Id.* cmt. c illus. 4.

140. *Id.* illus. 6.

result in including more workers as employees than would the tests set out in Comment c.¹⁴¹ Comment c's limitation of the scope of employment status in borrowed employee situations, therefore, violates the principle of doctrinal consistency because it offers no justification for the use of different tests under these companion provisions. In addition, because justice requires that doubts be resolved in favor of inclusion when construing employee protective statutes, especially in situations in which a worker may be left without any protection or benefits, the greater flexibility and inclusiveness of section 1.01 is a more appropriate approach for courts to follow than the narrow criteria proposed by Comment c. On the other hand, as previously discussed, differences could be justified if section 1.04 provided a broader definition of employment than is found in section 1.01 because, as discussed above and below, the section 1.01 definition itself is probably too narrow for the issues addressed by section 1.04.

A further problem with Comment c is that the legal standard for allocating joint or separate employer responsibility in borrowed employee situations is far from settled; many court decisions conflict with the performance control and payment rules as stated in either of the ways in which they are presented in Comment c. That is not to say that the factors listed in Comment c are irrelevant to resolving this issue. Courts often emphasize them. However, courts sometimes ignore them and often go beyond them.

When weighing the significance of a court's discussion of performance control where more than one purported principal is present, one should recognize that if the party the worker seeks to hold responsible as an employer, or the party that seeks to claim the immunities available as employer, exercises total control over the details of work performance, a finding of employer status based on evidence of performance control might obviate the need to explore other factors for imposing responsibility or immunities on a recipient of work efforts. Thus, when a court decision focuses on control of work performance or payment in finding employment status, it does not necessarily rule out other factors that might establish employment in the absence of such control.

To the extent that the Comment c rule is governed by the actual control test, it conflicts with the U.S. Supreme Court's decision in *Kelley v. Southern Pacific Co.*, in which the Court held that, for purposes of the

141. See Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158-60 (2003); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 279-80 (2006).

Federal Employers' Liability Act, a party will be an employer of a borrowed employee if it *either* controls or has the right to control the employee's physical conduct.¹⁴² More importantly, the Court in *Kelley* did not attempt to adopt the "either controls or has the right to control" test as a general rule for defining employee status and it has used other criteria when enforcing other federal statutes.¹⁴³

Although the "either controls or has the right to control" test was adopted in the *Restatement, (Third) of Agency* in a provision designed to ascertain *respondeat superior* responsibility,¹⁴⁴ that test represents neither settled law nor sound policy for dealing with employee protective statutes. Moreover, the comments to that provision describe operative facts that go beyond mere questions of performance control in determining whether a principal is an employer in borrowed employee situations.¹⁴⁵ These include the duration of the worker's presence in the workplace and the source of training and of tools needed to perform the work.¹⁴⁶ Thus, even for *respondeat superior* purposes, the latest *Restatement of Agency* allows for a more expanded notion of employment than is presented in Comment c.

While the Supreme Court's decision in *Kelley* recited a test of employment that focuses only on control of a worker's physical conduct, it was dealing with a situation in which that means of identifying the worker's employer did not leave the worker unprotected or without benefits.¹⁴⁷ Rather, *Kelley*'s injury was covered at the least by state workers' compensation benefits.¹⁴⁸ Nevertheless, he was seeking additional tort recovery under the Federal Employers Liability Act (FELA).¹⁴⁹ That statute, which applies to railroad workers¹⁵⁰ (and, through the Jones Act, to seafarers¹⁵¹) almost always offers an avenue of added benefits for employees seeking remedies for their injury or illness. Even if an FELA suit is barred by the failure to prove employment or the failure to prove the requisite fault, the injured worker will almost always be able to recover a state workers' compensation benefit or a compensation benefit under the generally more generous Longshore and Harbor Workers Compensation

142. 419 U.S. 318, 331-32 (1974).

143. *Id.* at 324-32.

144. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

145. *Id.* cmt. d(2).

146. *Id.*

147. *Kelley*, 419 U.S. at 332.

148. *Id.* at 321.

149. *Id.* at 322.

150. 45 U.S.C. §§ 51-60 (2000).

151. 46 U.S.C. § 30104 (2000).

Act,¹⁵² or under mandatory railway worker disability insurance,¹⁵³ or under the maritime doctrine of maintenance and cure.¹⁵⁴ Additionally, a seafarer whose FELA recovery is blocked by inability to prove employment status with the vessel may still have a tort type remedy under the maritime doctrine of unseaworthiness.¹⁵⁵ Accordingly, the relatively narrow employment status lines drawn by the Supreme Court for FELA (broader, nevertheless, than those that are recommended by Comment c) do not pose a serious risk of leaving employees without protection.

It is not surprising, then, that when determining the scope of employment responsibilities under the much broader reaching FLSA, the Supreme Court has taken a more flexible approach. That approach goes well beyond the common law's traditional focus on control of work activities, using instead an economic reality test that looks to such factors as the source of the opportunity to work, the payment for the work, and the regimentation of the work product.¹⁵⁶ As a result of this broader approach to employee status, if work is performed on the borrower's premises by employees of a lender that has no other customers, and the work is integral to the borrower's operations, the borrower is jointly liable for any FLSA pay deficiencies.¹⁵⁷

In like regard, in *Zheng v. Liberty Apparel Co.*,¹⁵⁸ the appellate court held that when determining whether a party is an employer for purposes of FLSA responsibilities it must consider the economic realities and weigh the permanence or duration of the working relationship and the extent to which the work is an integral part of the employer's business. Although the *Zheng* decision is cited in the Reporters' Notes to support two illustrative examples used in the Comments respecting the element of payment as evidence of employment, the Reporters overlook the decision's significance in supporting a test of employment that goes well beyond the narrow elements listed in Comment c.

Numerous other decisions have observed that determination of employment status under the FLSA requires examination of the totality of the circumstances to ascertain whether the putative employee is

152. 33 U.S.C. §§ 903-50 (2000).

153. See 45 U.S.C. § 352 (providing for pay for temporary disabilities under the mandatory Railroad Unemployment Insurance Act)

154. *The Osceola*, 189 U.S. 158 (1903) (although a vessel is not liable to a seaman for negligence resulting in personal injury, the seaman is entitled to recover for his maintenance and cure).

155. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50 (1960).

156. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

157. *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 408 (7th Cir. 2007) (analyzing *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)).

158. 355 F.3d 61, 67 (2d Cir. 2003).

economically dependent on the alleged employer. Hence, in *Baystate Alternative Staffing, Inc. v. Herman*, the court ruled that under the FLSA the absence of direct, on-site supervision does not preclude a determination that a lending entity shares with the borrower the status of employer of temporary workers.¹⁵⁹ Like the *Zheng* decision, this case is cited in the Reporters' Notes to support two illustrative examples respecting the element of payment as evidence of employment. Again, the Reporters overlook the decision's greater significance in supporting a test of employment that is broader and more flexible than the narrow elements listed in Comment c.

Similarly, the Reporters' Notes portray *Antenor v. D & S Farms*¹⁶⁰ as a decision using the test of the employer's power to control the work and effectively determine compensation. However, the court's opinion set forth eight factors to be weighed including the right, directly or indirectly, to hire, fire, or modify employment conditions; the ownership of the facilities where the work occurs; whether the work is integral to the enterprise; and the parties' respective investments in equipment and facilities.¹⁶¹ Further, the court in *Antenor* explained that no one factor is determinative; rather the employment relationship depends on the economic reality of all the circumstances, and that ultimately it must be determined whether the workers are economically dependent on the lender and borrower of their labor.¹⁶²

The Reporters' Notes also offer a misleading account of *Moreau v. Air France*,¹⁶³ which decided that under the Family and Medical Leave Act an airline was not a joint employer of employees of contractors that provided ramp and towing services, baggage handling, and food preparation. The

159. 163 F.3d 668 (1st Cir. 1998); see also *Rutherford Food Corp.*, 331 U.S. at 730 (determination of the employment relationship depends on the circumstances of the whole activity).

160. 88 F.3d 925 (11th Cir. 1996).

161. *Id.* at 932.

162. *Id.* The same observation regarding the Reporters' failure to acknowledge broader tests used in cases they cite is applicable to *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) where the court explained:

To determine whether an employer/employee relationship exists for purposes of federal welfare legislation, we look not to the common law definitions of those terms (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the 'economic reality' of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer."

Id. at 439; accord *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997). In *Torres-Lopez*, also cited by the Reporters, the court found joint employer responsibility, relying on such factors unrelated to performance or payment control as the ownership interest in the premises and equipment, the amount of investment in equipment and materials, the ability to shift activities from one source of income to another, the opportunity for profit or loss depending upon managerial skill, and the extent to which the work effort was an integral part of the business of the user of the workers' services. *Id.* at 639-41.

163. 343 F.3d 1179 (9th Cir. 2003).

Reporters' Notes assert that the court "stressed that Air France did not share in the control of the means and manner of work or the compensation of the servers." Although those factors had been stressed in the district court decision, the appellate court criticized that focus as "a bit narrow in the circumstances of this case,"¹⁶⁴ and affirmed the district court's conclusion only after weighing numerous other relevant factors including: use of shared premises with the ground handling companies, a provider's temporary subleasing of space from the airline, an arrangement giving the airline a small office area in a provider's facility, the premises where most work was performed, the source of capital investment in most of the equipment used in providing the services, the ability to shift business operations to serving other entities, the performance of such services for other entities, the source of employee opportunities for promotion, and the extent to which the work was integral to the respective businesses.¹⁶⁵

Department of Labor regulations under the FMLA also reflect a broad understanding of the employment relationship (not fully revealed by the Reporters' Notes referencing the regulations in Comment e) and include situations in which an employee performs work that simultaneously benefits two or more employers and situations in which one employer acts directly or indirectly in the interest of the other employer in relation to the employee.¹⁶⁶ Pointedly, the DOL regulations specify that determination of joint employment "is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality."¹⁶⁷ Moreover, the regulation establishes a presumption of joint employment when a temporary or leasing agency supplies employees to a second employer.¹⁶⁸

Nor, as previously indicated, have the federal courts followed the Supreme Court's relatively narrow *Kelley* approach when applying other federal employee-protective statutes that regulate benefits for work injuries. For example, in *Brown v. Union Oil Co.*,¹⁶⁹ in determining whether the defendant was the injured worker's employer under the Longshore and Harbor Workers Compensation Act, and therefore immune from tort liability, the court of appeals applied a nine factor test, and control of performance was only one element. As is so often recited, the court held

164. *Id.* at 1190.

165. *Id.* at 1190-91.

166. 29 CFR § 825.106 (2008).

167. *Id.* § 825.106(b)(1).

168. *Id.*

169. 984 F.2d 674 (5th Cir. 1993) (per curiam).

that “no single factor, or combination of them, is determinative.”¹⁷⁰ Other factors included whether the employee acquiesced in the new arrangement, whether there was a continuing relationship with the lender employer, the duration of the borrowing arrangement, and who could dismiss the employee.¹⁷¹ The authority to set the compensation (a determinative factor according to Illustration 4) is not among those listed by the appellate court. It should be noted that distinguishing the Longshore and Harbor Workers’ Compensation Act from the FELA is the fact that those covered by the Compensation Act, such as self-injured overseas employees of defense contractors, may not have any other recourse if they are deemed to not be employed by one of the joint employers. Hence, the legislative purpose of this welfare benefit law justifies a broad, flexible approach to ascertaining whether a claimant is within the protected class.

The federal Occupational Safety and Health Act (OSHA) requires an employer to furnish “employees employment and a place of employment which are free from recognized hazards . . . likely to cause serious physical harm to his employees.”¹⁷² Despite over three decades of disputes respecting the application of that language to borrowed employee situations, OSHA law on the issue is not fully settled. Nevertheless, the leading treatise in the field states, “In determining liability, the Commission and the courts have rejected the common law concept . . ., but have focused on business reality and the purposes of the Act.”¹⁷³ Accordingly, several circuits hold that a borrower employer has responsibility under the Act if it has knowledge of a violation of OSHA regulations and the ability to abate it regardless of its control over workers who are exposed to the hazard.¹⁷⁴

There also are numerous state court decisions arising in a variety of common law and statutory contexts that reject the rule stated in the second and third sentences of Comment c. For example, Alabama courts hold that the employer in borrowed employee situations is the party that has the reserved right to control the employee, not the party that actually exercises control. Power over compensation is not part of that court’s quite narrow and inflexible approach.¹⁷⁵

170. *Id.* at 676.

171. *Id.*; *accord* *Guillory v. Gukutu*, 534 F. Supp. 2d 267 (D.R.I. 2008).

172. 29 U.S.C. § 651 (2000).

173. MARK ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 163 (1998).

174. *MICA Corp. v. OSHRC*, 295 F.3d 447 (5th Cir. 2002) (per curiam); *Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); *U.S. v. Pitt.-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999).

175. *W.G. Yates & Sons Constr. Co. v. Zurich Am. Ins. Co.*, Civil Action 06-0803-WS-B, 2008 U.S. Dist. LEXIS 1816 (S.D. Ala. Jan. 8, 2008).

The default position for deciding whether a borrowing employer has *respondeat superior* responsibility for the borrowed employee's negligent acts under North Carolina law calls for the fact finder to weigh, among other things: the nature of the work to be performed, which employer supplies the instrumentalities used to perform the work, the nature of those instrumentalities, the duration of the employment, whether the temporary employer has the skill or knowledge to control the manner in which the work is performed, and whether the temporary employer in fact exercises performance control.¹⁷⁶ Further, absent evidence to the contrary, the North Carolina rule presumes that the lending employer retains the right of control.¹⁷⁷ Additionally, in North Carolina a party that benefits from work that it knows or should have known was either ultra-hazardous or inherently dangerous, is liable for the worker's injuries resulting from that hazard even though it did not control work performance.¹⁷⁸

In South Carolina the definition of employment looks to four factors: the right or exercise of control, furnishing of equipment, right to dismiss, and method of payment.¹⁷⁹ California courts have ruled that factors to be weighed in finding whether the state workers' compensation statute immunizes the lending employer from a tort suit by an injured employee include: the duration of the lending arrangement, which employer's payroll listed the loaned employee at the time of the injury, which employer had the authority to dismiss the loaned employee, and the degree of discretion available to the loaned employee in performing the assignment.¹⁸⁰

The Indiana bench holds that to determine if an employer-employee relationship exists with respect to a loaned worker under its workers' compensation act, the fact finder should weigh: whether the purported employer has authority to dismiss the worker, the mode of payment, who supplies tools or equipment, who controls the method of work assignment and performance, and the duration of employment.¹⁸¹ The Indiana court further explains that this is a balancing test in which the right to exercise control over the employee should receive the greatest weight.¹⁸²

176. *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 536 (M.D. N.C. 2008). Similar criteria have been attributed to application of the New York workers' compensation law. *Campos v. I. Grace Co. New England, LLC*, No. 06-Civ. 2466 (RWS), 2007 U.S. Dist. LEXIS 87393 (S.D. N.Y. Nov. 27, 2007); see also *infra* note 183 and accompanying text.

177. *Pettiford*, 556 F. Supp. 2d at 512.

178. *Kinsey v. Spann*, 533 S.E.2d 487, 490 (N.C. 2000).

179. *Nelson v. Yellow Cab Co.*, 564 S.E.2d 110, 112-13 (S.C. 2002).

180. *Marsh v. Tilley Steel Co.*, 606 P.2d 355 (Cal. 1980).

181. *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991).

182. *GKN Co. v. Magness*, 744 N.E.2d 397, 402 (Ind. 2001).

And, in New York it has been held that where a worker has dual responsibilities it is enough to hold a party liable for workers' compensation benefits if it created a web of relationships to receive the benefits of the worker's services even though that party did not pay the worker but had authority to remove him from the status that provided his income such as by excluding the individual from the work premises.¹⁸³

As previously explained, on several occasions the Reporters' Notes cite for other purposes decisions that use a far broader definition of employment, but they ignore the teaching of those decisions respecting employment in borrowed or dual employer situations. Additional examples of this include *NLRB v. Town & Country Elec., Inc.*, where, when reviewing whether a paid union organizer can simultaneously be an employee of an enterprise whose workers he is trying to organize, the U.S. Supreme Court stated that the meaning of "employee" under the NLRA is not based on the narrow traditional common law of agency definition of employee but instead takes guidance from "the breadth of the ordinary dictionary definition."¹⁸⁴

Similarly, the Reporters' Notes cite *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*,¹⁸⁵ in support of the proposition that workers can be employed jointly by multiple employers, but the discussion overlooks the significance of the appellate court's observation in that case that employment status was correctly established based on varying levels of involvement in decisions relating to hiring, discipline, assignment of work and equipment, compensation levels, and recognition and awards.¹⁸⁶ The Reporters' Notes also cite another case for the same proposition respecting the possibility of joint employment, but ignore the significance of the fact that employment status with the entity that assigned part time workers to the one for whom they performed services was based on the former entity's maintenance of the referral roster, issuance of the workers' paychecks, and control over their rate of pay and other benefits¹⁸⁷ – factors that Comment c

183. *Palmer v. State Univ. of N.Y. Upstate Med. Univ.*, 787 N.Y.S.2d 489 (App. Div.), *appeal denied*, 842 N.E.2d 27 (N.Y. 2005).

184. 516 U.S. 85, 90 (1995). Although finding that the NLRB's discretion in such cases is not confined by common law concepts, the Court did examine the facts in light of the *Restatement (Second) of Agency* and found no conflict between the NLRB's finding and the Restatement rules respecting employee status. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a, at 499 (1957)).

185. 363 F.3d 437 (D.C. Cir. 2004).

186. *See id.* at 440-41.

187. *NLRB v. W. Temp. Servs., Inc.*, 821 F.2d 1258, 1266-67 (7th Cir. 1987); *see also* *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d (2d Cir. 2003); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998); *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117 (3d Cir. 1982) (joint employment where multiple entities share or co-determine key matters governing the essential terms and conditions of employment).

adopts in part but not in their entirety.

The concluding sentence in the paragraph in which the Reporters' Notes discuss these and similar cases reads: "As an employer may have responsibility under the NLRA to bargain collectively over any subject that may control, the power to control test fits well the purposes of this statute."¹⁸⁸ In addition to being an inaccurate reflection of the NLRB's approach to such cases and an incomplete and unclear description of the duty to bargain, this statement does not reveal the significance of the breadth of bargaining subjects, which includes numerous issues unrelated to work performance or pay. Nor does it give proper weight to the feasibility of joint employer bargaining as evidenced by the long history of multi-employer bargaining in the U.S. and in other free market economies. Thus, if the duty to bargain helps define who is an employee under the NLRA, the breadth of the duty to bargain should justify weighing factors far beyond the two control elements recited in Comment c.

The Reporters' Notes also inaccurately assert that employment discrimination cases involving questions of joint employment "generally have applied the same functional test" as is used under the FLSA¹⁸⁹ – a test the Reporters' Notes, as explained above, mischaracterize as relying on control of performance and pay.¹⁹⁰ *McMullin v. Ashcroft*,¹⁹¹ the most recent of the cited decisions, arose under the Americans With Disabilities and the Rehabilitation Acts.¹⁹² There the breadth of the court's analysis, as in so many other cases, went beyond performance control and payment. Rather, the court more broadly asked whether one or both entities exercised significant control over the essential terms and conditions of the worker's employment and sought its answer by looking at such factors as their co-determination of the worker's initial and continuing qualifications for the position, their respective roles in selecting the worker, their respective abilities to remove the worker and shape job responsibilities, and identifying which party equipped the worker.¹⁹³

In contrast to the statement in the Reporters' Notes respecting the test for an employment relationship in discrimination cases, the Eleventh Circuit in *Virgo v. Riviera Beach Assocs.*, a Title VII case, looked not to FLSA decisions but to NLRB cases, stating that the question of fact to be

188. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.04 reporters notes, at 58.

189. *Id.* at 59.

190. The cases cited in the Notes in support of this statement are all district court decisions. *Id.*

191. 337 F. Supp. 2d 1281 (D. Wyo. 2004).

192. Which Act applied depended on whether the employer was the supplier or user of the worker's services.

193. *McMullin*, 337 F. Supp. 2d at 1294, 1297.

resolved is whether the alleged employer has sufficient control of the terms and conditions of employment.¹⁹⁴ The terms and conditions of employment, of course, cover numerous aspects of the relationship unrelated to control of compensation or work performance.

VII. CONCLUSION

To the extent to which a Restatement is intended to provide a clear, accurate statement respecting existing “majority” or consensus rules, sections 1.02, 1.03, and 1.04 do not achieve that goal. Majority or consensus rules have not been accurately identified and largely do not exist with respect to the subjects of these three sections. In addition, the stated black letter rules lack completeness and precision, in some cases are contradicted by the reiteration of those rules in the Comments, seldom are explicated with supportive doctrinal or empirical analysis, and the few parts where analysis is offered it is far from exhaustive. Moreover, the Reporters’ Notes have numerous incorrect or misleading representations of case decisions and other authorities.

Restatements, even when accurate and clear ought to do more than summarize consensus rules and settled doctrinal explanations. *American Law Reports*, *American Jurisprudence* and *Corpus Juris* already do that and do so in a way that is regularly updated. So do the more concise (and thereby generally less useful) treatises. Based on the traditional role of Restatements, judges, scholars, and practitioners look to ALI work products for something more. They are sources for furthering the process of synthesizing and refining the common law so as to better fulfill the goals of justice.

One aspect of promoting justice is to hold people and legal entities to that conduct which the community expects of them – enforcement of the community’s normative expectations. However, a problem in applying that approach is that as communities become larger and more complex, it is more difficult to identify accurately a single set of normative expectations for the employment relationship. Also, owners, managers, workers, and judges do not necessarily share expectations respecting the fair allocation of employment rights and obligations. In addition, as enterprises expand into diverse communities, the participants’ understanding of normative behavior can be expected both to change and to vary. Those expanded, diverse communities often extend beyond national boundaries and a not insignificant portion of that part of our workforce most often targeted by

194. 30 F.3d 1350 (11th Cir. 1994).

protective legislation has at least one foot in cultures that are not part of mainstream America. Therefore, it is appropriate to seek guidance from sources that reflect external and global normative standards. There should be nothing startling in this proposition. Such American legal classics as the *Federalist Papers* and early Supreme Court decisions reveal that American jurists and scholars working in an age when this nation had little else besides the common law regularly sought guidance from French, German, and Roman legal sources as well as from British and other authorities.

Additionally, as technology changes, so too are there important changes in the normative expectations. For example, discovering who is an employee by examining the extent of control over performance is less and less relevant when workers are hired to innovate, to create, or to telecommute from their homes. One neglected source of guidance respecting such changes can be found in the trends of legislative reform. However, the Comments and Reporters' Notes accompanying sections 1.02, 1.03, and 1.04 do not reveal an effort to seek guidance from this source or from other sources to gain a broader understanding of the normative expectations of the employment relationship in the changing work environment.

Further, as the best common law jurists from Coke to Cardozo have shown, the common law should be more than simply a reflection of normative expectations. Those who apply the law should not lose sight of the goals of justice – protect the weak from exploitation by the strong, ensure honest dealings, adjust legal relationships based on neutral considerations, distribute burdens to those who can carry them with the least pain (often by redistributing them to a broader community), and place risks on the shoulders of those best able to minimize the threatened harm. In those parts of the text examined above, the rules, comments, and notes do not reveal an effort to improve our system of justice either by analyzing the impact of the proposed rules or by seeking guidance beyond the confines of our own institutions.

Several years ago, Professor Guy Davidov offered a carefully explicated analysis of the contemporary concept of employment in a variety of advanced economies (including the U.S.) with an eye to best implement legislative regimes for employee protections and obligations. Building upon a draft guideline being developed by the ILO, he offered and justified an approach that weighs ten factors, with none being determinative.¹⁹⁵ These are:

195. Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 402-09 (2002).

(1) The extent to which the user enterprise determines when and how work should be performed, including working time and other conditions of work of the worker;

(2) the extent of supervisory authority and control of the user enterprise over the worker with respect to the work performed, including disciplinary authority;

(3) the extent to which the user enterprise makes investments and provides tools, materials and machinery, among other things, to perform the work concerned;

(4) whether the worker has the ability to spread her risks—among different clients, different suppliers, or others;

(5) whether the work is performed on a regular and continuous basis;

(6) whether the worker works for a single user enterprise;

(7) the extent to which the work performed is integrated into the organizational or bureaucratic control of the user enterprise;

(8) whether the user enterprise provides substantial job-specific training to the worker;

(9) whether the worker is free to refuse work; and

(10) whether the worker can send substitutes to do the work.

Rather than subjugating employment law to the agency tests of vicarious liability, when correcting and revising their draft for Chapter 1, the Reporters ought to reconsider the tests offered in sections 1.02, 1.03, and 1.04 in light of Professor Davidov's thoughtful recommendations.

Finally, the Chapter is incomplete in its coverage. There are contexts in which law has a need to define the boundaries and characteristics of employment relations that go beyond those explored in Chapter 1. For example, employees are guests at the place where they perform their work. Are or should the definitions of the relationship that drive vicarious liability rules and trespass rules for employees be similar to or the same as those that drive rules respecting responsibilities toward other categories of guests? What about bailments? Is one a gratuitous bailee and the other a commercial bailee? If so, which is which? Are the employee's tools or other personal property deserving of the same or different protection by the principal than are those of an independent contractor? As another example, the issue of apparent authority is, in a sense, the contractual equivalent of vicarious liability. Should the same rules apply for finding apparent authority to make a contractual undertaking as apply for finding vicarious liability? Should the guidelines respecting apparent authority be the same for a worker with respect to dealings with low level supervisors and same level co-workers as they are for third parties? Based on a key-word search

of Chapter 1, it does not appear that the drafters have examined any of these questions.

There are other common law questions that arise out of employment relations that do not seem to have been considered in defining employment, though, perhaps they are covered elsewhere in the total document including the parts yet to be written. Copyright law makes certain presumptions based on employee status, including common law exceptions based on employment as a teacher. Key-word searching the chapter shows a couple of parenthetical references to cases citing the federal copyright statute but no analysis respecting the appropriateness or inappropriateness of treating or not treating someone as an employee for purposes of copyright but not for other purposes. Similarly, the common law shop right claim to equitable use of a patent is based on employee status. Should that status be defined in the same manner for this purpose as for the purpose of determining vicarious liability or determining coverage under employee protective legislation? Addressing these questions is a necessary part of any restatement of the law governing the employment relationship.