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COMMENTS ON *RESTATEMENT OF EMPLOYMENT LAW*
(THIRD), CHAPTER 1

BY
CHARLOTTE GARDEN* AND JOSEPH E. SLATER**

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I. INTRODUCTION

This article addresses the *Restatement of Employment Law*, Chapter 1, on the “Existence of Employment Relationship.” The Labor Law Group previously responded to a draft version of this chapter.¹ This article will not revisit all the considerations discussed in that article. Instead, it will focus on three issues within this topic that have become increasingly important in recent years that the *Restatement* does not adequately address. These three issues are: the joint employer relationship; the use of unpaid interns; and the rise of the “gig” economy, with its attendant questions about employee status in enterprises such as Uber or Lyft. The article addresses these issues in turn, and then closes by touching on a few of the most important issues left unresolved from the draft to the final version of the *Restatement*.

II. THE JOINT EMPLOYER RELATIONSHIP

“Fissured” work arrangements in which multiple entities are responsible for different aspects of employees’ working conditions are becoming increasingly common.² Indeed, franchising and subcontracting has become the dominant form of arranging work in many industries responsible for the employment of millions. Thus, when these arrangements give rise to a joint employment relationship is a question that is only growing in importance.³ Yet, the *Restatement*

1. Dennis Nolan et al., *Working Group on Chapter 1 of the Proposed Restatement of Employment Law: Existence of Employment Relationship*, 13 EMP. RTS. & EMP. POL’Y J. 43 (2009) [hereinafter *Working Group*].

2. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 7-8 (2014) (providing examples, including that “[t]oday, more than 80% of [hotel] staff are employed by hotel franchisees and supervised by separate management companies that bear no relation to the brand name of the property where they work”). For a discussion of the fissured workplace and relevant legal rules in historical context through the present see Matthew Finkin, *The Legal Ambiguity of Fissured Work in the United States*, in *THE NOTION OF EMPLOYER IN THE ERA OF THE FISSURED WORKPLACE* 7 (Hiroya Nakakubo & Takashi Araki eds., 2017).

3. It may well be that the concept of joint employment and reliance on the traditional definition of “employer” generally will prove inadequate to deal with the modern, fissured economy with its complex and convoluted relationships between entities and workers. For such an argument, see Alan Hyde, *Nonemployer Responsibility for Labor Conditions*, in *WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR* ch. 23 (2016) (proposing a concept of “responsibility” for labor conditions instead of the traditional “employer” analysis). While such a model is beyond the scope of an article critiquing a *Restatement* of law, it is worth noting that the

hardly describes the existing approaches, and does not take a position on which is best.

Restatement section 1.04(b) provides that:

(b) An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services as provided in § 1.01(a)(3).

This language does not resolve a key issue in current case law, including but not limited to law under the National Labor Relations Act (NLRA):⁴ whether an employer's "control" over employees must be regularly, actually exercised, or whether "indirect" or "potential" control is sufficient. However, the NLRB recently addressed this issue in detail.

A. *The Joint-Employment Test from Browning-Ferris Industries of California: Potential or Indirect Control*

One of the most high-profile labor and employment law cases in recent years was the decision of the National Labor Relations Board (NLRB) in a joint employment case. In *Browning-Ferris Industries of California*,⁵ the NLRB appeared to adjust course on the standard for finding joint employer status. While the NLRB insisted that it was merely returning to an older, but not radically different, rule – a view that we share, as described below – the case caused a great deal of concern in the employer community. While the case did not involve a franchising relationship, much of the uproar following *Browning-Ferris Industries of California* was focused on potential impacts in franchisor-franchisee cases,⁶ including a pending case alleging that McDonald's is a joint employer along with its franchises.

In this 2015 decision, the NLRB first stated that it was reaffirming the rule from a 1982 Third Circuit case with a similar name, *NLRB v. Browning-Ferris Industries of Pennsylvania*.⁷ First,

approach endorsed below is hardly radical.

4. 29 U.S.C. §§ 151-69 (2012).

5. 362 N.L.R.B. No. 186 (Aug. 27, 2015).

6. For example, in response to this case, Texas, Tennessee, and Louisiana passed laws stating that franchisors are generally not employers of employees of the franchisor's franchisee. See Jess A. Dance, *States Come Out Swinging Against New Joint-Employer Test*, LAW360 (Sept. 22, 2015, 11:05 AM), <<https://www.law360.com/articles/703857/states-come-out-swinging-against-new-joint-employer-test>> (discussing Texas S.B. 652, Tennessee S.B. 475, and Louisiana H.B. 464). Also, a House panel considered a bill to overturn *Browning-Ferris of California*. See Lawrence Dubé, *House Panel Considers NLRA Joint Employer Bill*, 188 Daily Lab. Rep. (BNA) AA-1 (Sept. 29, 2015).

7. 691 F.2d 1117, 1122-23 (3d Cir. 1982).

the NLRB noted that this rule featured an inclusive vision of subjects that could lead to an employment relationship: “matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction,” a non-exhaustive list.⁸ Other examples included dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.⁹

Most importantly, the NLRB went on to clarify what it meant by “control” over these functions, explaining that some of its cases decided in the years between *Browning-Ferris Industries of California* and *Browning-Ferris Industries of Pennsylvania* had imposed additional requirements for finding joint-employer status without sufficient authority or reasoning.¹⁰ Specifically, the Board stated:

We will no longer require that a joint employer not only *possess* the authority to control employees’ terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status.¹¹

This standard contains both the concepts of “indirect control” and “potential” control. The NLRB’s General Counsel had specifically urged the NLRB to adopt a standard including “potential” control.¹² While the paragraph quoted above does not specifically use the word “potential,” the idea of “reserved” authority to control captures that idea. *Browning-Ferris of California* did not elaborate on the precise nature of “indirect” or “potential” control, because, in short, both employers in that case had exercised actual control. The only specific mention of “potential” control in the majority opinion is in a footnote: “we agree with the General Counsel that ‘direct, indirect, and potential control over working conditions’ – at least as we have explained those concepts here – are all relevant to the joint-employer inquiry.”¹³ Still, the dissent made much of this

8. *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, at 19 (emphasis in original).

9. *Id.*

10. *Id.*

11. *Id.* at 2.

12. *Id.* at 11.

13. *Id.* at 16 n.68.

point: “Our fundamental disagreement with the majority’s test is not just that they view indicia of indirect, and even potential, control to be probative of employer status, they hold such indicia can be *dispositive* without *any* evidence of direct control.”¹⁴

Notably, this issue is not limited to statutory interpretations of the NLRA. The majority and dissent sparred over whether “indirect” or “potential” control of conditions of employment could create joint employment under common law. The majority argued that purported requirement that a joint employer’s control “be exercised and that the exercise be direct and immediate . . . is not, in fact, compelled by the common law – and, indeed, seems inconsistent with common-law principles.”¹⁵ The dissent responded that “‘control’ under the common-law principles requires some direct-and-immediate control. . . .”¹⁶

B. The Restatement Comment Does Not Resolve the “Indirect” or “Potential” Control Issue

The relevant *Restatement* comment is not clear on this important issue. Comment c is titled “Joint employment: rendering services that two or more employers supervise or control.” It states that “[e]mployees can serve two or more employers who jointly or in tandem control their rendering of services under § 1.01(a)(3).”¹⁷ Restatement section 1.01(a)(3), in turn, seems mainly concerned with distinguishing “employees” from other categories of workers, *e.g.*, independent contractors. Thus, comment c explains that the worker’s “relationship with each putative employer must effectively prevent the individual from rendering services as an independent businessperson.”¹⁸ This is not sufficient for deciding whether a joint-employment status exists in close cases – indeed, this question is entirely irrelevant in the significant number of cases in which the question is whether a user employer is a joint employer along with a supplier employer, or whether the supplier employer is the sole employer of the employees in question.¹⁹

14. *Id.* (Miscimarra & Johnson, dissenting) (emphasis in the original).

15. *Id.* at 17 (majority opinion).

16. *Id.* (Miscimarra & Johnson, dissenting).

17. RESTATEMENT OF EMP’T LAW §1.04 cmt.c (AM. LAW INST. 2015).

18. *Id.*

19. As David Weil comprehensively describes in his book, *The Fissured Workplace*, subcontracting and franchising are increasingly prevalent features of modern employment. See WEIL, *supra* note 2, at 8-9. While difficult joint employer questions plague these arrangements,

Comment c continues with examples that turn on the concept of “control” without defining that term in any detail. The comment specifies that “a company that merely supplies to a ‘user’ company individuals who work under the user-company’s sole direction and control and who are paid by the user company is not an employer of the supplied individuals.”²⁰ Also, “a company that uses and benefits from the services of a supplying company’s employees is not an employer of the supplied employees if the company does not have the power to direct and control their work or set their compensation.”²¹ But what if one company had potential control, but did not exercise it? The comment does not address this.

The comment provides several illustrations, none of which resolve this question, and some of which arguably confuse it. In illustration 3, one employer trains a cleaner to provide cleaning services to an individual. The individual only tells the worker what rooms are to be cleaned; the employer controls the manner and means of cleaning and sets the employee’s compensation. Thus, the comment explains, the worker is an employee of the employer, but not the individual, because the latter employer is merely a “customer” of cleaning services. While this is probably correct (though more information would be necessary to say for sure), illustration 3 does little to explain why this is so. Presumably, the individual who is benefiting from the employee’s cleaning not only does not but *could not* impose discipline on the employee; fire the employee; direct the employee to clean a neighbor’s house instead; or require that the employee adopt more onerous cleaning methods. Thus, the individual in this illustration is limited to setting the order in which tasks will be performed; if unhappy with the cleaner, the individual’s recourse is to appeal to the employer to take action or to cancel the contract. Illustration 4 involves workers who clean in a contrasting fact pattern. There, the first employer pays the workers and can discipline or reward them. The second employer’s supervisors set the workers’ schedules and direct the details of their work. Given these facts, the second employer’s actual and apparently regularly and directly asserted control over the work process creates a joint-employment situation. Illustration 5 – like illustration 3 – makes the

those questions do not involve putative independent contractors; rather, the issue that arises in connection with both of these arrangements is whether the upstream employer – the franchisor or the contractor – is an employer of the employees, in addition to the downstream employer.

20. RESTATEMENT OF EMP’T LAW §1.04 cmt. c.

21. *Id.*

point that the power of a “user” employer to state what work it wants accomplished coupled with the power of the user employer to request a different worker from the leasing employer if the user is dissatisfied with the worker is not enough to create joint employment. Illustration 6 involves one employer who effectively controls working time, working conditions, and compensation, while another employer can hire, fire, and also has power over compensation. Thus, again, because both employers regularly exercise control directly over employment issues, joint employment is created. Illustration 7 is a variation on 6 in which one of the two employers does not have any effective control over wages or details of work, and thus is not a joint employer. Illustration 8 involves a professional sports league, in which both the league and individual teams have power over working conditions and compensation, thus creating joint employment.

In short, none of these illustrations involve facts that raise the issue in *Browning-Ferris of California* and related precedent: what if one of the two alleged employers has potential control over wages, hours, or other working conditions, but that employer does not, or has not yet, actually exercised such power, at least not directly?

C. The Reporters’ Note Does Not Resolve This Issue

Nor does the reporters’ note shed adequate light on this issue. This section of the *Restatement* first refers to the *Restatement (Third) of Agency* section 7.03, comment d(2), which provides that “[l]iability should be allocated to the employer in the better position to take measures to prevent the injury suffered by the third party. An employer is in that position if the employer has the right to control an employee’s conduct.”²² This mention of the “right” to control work could support a claim of joint employment based on “potential” control, but this remains unclear.

The note section points out that illustration 4 is based on an NLRA case, *Boire v. Greyhound Corp.*²³ It states that the NLRB’s joint-employer analysis under the NLRA is “similar to the analysis courts utilize” in cases under the Fair Labor Standards Act (FLSA),²⁴ apparently seeing *Boire* as the current NLRA rule. In so

22. 2 RESTATEMENT (THIRD) AGENCY §7.03 cmt. d(2) (AM. LAW INST. 2005).

23. 376 U.S. 473 (1964).

24. RESTATEMENT OF EMP’T LAW § 1.04 cmt. c, reporters’ note (AM. LAW INST. 2015); *see* 29 U.S.C. §§ 201-19 (2012).

doing, it cites a series of NLRA cases from 1984-2011.²⁵ But courts and agencies now need to address the issues raised in *Browning-Ferris of California*.

Discussions of the other illustrations do not address the “potential control” issue directly. The note section does state that that in *Antenor v. D & S Farms*, the Eleventh Circuit held that bean growers, in addition to labor contractors, were joint employers under the Migrant and Seasonal Agricultural Worker Protection Act²⁶ and the FLSA, because of the growers’ “power to control the work and effectively determine the compensation of the pickers.”²⁷ The description does not specify whether such power was exercised, and in any event this discussion does not identify or discuss this issue.

D. The NLRA and Beyond: Recent Joint-Employment Cases Under Various Statutes

The trend to take a broader view of what may constitute joint employment has continued both under the NLRA and other statutes. While statutory rules may and do vary from the common law,²⁸ they often rely on it. Also, discussions of joint employment law issues under employment law statutes are useful for their discussions of the purpose of defining the employment relationship *in the employment law* (as opposed to, say, tort law) context.

1. Related Issues Under the NLRA: Bargaining Units and Franchising

Recent NLRB cases raise a series of other issues related to joint employers. First, less than a year after *Browning-Ferris of California*, the NLRB held, in *Miller & Anderson, Inc.*, that unions may organize

25. RESTATEMENT OF EMP'T LAW § 1.04 cmt. c, reporters' note (citing *Serv. Emps. Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442-45 (2d Cir. 2011); *Dunkin' Donuts v. NLRB*, 363 F.3d 437, 440-41 (D.C. Cir. 2004); *NLRB v. W. Temp. Serv.*, 821 F.2d 1258, 1266-67 (7th Cir. 1987); *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122-23 (3d Cir. 1982); *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966); *Cont'l Winding Co.*, 305 N.L.R.B. 122 (1991); *Millcraft Paper Co.*, 270 N.L.R.B. 812, 813-14 (1984)).

26. 29 U.S.C. § 1823 (2012).

27. 88 F.3d 925, 938 (11th Cir. 1996).

28. Comment d notes that some statutes limit obligations to one employer, even where the common law would likely find a joint employment relationship, specifically mentioning the Internal Revenue Code and the Family and Medical Leave Act (FMLA). The FMLA regulations define the term “joint employment” under that statute: “[w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers.” 29 C.F.R. § 825.106(a) (2016). This appears to refer to actual control, although it is not entirely clear.

in one bargaining unit the employees of both a single employer and those that employer jointly employed with another company.²⁹ The case overturned previous precedent by holding that such a unit is not a multiemployer unit requiring the consent of both employers.³⁰ *Miller & Anderson, Inc.* did limit the user employer's obligation to bargain as to the jointly employed employees to those subjects that are within its control.³¹

Second, and more famously, the joint employment issue has come up repeatedly in the franchising context, especially in a recently-consolidated NLRB case involving McDonalds and a number of its franchises.³² One report explained that this case has been "watched closely because of the NLRB general counsel's claim that the franchiser's indirect or potential control over fast-food employees supports a finding that it is a joint employer with local restaurant operators."³³ Current litigation against McDonalds on such theories is also ongoing under state labor codes.³⁴ A management-side firm has estimated that between September 1, 2015 and May 2016, more than fifty joint employer charges were filed in cases involving franchisees, and eighty more charges could lead to joint employer complaints.³⁵ The Department of Labor has made it clear that investigating potential wage and hour violations in the context of franchisors would be a priority.³⁶ However, General Counsel Richard Griffin's term expires in November 2017; it is unlikely that these cases will be resolved by then, and doubtful that a General Counsel appointed by President Trump will continue to prosecute them. Still, the underlying problem will remain, and the *Restatement* does not

29. 364 N.L.R.B. No. 39, at 8 (July 11, 2016).

30. *Id.* at 20.

31. *Id.* at 15.

32. McDonald's USA, LLC, No. 02-CA-093893 (NLRB). Per an order dated October 12, 2016, this case consolidated a number of separate cases raising the same issue. See Laurence Dubé, *McDonald's Labor Board Deal May Speed Joint Employer Ruling*, 198 Daily Lab. Rep. (BNA) AA-1 (Oct. 13, 2016).

33. Dubé, *supra* note 32.

34. See Cara Salvatore, *McDonald's Can't Escape Franchise Workers' Pay Suit*, LAW360 (Aug. 17, 2016, 2:49 PM), <<https://www.law360.com/articles/829427/mcdonald-s-can-t-escape-franchise-workers-pay-suit>> (California law on wage payments).

35. Matthew Bultman, *One Year After Browning-Ferris, Employers Decry Uncertainty*, LAW360 (Aug. 16, 2016, 7:42 PM), <<https://www.law360.com/articles/828691/one-year-after-browning-ferris-employers-decry-uncertainty>>.

36. Benn Penn, *Is Franchise Model a Recipe for Fast-Food Wage Violations*, 20 Lab. Rel. Week (BNA) 1690 (Sept. 13, 2016) (noting that investigations have focused on Subway, McDonald's, Dunkin' Donuts, and "other national brands," with the Wage and Hour Division having conducted nearly 4000 investigations at the twenty largest fast-food brands combined, leading to discovery of more than 68,000 FLSA violations).

address it.

2. Title VII

In a Title VII case, the D.C. Circuit seemed to endorse the approach *Browning-Ferris of California* used by stressing the significance of an employer's "retained" control.

We have recognized two largely overlapping articulations of the test for identifying joint-employer status. . . . The first . . . speaks in terms of the "economic realities" of the work relationship," emphasizing whether the "employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved." A second articulation borrows language from *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982), asking whether the employer, "while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."³⁷

On the other hand, the Fourth Circuit in *Buler v. Drive Automotive Industries of America, Inc.*, while holding as a matter of first impression that joint employment doctrine may be used in Title VII cases, focused "on determining which entities actually exercise control."³⁸ But even this case stressed that one reason to permit the use of joint employment doctrine in Title VII cases is that the doctrine will provide more protections to those employees who are assigned by staffing agencies, where the user employer's reserved control will often be relevant.³⁹

Notably, the EEOC has argued for the NLRB's *Browning-Ferris of California* standard in employment discrimination cases. In September 2016, it filed an amicus brief in the employer's appeal in that NLRB case endorsing the NLRB's approach and stating that the "NLRB acted appropriately in bringing its joint-employer standard in line with the EEOC's."⁴⁰

3. Wage and Hour Statutes

Courts and agencies are adopting broad definitions of joint

37. *Al-Saffy v. Vilsack*, 827 F.3d 85, 96-97 (D.C. Cir. 2016) (quoting *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1123 (D.C. Cir. 2016)).

38. 793 F.3d 404, 409 (4th Cir. 2015).

39. *Id.* at 410.

40. Matthew Bultman, *EEOC Backs NLRB's Joint Employer Rule at DC Circ.*, LAW360 (Sept. 14, 2016, 9:09 PM), <<https://www.law360.com/articles/840135/eec-backs-nlrbs-joint-employer-rule-at-dc-circ>>.

employment under other statutes as well. The Ninth Circuit has explained that “the concept of joint employment should be defined expansively under the FLSA,” and joint employment may be found where the facts show “that employment by one employer is not completely dissociated from employment by the other employer.”⁴¹

Along these lines, the Department of Labor Wage and Hour Division under President Obama issued an Administrator’s Interpretation under which potential and/or indirect power to control employment may lead to employer status. The interpretation explained that the central concern is economic realities and dependency, and it specified that:

To the extent that the potential joint employer *has the power* to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer. Again, the potential joint employer *may exercise such control indirectly* and need not exclusively exercise such control for there to be an indication of joint employment.⁴²

While the Trump administration has withdrawn this interpretation,⁴³ we believe it represents the correct approach.

Under President Obama, the Department of Labor seemed interested in joint employment issues under the Occupational Safety and Health Act⁴⁴ as well. Even before the NLRB issued *Browning-Ferris of California*, the Occupational Health and Safety Administration was exploring using the joint employer doctrine in cases involving franchisors and franchisees.⁴⁵ The Obama administration’s position included the following:

Host employers need to treat temporary workers as they treat existing employees. Temporary staffing agencies and host employers share control over the employee, and are therefore jointly responsible for temp employee’s safety and health. It is essential that both employers comply with all relevant OSHA requirements.⁴⁶

41. *Chao v. A-One Med. Servs. Inc.*, 346 F.3d 908, 917 (9th Cir. 2003) (quoting *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) and 29 C.F.R. § 791.2(a) (2002)).

42. Wage & Hour Div., U.S. Dep’t of Labor, Administrator’s Interpretation No. 2016-1, at 12 (Jan. 20, 2016), <https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf>.

43. See Department of Labor News Release 17-0807-NAT (June 7, 2017), *available at* <<https://www.dol.gov/newsroom/releases/opa/opa20170607>>.

44. 29 U.S.C. §§ 651-78 (2012).

45. Aaron Vehling, *OSHA Mulls Joint Employer Standard for Safety Probes*, LAW360 (Aug. 26, 2015, 4:12 PM), <<https://www.law360.com/articles/695686/osh-mulls-joint-employer-standard-for-safety-probes>>.

46. *Protecting Temporary Workers*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/temp_workers/> (last visited May 6, 2017).

Finally, in interpreting the Pennsylvania Wage Payment and Collections Act, the Third Circuit in *Williams v. Jani-King of Philadelphia, Inc.* recently approved a class certification of workers, despite the employer's argument that actual control was more important than the "right to control."⁴⁷ The opinion, which involved a franchising relationship, stressed that Pennsylvania Supreme Court had made the "right to control" the paramount consideration.⁴⁸

In sum, while the *Restatement* does not address the relevance of reserved or potential control in assessing joint employer status, a growing consensus of courts and, at least until recently, federal agencies is emerging. For reasons that follow, we add our voices to this consensus.

E. Browning-Ferris of California is the Better Approach

Browning-Ferris of California represents the better approach. This case was not a radical departure from past precedent. It did reject limitations added to the joint employer concept from a few cases decided in the 1980s.⁴⁹ But the new rule is consistent with earlier precedents, e.g. *Boire v. Greyhound Corp.*,⁵⁰ which the *Restatement* uses as the basis for an illustration, and the Third Circuit's opinion in *Browning-Ferris Industries of Pennsylvania*. *Browning-Ferris of California* simply clarified that employers cannot avoid joint employer status by retaining but not exercising "directly and immediately" control over wages, hours, and working conditions. Notably, in *Browning-Ferris of California*, Browning-Ferris, the company that unsuccessfully argued it was not a joint employer, controlled matters such as termination decisions indirectly, through the supervisors of the other employer. The right to control terms and conditions of employment is still required.⁵¹

This approach is predicated on common law principles. As Michael Harper, one of the Reporters for the *Restatement* has

47. 837 F.3d 314, 321 (3d Cir. 2016).

48. *Id.* (citing *Universal Am-Can, Ltd. v. Workers' Comp. Appeals Bd.*, 762 A.2d 328, 333 (Pa. 2000)).

49. *TLI, Inc.*, 271 N.L.R.B. 798 (1984); *Laerco Transp.*, 269 N.L.R.B. 324 (1984). Also, *Browning-Ferris* supplants two later cases to the extent that they relied on the 1980s case: *A&M Property Holding Corp.*, 350 N.L.R.B. 998 (2007); *Airborne Express*, 338 N.L.R.B. 597 (2002).

50. 367 U.S. 473 (1964).

51. *Hearing Before the H. Subcomm. on Health, Emp't, Labor & Pensions, Comm. on Educ. & the Workforce*, 114th Cong. 45 (2015) (statement of Michael Harper, Prof. of Law, Boston Univ. Sch. of Law).

explained, the common law has long used the “right to control” test.⁵² Similarly, Professor Anne Lofaso has pointed out that this approach is consistent with the both *Restatement of the Law of Agency*, § 2(1) and the *Restatement (Second) of Agency* § 2(1), as both refer to a “master” as one “who controls or has the right to control” the conduct of someone performing services on the master’s behalf.⁵³ In defending the position that the common law could find employer status based on possessing power, as opposed to requiring that the employer exercise that power, Professor Lofaso also cites *Restatement of the Law of Agency* § 220, comment D: “the control or right of control needed to establish the relation of master and servant may be very attenuated.”⁵⁴

Indeed, Harper argues that “[t]he Illustrations in § 1.04, Comment c, make clear that employer status turns on ultimate legal authority or power, not on whether the power is exercised directly or indirectly.”⁵⁵ He notes that illustration 4 is based on the facts of *Greyhound v. Boire*.⁵⁶ Illustration 4 finds joint employment when the employer at issue “has power to discipline, transfer, or promote. . . .” While this illustration plausibly adopts the *Browning-Ferris of California* test, and Professor Harper’s explanation adds more force to that interpretation, the *Restatement* could and should be more explicit and clear on this point.

Further, a broad approach to joint employment is consistent with the goals of employment law, especially in the context of a changing economy. The Fourth Circuit explained this well in *Butler v. Drive Automotive Industries of America*,⁵⁷ a case decided before *Browning Ferris of California*.

Finally, the joint employment doctrine also recognizes the reality of changes in modern employment, in which increasing numbers of workers are employed by temporary staffing companies that exercise little control over their day-to-day activities. See *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 933-34 (D.S.C.1997) (“While the phenomenon of temporary employees first gained momentum in the United States’ post-World War II economy, ‘the temporary help industry has recently exploded,

52. *Id.* at 46-47. Harper also argues that *Browning-Ferris of California* did not hold that “potential” control of working conditions alone was sufficient to find employer status. *Id.* at 46 n.3.

53. *Id.* at 60 (statement of Anne Marie Lofaso, Prof. of Law, W. Va. Univ. Coll. of Law).

54. *Id.* at 61.

55. *Id.* at 47.

56. *Id.*

57. 793 F.3d 404 (4th Cir. 2015).

especially since the 1980s.” (brackets omitted) (quoting *Development in the Law—Employment Discrimination: V. Temporary Employment and the Imbalance of Power*, 109 Harv. L. Rev. 1647, 1648 (1996)); *Lima v. Addeco*, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009) (“The joint employer doctrine has been applied to temporary employment or staffing agencies and their client entities.”).

The joint employment doctrine thus prevents those who effectively employ a worker from evading liability by hiding behind another entity, such as a staffing agency. *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973). Given Title VII’s remedial intent, employers should not be able to “avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship.” *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484 (8th Cir. 2000).⁵⁸

Significantly, in this case, the Fourth Circuit explained that one of the most important factors in determining joint employment was whether or not the purported employers “have the power to hire and fire.”⁵⁹ It did not require that the power be direct or regularly exercised. This is the better approach.

Allowing indirect or potential control to create an employment relationship could have important, positive effects for workers. Professor Matthew Finkin gives an example involving farmworkers growing produce which Campbell Soup ultimately uses, and how the test endorsed above could at least arguably lead to that employer’s joint responsibility for wage and hour violations.⁶⁰ While the farmworkers work in the fields, not a Campbell plant, and while Campbell’s supervisors do not directly monitor them, “they cannot be shifted by their growers to non-Campbell work; their work is integral to Campbell’s production; their growers’ contracts cannot be shifted to another. . .; and their work is not only predominantly but exclusively done for Campbell.”⁶¹ In such a situation, we believe, joint responsibility is appropriate.

58. *Id.* at 410. David Weil implied a similar dynamic with respect to franchises: “When running their own facilities, major fast-food companies are quite scrupulous in terms of compliance. . . . But why [do franchisors] tolerate in franchisees what they deplore in their own operations?” WEIL, *supra* note 2, at 196.

59. 793 F.3d at 414.

60. Finkin, *supra* note 2, at 20.

61. *Id.*

III. UNPAID INTERNS

A. Introduction

The test for when an unpaid internship is legal because the intern is not an “employee” is also a high-profile, controversial issue in the modern economy.⁶² The use of unpaid internships has skyrocketed in recent years.⁶³ One study found that in 2014, 68.4 percent of 2014 high school graduates were enrolled in colleges; about 61 percent of college students by their senior year had participated in an internship; and nearly half of those interns did not receive any pay or compensation for their work.⁶⁴ Another study shows that 75 percent of four-year college students will hold at least one internship before graduating and that one-third to one-half of those internships will be without compensation.⁶⁵ Yet another study found that paid interns were twice as likely as unpaid interns to receive a job offer from the company where they worked and that unpaid internships were less likely than paid internships to lead to well-paying jobs.⁶⁶

The law governing this topic remains unclear. While, as discussed below, the Department of Labor has issued guidance in this area for purposes of the FLSA, some courts have been skeptical about adopting the rule in this guidance. The result is a multiplicity of tests.⁶⁷ We believe that the *Restatement* should have recommended the Department of Labor’s approach for the FLSA. First, litigation over unpaid internships usually arises under the FLSA or statutes with similar goals of protecting employees. Second, we believe the

62. Misclassification of student interns was recently the subject of an article in the parody news site *The Onion*, underscoring popular awareness of this issue. *College Senior Holding Out Hope that Internship Will Lead to Class-Action Lawsuit*, THE ONION (Jan. 9, 2017), <<http://www.theonion.com/article/college-senior-holding-out-hope-internship-will-le-54994>>.

63. The Department of Labor does not track the number of unpaid internships, but one estimate in 2012 put the number of unpaid interns each year as ranging from 500,000 to one million. Derek Thompson, *Work Is Work: Why Free Internships Are Immoral*, ATLANTIC (May 14, 2012), <<http://www.theatlantic.com/business/archive/2012/05/work-iswork-why-free-internships-are-immoral/257130/>>.

64. Sean Hughes & Jerry Lagomarsine, Note, *The Misfortune of the Unpaid Intern*, 32 HOFSTRA LAB. & EMP. L.J. 409, 409-10 (2015).

65. Nina Markey et al., *Get Your Own Coffee: Advice for Employers Facing Increasing Uncertainty with Respect to the FLSA and Unpaid Internships*, 33 HOFSTRA LAB. & EMP. L.J. 101, 101-02 (2016).

66. Thomas Johnson, *The Fox Searchlight Signal: Why Fox Searchlight Marks the Beginning of the End for Preferential Treatment of Unpaid Internships at Nonprofits*, 102 VA. L. REV. 1127, 1159 (2016).

67. For a good discussion of this issue in general, including but not limited to the various and often conflicting tests and approaches different courts have used in these cases, see David Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L.J. 357 (2016).

Department of Labor's approach to this issue is the soundest, providing both the most clarity and the most protection to employees in the modern economy.

B. Problems With the Restatement's Approach to the Topic

Restatement section 1.02 comment g addresses unpaid interns, but it does not adequately deal with this issue as it exists today. The first sentence of the discussion is arguably misleading, and its remaining discussion seems mostly aimed at internships provided by educational institutions themselves to students. Specifically, comment g provides:

g. Interns and student assistants. Interns who provide services without compensation or a clear promise of future employment generally are not employees for purposes of this Restatement. Similarly, students who render uncompensated services to satisfy education or training requirements for graduation or for admission into a particular profession or craft generally are not employees. These are corollaries of the principle that an individual's unilateral expectation of future opportunities is not sufficient to establish employee status. An individual remains a volunteer even if she renders uncompensated service as part of her training or education with the hope of obtaining a job with a particular employer rather than to develop skills that would be useful to many employers. Where an educational institution compensates student assistants for performing services that benefit the institution, however, such compensation encourages the students to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship.⁶⁸

The first sentence in isolation could be read to mean that if a worker deemed an "intern" is performing services for an employer without being paid and the worker has no "clear promise of future employment," that worker is not an employee. Nowhere in this section of the *Restatement* is the term "intern" defined. Nor is the phrase "clear promise of future employment" defined. Under employment-at-will rules and common hiring and employment practices, many workers who are unambiguously employees have no "clear promise of future employment." It cannot be true, however, that merely labelling a worker an "intern," refusing to give that worker a clear promise of future employment, and not paying the worker makes the worker a "volunteer" and not an "employee." That certainly is not true under labor and employment law statutes.

68. RESTATEMENT OF EMP'T LAW § 1.02 cmt. g (AM. LAW INST. 2015).

The remainder of the text of comment g seems to deal with educational institutions that provide different types of internships to students at the educational institution or pursuant to degree requirements of the institution. Indeed, the *Restatement's* two illustrations on this issue involve such fact patterns. Notably, both illustrations were drawn from cases decided under an employment law statute, Title VII.⁶⁹

10. A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P's auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A's education and also to obtain A's services on P's funded research.⁷⁰

11. A is a social-work student at a university. In order to obtain a degree, A must complete an internship as a volunteer at a university-approved social-service agency. A elects to work at P, a hospital for the mentally disabled. P does not provide pay or other benefits to A. A is not an employee of P.⁷¹

In illustration 10, it is not entirely clear what makes the worker an employee. Is it that the employer has decided to pay the worker, or is it that the employer, as well as the employee, is receiving significant benefits from the work? The former reading cannot be sufficient, as this implies, again, that simply deciding not to pay a worker goes at least a long way in legally justifying not paying the worker. The latter reading is similar to the "primary beneficiary" test some courts have used under the FLSA. This test is discussed further, and critiqued, below. Illustration 11 makes the point that an internship that is a necessary component of an educational degree may be unpaid, without explaining why that is true.

C. Students Working at Educational Institutions They Attend

The reporters' note includes further discussion of cases involving students and their own schools. It cites cases on the issue of whether student athletes receiving athletic scholarships who were injured while playing a money-generating sport are entitled to receive

69. The reporters' note on this issue explains that illustration 10 is based on *Cuddeback v. Florida Board of Education*, 381 F.3d 1230 (11th Cir. 2004) and illustration 11 is based on *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), both Title VII cases.

70. RESTATEMENT OF EMP'T LAW §1.02 cmt. g, illus. 10.

71. *Id.* illus 11.

workers-compensation benefits.⁷² Here, the note might have fruitfully engaged with, or at least noted, the arguments found in the NLRB's Regional Director's decision in the *Northwestern University* case involving football players.⁷³ In short, in that case the Regional Director found that the college football players at Northwestern were not primarily students: their football activities were not integral to their education; academic faculty did not supervise their activities as part of a degree program; the football program produced a tremendous amount of revenue; and the school exercised a great deal of control over the lives of the athletes both on and off the field. While the full NLRB declined to take jurisdiction in this case,⁷⁴ and no court has found college athletes to be employees, this issue is likely to come up again, perhaps under the NLRA and perhaps under other statutes.⁷⁵ We are sympathetic to the position of the NLRB Regional Director in that case, and we believe that the *Restatement's* short discussion of old cases on this issue will not do the topic justice moving forward.

The reporters' note also mentions the NLRB's shifting positions as to when, if ever, graduate and research assistants at universities should be considered "employees." It is worth mentioning, that NLRB has recently reversed the most recent case on this issue, *Brown University*⁷⁶ (which, as the note explains, held that such assistants were not employees).⁷⁷ In *Trustees of Columbia University in the City of New York*⁷⁸ the NLRB reverted to an earlier rule (also from a case involving NYU⁷⁹) under which paid graduate assistants often would be considered to be employees. Notably, in *Trustees of Columbia University*, the NLRB stressed that it was using common-law principles in its analysis.⁸⁰

72. RESTATEMENT OF EMP'T LAW § 1.02 cmt. g, reporters' note (majority approach: no).

73. Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 198 L.R.R.M. (BNA) 1837 (NLRB Reg'l Dir. 2014).

74. Nw. Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015).

75. See, e.g., Lester Munson, *Free to Tweet: Northwestern's Restrictions on Football Players Ruled Unlawful*, ESPN (Oct. 10, 2016), <http://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful> (discussing an NLRB case where Northwestern University agreed to modify its social media policy for football players).

76. 342 N.L.R.B. 483 (2004).

77. RESTATEMENT OF EMP'T LAW § 1.02 cmt. g, reporters' note. The NLRB invited briefs in two cases involving NYU. Notice and Invitation to File Briefs, N.Y. Univ., No. 2-RC-23481 (NLRB June 22, 2012); Notice and Invitation to File Briefs, Polytechnic Inst. of N.Y. Univ., No. 29-RC-012054 (NLRB June 22, 2012).

78. 364 N.L.R.B. No. 90 (Aug. 23, 2016).

79. N.Y. Univ., 332 N.L.R.B. 1205 (2000).

80. 364 N.L.R.B. No. 90, at 6.

Further, given that many universities are public institutions, it would be wise to consider public-sector labor law rules as well as rules under the NLRA. In short, in the public sector, rules vary under differing state laws, with some more inclusive than others.⁸¹ As a generalization, though, rules in the public sector are often more inclusive in treating graduate assistants as employees.⁸²

We believe the more inclusive approach is better. Specifically, for both the public and private sectors, we believe that graduate assistants who work as teachers or researchers, even if the teaching or researching is in a field they may wish to teach or practice in later, should be treated as employees if they meet the test of the NLRB in the first *New York University* case,⁸³ reinstated in *Trustees of Columbia University*. In the first *New York University* case, the Board relied on *Boston Medical Center*,⁸⁴ which had held that various interns, residents, and fellows in medical schools, who had completed their medical degrees but were enrolled in a hospital's on-the-job training program that provided education and experience needed for a medical license and specialty certifications, were employees.⁸⁵ The Board held that NYU's graduate assistants were analogous to the employees in *Boston Medical Center* and, applying the common-law test which governs coverage determinations under NLRA section 2(3), held that the graduate assistants were "employees."⁸⁶ We believe this is the correct approach.

81. See generally MARTIN MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 528-35 (3d ed. 2016); Grant Hayden, *The University Works Because We Do: Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233 (2001).

82. Illinois is an example of a less inclusive rule, under which students whose assistantships are "significantly connected to their status as students" are not covered. *Graduate Emps. Org. v. Ill. Educ. Labor Relations Bd.*, 733 N.E.2d 759 (Ill. App. 2000). That is a minority approach, however. For an example of the more common approach, see *In the Matter of the Employees of Temple University*, 32 *PPER* ¶ 32164 (Pa. Labor Relations Bd. 2001), which held that graduate assistants were covered employees. In finding graduate assistants covered under Pennsylvania law, *Temple University* noted that *Graduate Employees' Organization* represented a small minority rule, and it cited numerous public-sector precedents holding that graduate assistants were covered. According to the AFL-CIO's brief filed in *Brown University*, bargaining relationships had been established between graduate assistants and the University of California, the University of Florida, the University of South Florida, the University of Iowa, the University of Kansas, the University of Massachusetts, Michigan State University, the University of Michigan, Rutgers, the City University of New York, New York University, the State University of New York, the University of Oregon, Temple University, the University of Wisconsin, and Wayne State University. Brief for AFL-CIO as Amici Curiae Supporting Petitioner, at 36, *Brown Univ.*, 342 N.L.R.B. 483 (2004).

83. 332 N.L.R.B. 1205 (2000).

84. 330 N.L.R.B. 152, 153 (1999).

85. 332 N.L.R.B. at 1206.

86. *Id.*

D. Students Working for Other Employers

The issue of unpaid interns in the modern economy, however, goes far beyond students performing work for the education institutions the students attend. Recent cases have focused on interns at for-profit institutions and internships that are not required components of educational degrees.⁸⁷ The reporters' note addresses this issue as follows:

Many students do not meet the initial conditions for being employees because their work serves only their own interest in learning and skill development rather than the interest of the institution providing the instruction or training. This can be true even for a for-profit enterprise providing practical training as a means of developing a labor pool for future recruitment. See the Supreme Court's interpretation of the FLSA in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), where the railroad's training brakemen were found to receive "no immediate advantage" from any work done by the trainees. *Id.* at 153.⁸⁸

Yet after citing *Walling v. Portland*, the note goes on to treat the FLSA rule as distinct from the common law rule.

Particular legislation may provide for a different treatment of volunteers than the common-law rule stated in this Section. For example, the FLSA broadly defines the term "employ" to include "to suffer or permit to work." 29 U.S.C. § 203(g). In *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-153 (1947), the Court held this language did not encompass a private railroad company's training program because the trainees worked "for their own advantage" and "the railroads receive[d] no immediate advantage" from that work.⁸⁹

We believe it is best to use one rule in this area and not distinguish between a "common law" rule and "statutory" rules. As noted *infra*, the NLRB already purports to use the common law test for NLRA cases, and the *Restatement* takes for its own illustrations two Title VII cases. The bulk of the litigation about whether interns are employees has been under the FLSA, and we will focus on that litigation in discussing what we believe is the best rule.

The reporters' note describes the interpretation and test from the Department of Labor on this issue,⁹⁰ while noting that "[s]everal

87. The focus below is on interns at for-profit employers. Both courts and the Department of Labor have not been entirely clear as to whether the same rules do or should apply to interns at non-profits. See Johnson, *supra* note 66 (arguing that the same rules do and should apply to both sectors).

88. RESTATEMENT OF EMP'T LAW 1.02 Reporter's Note.

89. *Id.*

90. Opinion Letter Fair Labor Standards Act (FLSA), WH-20, 1970 WL 26388 (Mar. 31,

federal courts have resisted this interpretation of *Walling*, instead applying a test turning on whether the trainee or the putative employer is the primary beneficiary of the training.⁹¹ It is true that courts have been split on the test to use in these cases,⁹² but we believe the Department of Labor's test is best, and that the *Restatement* should have endorsed it.

The Department of Labor's test states that for an unpaid internship to be legal under the FLSA, all of the following criteria must be met.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁹³

While some courts use variations on this test in which not every factor must be met,⁹⁴ the main competing approach is the "primary

1970).

91. The note gives the following citations: *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989). *But cf. Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 530-32 (S.D.N.Y. 2013) (declining to apply the primary-beneficiary test to motion-picture production interns). More recently, however, the Second Circuit took a different approach in the *Glatt* litigation. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2015) (adopting a multi-factor, balancing approach to determine who is the primary beneficiary). Other courts have used a multi-factor "totality of the circumstances" test. *See, e.g., Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982).

92. *See, e.g., Yamada, supra* note 67.

93. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET # 71, INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (April 2010), available at <<http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>>.

94. *Glatt*, 811 F.3d at 536 (citing with approval *Barfield v. N.Y.C. Health & Hosp. Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008) that "employment" is "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances" and applying a "set of non-exhaustive factors") *See Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1210 n.9 (11th Cir. 2015) (collecting cases). *Schumann* itself used a "non-exhaustive set of considerations" to use in determining who the "primary beneficiary" of an internship was, listing seven such considerations which overlap with, but differ in part, from the Department of Labor's list. *Id.* at 1211-12. Thus, while rejecting the Department of Labor's approach, the *Glatt* court also rejected the stricter "primary beneficiary" test used by the district court in *Schumann*.

beneficiary” test, in which courts attempt to determine, for any given internship, whether the worker or the employer is the “primary beneficiary” of the intern relationship. The many different tests courts have used have led to calls for a single, standardized approach.⁹⁵

We believe the Department of Labor’s approach is superior for two reasons. First, the “primary beneficiary” test is too difficult to apply in practice. Presumably, most internships benefit both sides in ways that are hard if not impossible to directly weigh or compare. Also, a worker providing benefits to an employer should not be deprived of “employee” status merely because the worker is receiving some valuable experience by doing the work.

Second, practically, the Department of Labor test will be more difficult to meet. We believe, as a matter of policy, that it is preferable that unpaid internships at for-profit employers be relatively rare. They are a source of potential exploitation of workers by institutions that typically could easily be providing payment in exchange for useful labor. They make it more difficult for less well-off workers to enter certain fields and job categories by excluding those who cannot afford to spend significant time working for no compensation. A number of scholars and articles have criticized the “primary beneficiary” test for not providing sufficient protections for workers.⁹⁶

Also, there is increasing evidence that unpaid internships do not provide the purported benefits the interns believe they will receive. Often, unpaid interns are assigned menial tasks and are not later considered for regular, full time work.⁹⁷ Widespread use of unpaid internships may also displace paid, experienced workers. And again, because they are unpaid, such internships are generally limited to those who can afford to work for a significant period of time without wages, thus disadvantaging those from less affluent backgrounds.⁹⁸

95. Hughes & Lagomarsine, *supra* note 64; Nicole Klingler, Note, *Will Work for Free: The Legality of Unpaid Internships*, 10 BROOK. J. CORP. FIN. & COM. L. 551 (2016); Madiha Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183 (2015).

96. See, e.g., Hughes & Lagomarsine, *supra* note 64 (arguing for the rule the lower court used in *Glatt*); Klingler, *supra* note 95 (primary benefits test the Second Circuit used in *Glatt* does not adequately protect unpaid interns, nor does it inform employers of the standards they need to meet in order to adopt legal unpaid internship programs).

97. Malik, *supra* note 95, at 1188.

98. *Id.* at 1188-89 (citing KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POL’Y INST., POLICY MEMORANDUM #160, NOT-SO-EQUAL PROTECTION: REFORMING THE REGULATION OF STUDENT INTERNSHIPS 3 (2010), <http://www.epi.org/files/page/-/pdf/epi_pm_160.pdf> (choice to take an unpaid internship depends on a student’s

We are sympathetic to the arguments made by Professor David Yamada. He writes:

The unwieldy “primary beneficiary” test adopted by the court of appeals in *Glatt* gives the label of intern an unwarranted legal meaning and distracts us from the fundamental concept of paying people for work rendered. By simply pasting “intern” on what otherwise might be considered a part-time, summer, or postgraduate entry-level job, an employer now can take its chances and make the position unpaid, claiming that the training, experience, and networking opportunities provided to the intern exceed the benefits provided to the employer by the intern’s labor. The intern, in turn, is left in the unenviable position of either accepting what are likely to be unilaterally imposed terms or challenging the unpaid status and thus jeopardizing her future career.⁹⁹

Also, as Professor Yamada explains, the “primary beneficiary” test is ill-conceived and difficult if not impossible to apply. It underestimates the “significant benefits of internships to two major stakeholders, employers and institutions of higher education.”¹⁰⁰ First, employers reap many benefits from interns, by allowing them to train and evaluate prospective employees as well as getting work done. Second, educational institutions benefit from incorporating internships into degree programs, increasing the marketability of such programs and allowing the educational institution to charge tuition for time spent in internships.¹⁰¹ As to application, Professor Yamada, citing the District Court in *Glatt*, argues that “the primary beneficiary test has an inherently illogical and unpredictable dynamic to it.”¹⁰² The same internship could be compensable for one intern if that intern gained little from it, but not compensable to another who did the same work but learned a lot. “Under this test, an employer could never know in advance whether it would be required to pay its interns.”¹⁰³

Allowing internships to be unpaid only in relatively narrow circumstances would also help curb abuse in this area. Significant evidence exists that employers are taking advantage of relatively tight labor markets in some fields to create internships that are illegal under any existing approach, simply because the interns involved are

“economic means, thus institutionalizing socioeconomic disparities beyond college”).

99. Yamada, *supra* note 67, at 372.

100. *Id.*

101. *Id.*

102. *Id.* at 373.

103. *Id.*

too intimidated to sue, because they do not want to be practically blackballed from certain industries.¹⁰⁴ A variety of academics have argued that “unpaid interns displace paid labor, hurt the economy, and receive few opportunities to develop substantive experience.”¹⁰⁵ In close cases, the *Restatement* should have adopted a position that protects more vulnerable workers at the margins. We believe the Department of Labor rule is the correct approach, and that the *Restatement* should have indicated that.

IV. MISCLASSIFICATION IN THE APP-BASED ECONOMY?

Seven years ago, the working group on the proposed *Restatement (Third) of Employment Law* urged that technological change would prompt “important changes in . . . normative expectations” regarding employment status.¹⁰⁶ Sure enough, as the *Restatement* was being finalized and going to print, familiar questions about the distinction between independent contractors and employees were beginning to arise in a new context: the “app-based economy.” Whether at least some app-based workers are employees – rather than independent contractors, as their putative employers often claim – is a question currently being litigated in numerous courts and administrative fora, as well as in the court of public opinion.¹⁰⁷ We anticipate that, when the dust settles, many app-based economy workers will be reclassified as employees; for example, our own view is that at minimum, a core group of Uber drivers who drive a significant amount of time and meaningfully rely on Uber for income are currently misclassified as independent contractors for purposes of many state and federal laws.

In the meantime, this Part offers a preview of things to come by surveying pending litigation regarding the classification of app-based workers in light of the common law principles articulated in the *Restatement*. We believe that, while the *Restatement* offers analysis and examples of the distinction between independent contractors and

104. See, e.g., Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), <<http://www.nytimes.com/2010/04/03/business/03intern.html>>.

105. Johnson, *supra* note 66, at 1160 (collecting sources).

106. Working Group, *supra* note 1, at 84.

107. AARON SMITH, PEW RESEARCH CTR., SHARED, COLLABORATIVE AND ON DEMAND: THE NEW DIGITAL ECONOMY 8 (2016), <http://www.pewinternet.org/files/2016/05/PI_2016_05.19_Sharing-Economy_FINAL.pdf> (survey finding that 66 percent of respondents indicated that they considered workers in ride-hailing services like Uber and Lyft to be independent contractors).

employees, it missed an opportunity to articulate the purpose of this distinction in various contexts. As a result, it will be of less use to decision-makers in future cases than it otherwise could have been. A more focused analysis of this threshold issue would have made decision makers' tasks easier by contextualizing the various factors that go into the employee/independent contractor analysis, while also promoting just outcomes in these cases. Thus, rather than advocating for a particular rule, this Part advocates for a purposive approach to applying the various multi-factor employee/independent contractor tests.

A. Background: The App-Based Economy

We use the phrase “app-based economy” to refer to economic transactions that are facilitated by online applications that match customers with providers, such as when a rider uses the Uber app to be matched with a driver, or a traveler uses AirBnB to find a place to stay.¹⁰⁸ While the ride-hailing apps Uber and Lyft are likely the most familiar examples, others abound: for example, the app Handy allows users to request workers to perform cleaning, home repair, and similar tasks; the app Postmates dispatches runners to deliver customers' take-out food orders; and on the more exclusive end, the now-defunct app FlyteNow could be described as Uber for private jets. These services are growing rapidly as developers seek new jobs to which the app-based model might be brought to bear; thus, while the app “Pooper”¹⁰⁹ – Uber for dog poop – turned out to be a hoax, its launch was covered by news outlets including the Washington Post,¹¹⁰ and “hundreds” of people reportedly signed up either to have their dog's waste picked up by a stranger for a fee, or to work as “scoopers.”¹¹¹

108. Other terms commonly used to refer to these businesses include “sharing economy,” “gig economy,” “on-demand economy,” and “1099 economy.” We have chosen to use the phrase app-based economy because, in our view, it most accurately describes the subset of work arrangements discussed in this Part. However, when another source uses a different term, we use that term, and acknowledge that different terms can encompass somewhat different sets of transactions.

109. POOPER, <<http://pooperapp.com/>> (last visited May 6, 2017).

110. Karin Brulliard, *Update: Sorry, Lazy Dog Owners. The App that Finds Someone to Scoop Poop Is Fake*, WASH. POST (Aug. 2, 2016), <<https://www.washingtonpost.com/news/animalia/wp/2016/07/22/so-it-has-come-to-this-an-app-that-finds-someone-to-pick-up-your-dogs-poop/>>.

111. Zach Schonfeld, *How a Fake Dog Poop App Fooled the Media*, NEWSWEEK (Jul. 29, 2016), <<http://www.newsweek.com/how-media-got-fooled-completely-satirical-dog-poop-app-485598>>.

As the foregoing suggests, app-based transactions are increasingly common; one study found that “72 percent of American adults have used at least one of 11 different shared and on-demand services,” and 15 percent of Americans have used a ride-hailing app.¹¹² And, while the size of the app-based economy workforce is very difficult to determine, a recent estimate suggested that at least “600,000 workers, or 0.4 percent of total U.S. employment, work with an online intermediary in the gig economy,” with two thirds of those working for Uber.¹¹³ However, the same study noted that participation in gig economy work could actually be twice as large,¹¹⁴ and another survey predicted that “on-demand economy” participation was much larger still; it claimed that nearly a quarter of Americans have offered an “on-demand” service at least once.¹¹⁵ The difficulty of estimating the extent of Americans’ participation in the app-based economy is illustrated by the Internal Revenue Service’s response to a question from Senator Mark Warner regarding the size of the on-demand economy; after detailing various challenges in quantifying the extent of that participation based on information that the IRS collects, that agency essentially threw up its hands, refusing to hazard even an estimate.¹¹⁶

The classification of workers is often challenging, as the application of multifactor tests tends to be. And the early experience of courts and agencies suggests that the classification of workers in the app-based economy is a particularly difficult iteration of this task. This is in part because the technology involved – the apps that define this sector of the economy – obscures and complicates the

112. SMITH, *supra* note 107, at 3, 5. However, that statistic captures many types of online transactions that do not generally raise questions about worker classification (for example, using the websites Etsy or eBay to purchase second-hand goods).

113. SETH D. HARRIS & ALAN B. KREUGER, THE HAMILTON PROJECT, DISCUSSION PAPER 2015-10, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 2, 12 (2015), <http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf>.

114. *Id.* at 12.

115. A poll conducted by *Time Magazine*, the public relations firm Burson Marsteller, and the Aspen Institute reached the conclusion that “22% of American adults, or 45 million people, have already offered some kind of good or service in [the on demand] economy.” Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <<http://time.com/4169532/sharing-economy-poll/>>. That same survey concluded that 10 percent of Americans have offered ride-sharing services, and 11 percent of Americans have offered services via “platforms that connect people looking for services like a handyman, babysitter, care provider or mover.” Burson-Marsteller et al., *The On-Demand Economy Survey* (2016) (powerpoint presentation on file with author).

116. Letter from Anne Wall, Assistant Sec’y for Legislative Affairs, U.S. Dep’t of the Treasury to Senator Mark R. Warner (Oct. 27, 2015), 2015 WL 7356208.

relationship between workers and the enterprises they serve.

For example, the “right to control” test discussed in the *Restatement* looks to, among other things, “whether or not the one employed is engaged in a distinct occupation or business.”¹¹⁷ In traditional cases, this factor is often relatively easily resolved in one direction or the other – even where the employee/independent contractor inquiry is otherwise a close one. For example, in one instance of the long-running litigation over whether certain FedEx drivers were employees or independent contractors, the Ninth Circuit easily dispatched this factor in favor of the plaintiffs;¹¹⁸ even FedEx itself acknowledged that both it and the plaintiff drivers were involved in the “pickup and delivery of packages,” though it made a passing attempt to argue that it was involved primarily in the “information and distribution network for the pickup and delivery of packages,” whereas the drivers were involved in the “physical pickup and delivery of packages.”¹¹⁹ But even that level of agreement is often lacking in the app-based economy cases. Instead, fundamental disagreements exist as to what business app-based companies like Uber are in. Specifically, Uber steadfastly maintains that it is a technology company – in the business of creating and marketing a platform that could be used to facilitate many different types of transactions – whereas Uber drivers are in the transportation business.¹²⁰ (In this regard, Uber can point to its expansion into food delivery via “UberEATS,” and the on-demand delivery of adoptable kittens via “UberKITTENS.”¹²¹) On the other hand, Uber drivers who have brought misclassification suits have argued that they both they and Uber are in the transportation business.¹²² Which characterization

117. RESTATEMENT OF EMP’T LAW § 1.01 cmt. e (AM. LAW INST. 2015).

118. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 995 (9th Cir. 2014) (reasoning that “the work performed by the drivers is wholly integrated into FedEx’s operation. The drivers look like FedEx employees, act like FedEx employees, [and] are paid like FedEx employees . . . The customers are FedEx’s customers, not the drivers’ customers,” quoting *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007)).

119. Second Brief on Cross-Appeal at 61, *Alexander*, 765 F.3d at 981 (Nos. 12-17509, 12-17458), 2013 WL 3171021 (also arguing that some contractors may be incorporated).

120. E.g., *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (“In this litigation, Uber bills itself as a ‘technology company,’ not a ‘transportation company,’ and describes the software it provides as a ‘lead generation platform’ that can be used to connect ‘businesses that provide transportation’ with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as ‘transportation providers.’”)

121. See *UBEREATS*, <<https://ubereats.com/>> (last visited May 7, 2017); Sarah Haydu, *Clear your Calendars – #UberKITTENS Are Back*, *UBER* (Oct. 28, 2015), <<https://newsroom.uber.com/uber-kittens-are-back/>>.

122. *O’Connor*, 82 F. Supp. 3d at 1137 (“Plaintiffs characterize Uber’s business (and their

of Uber one accepts will in turn influence whether one views Uber drivers as employees.

The app-based economy presents similar challenges in assessing the extent to which the employer “controls the manner and means by which the individual renders the services.”¹²³ As the *Restatement* puts it:

the employer’s power to control the manner and means by which an individual renders services is sufficient to make the service provider an employee. Where the employer exercises such power, the service provider generally cannot further his or her economic interest by exercising entrepreneurial authority with respect to the scheduling of performance¹²⁴

Yet, in much of the app-based economy, the putative employer’s power to control the manner and means of service delivery is at least partially devolved onto a combination of service providers themselves and the providers’ customers. Again, Uber illustrates why this is. First, as Professor Miriam Cherry has written, “[r]ather than . . . spot checks by supervisors, Uber has essentially outsourced its quality control to its passengers.”¹²⁵ It does this by asking passengers to rate drivers on a scale of 1-5 at the conclusion of a ride, and deactivating (which is to say, terminating) drivers whose star rating falls below a certain cut-off point.¹²⁶ Because Uber can set the required minimum star rating at a very high threshold – for example, an internal Uber document revealed that San Francisco drivers whose average rating fell below 4.6 were at risk of deactivation¹²⁷ – drivers will have a strong incentive to hew to local norms governing Uber rides.¹²⁸ In addition, Uber can discipline drivers short of deactivating

relationship with Uber) differently. They note that while Uber now disclaims that it is a ‘transportation company,’ Uber has previously referred to itself as an ‘On-Demand Car Service’, and goes by the tagline ‘Everyone’s Private Driver.’”

123. RESTATEMENT OF EMP’T LAW § 1.01 cmt. d (AM. LAW INST. 2015).

124. *Id.*

125. Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 597 (2016); see also Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 INT’L J. COMM. 3758 (2016) (describing Uber’s use of surveillant practices to effect “soft control” over otherwise flexible workers).

126. *Legal: Uber Community Guidelines*, UBER (last updated Apr. 6, 2017), <<https://www.uber.com/legal/community-guidelines/us-en/>> (scroll down to “Why Drivers Can Lose Access to Uber – US Only”) (stating that “[t]here are several ways we measure driver quality, with the most important being Star Ratings and Cancellation Rate”).

127. James Cook, *Uber’s Internal Charts Show How its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <<http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2>>.

128. For example, Uber driver online forums include threads on which drivers discuss whether and how they provide “extras” – water, candy, magazines, or phone chargers – for

them by temporarily blocking access to the account¹²⁹—that is, suspending them. Uber uses this technique to encourage drivers who are logged into the Uber app to accept trip requests because, as Uber puts it, “[c]onsistently accepting trip requests . . . keeps the system running smoothly.”¹³⁰ Thus, Uber expects drivers to routinely accept rides when they are logged in and has developed mechanisms to enforce that expectation.

But at the same time, drivers own their own cars, and they are not required to log in at any particular times or drive in any particular places. That is, unlike in other driver classification cases,¹³¹ there are neither Uber shifts nor pre-determined Uber routes, although the Uber app includes mapping software that suggests the most efficient route for drivers to take once they have picked up a passenger. Instead, Uber has so far attempted to motivate drivers to drive at peak times by offering “surge pricing,”¹³² as well as through messages, delivered through the Uber app, that encourage drivers to start or keep driving.¹³³ When surge pricing is in effect, drivers benefit from increased per-trip earnings; at any time, drivers can increase their fares per hour by successfully predicting where and when passengers are likely to need rides. Finally, the Uber driver agreement refers to the possibility that drivers may charge passengers a lower fare than the one designated by Uber,¹³⁴ though it is unclear how drivers would

passengers’ use. See, e.g., *Water, Candy, Phone Chargers?*, UBERPEOPLE (discussion started by Jeeves July 6, 2014), <<http://uberpeople.net/threads/water-candy-phone-chargers.803/>>. Those threads suggest that at least some Uber drivers are concerned with what we might call area standards in the sense they want to provide service that is on par with other drivers in order to ensure a high rating from passengers, but also to avoid spending unnecessarily on items to enhance passengers’ experiences.

129. *Legal: Uber Community Guidelines*, *supra* note 126 (scroll down to “Why Drivers Can Lose Access to Uber – US Only”).

130. *Legal: Uber Community Guidelines*, *supra* note 126 (scroll down to “Acceptance Rates”).

131. E.g., *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 (D.C. Cir. 2009) (describing management system in which particular drivers were responsible for completing one or more delivery routes in context of assessing whether drivers had opportunity for entrepreneurial control); *Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 436 (Ct. App. 1991) (cab drivers would “lease” cabs for ten-hour shifts, during which drivers were free to work however they saw fit).

132. Aarti Shahani, *Uber Plans to Kill Surge Pricing, Though Drivers Say it Makes Job Worth It*, NPR (May 3, 2016, 4:36 AM) <<http://www.npr.org/sections/alltechconsidered/2016/05/03/476513775/uber-plans-to-kill-surge-pricing-though-drivers-say-it-makes-job-worth-it>>.

133. Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, NY TIMES (APRIL 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drive-rs-psychological-tricks.html>.

134. Raiser, LLC, *Software License and Online Services Agreement* para 4.1 (last updated Nov. 10, 2014), <https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf> (stating that drivers “shall

actually do this; passengers enter their credit card information into the Uber app and are charged automatically, with no apparent opportunity for drivers to lower the fare.¹³⁵ Instead, drivers wanting to lower fares (for example, in order to avoid a low star rating due to an obstructed route) more commonly simply end the trip in the Uber app before they have arrived at the passenger's destination, and provide the rest of the ride for free.

As the foregoing discussion suggests, it is difficult to identify characteristics of the "typical" worker in the app-based economy. Apps like Uber tout their flexibility and emphasize that workers may work as much or as little as they like, switching between apps at will – presumably to bolster arguments that they should be free of the constraints of the employment relationship as well as other forms of regulation.¹³⁶ Still, while Uber reports that "[m]ore than half" of its drivers "work nine hours or less per week,"¹³⁷ Professor Noah Zatz has argued that "a small proportion of drivers are doing most of Uber's work."¹³⁸ As the *Restatement* reflects, some iterations of the modern employee vs. independent contractor analysis explicitly consider a workers' reliance on a particular putative employer;¹³⁹ courts and agencies applying these standards to Uber drivers may accordingly find that some drivers are more likely to be employees than others.¹⁴⁰

always have the right to . . . charge a fare that is less than the pre-arranged Fare").

135. See *Spencer v. Kalanick*, 174 F. Supp. 3d 817, 822 n.3 (S.D.N.Y. 2016) (stating that Uber CEO Travis Kalanick "contends that Uber's Driver Terms 'do provide that driver-partners have the discretion to charge less than the suggested price determined by Uber's pricing algorithm,'" but that "Plaintiffs point out . . . 'there is no mechanism by which drivers can charge anything but the App-dictated fare.'").

136. Kia Kokalitcheva, *Uber CEO: Most Drivers Work Too Little to be Considered Full Time Employees*, FORTUNE (Oct. 21, 2015), <<http://fortune.com/2015/10/21/travis-kalanick-part-time-drivers/>>.

137. *Id.*

138. Noah Zatz, *Is Uber Wagging the Dog With Its Moonlighting Drivers?*, ON LABOR (Feb. 1, 2016), <<https://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/>>.

139. See RESTATEMENT OF EMP'T LAW § 1.01 cmts. d-e, reporters' note (discussing the "economic realities" test and stating that "[a]s applied in modern FLSA decisions," relevant considerations include "the permanence of the working relationship"; quoting *Baker v. Flint Eng'g & Constr. Corp.*, 137 F.3d 1436, 1440 (10th Cir. 1989)); see also *id.* cmt. f (discussing analysis under Washington Minimum Wage Act, which requires consideration of "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself" and quoting *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 300 (Wash. 2012) (en banc)).

140. See Noah D. Zatz, *Does Work Law Have a Future if the Labor Market Does Not?*, 91 CHI-KENT L. REV. 1081, 1094 (2016) (observing that "[t]he most difficult cases for applying employment law to Uber are those in which drivers are not, in practice, especially dependent on Uber for their livelihood").

The proper classification of workers in the app-based economy has generated a significant amount of scholarly commentary. Much of this commentary – like the above discussion – is focused on Uber, presumably because of Uber’s dominance in the app-based economy. Some commentators have persuasively argued that Uber drivers qualify as employees under existing tests,¹⁴¹ but that is certainly not the only view.¹⁴² To the extent that there is a dominant view among labor and employment scholars, it seems to be that the difficulty of applying the traditional factors makes that approach wholly unsatisfactory; this group often advocates for new approaches to distinguishing independent contractors from employees,¹⁴³ or to regulating work in the app-based economy altogether.¹⁴⁴

141. See, e.g., Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify “Independent Worker” Category*, ECON. POL’Y INST. (Mar. 17, 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> (stating that “[w]e do believe for a host of reasons that Uber drivers are employees”); Benjamin Sachs, *Do We Need an “Independent Worker” Category?*, ONLABOR (Dec. 8, 2015), <<https://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/>>.

142. See, e.g., Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1, (2016) (stating that the relationship between suppliers and platforms “most likely doesn’t reach the level of the Employee-Employer tie under current laws”); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 496 (2016) (stating that “Uber and Lyft drivers are neither clearly employees nor clearly independent contractors under existing tests, as typically understood,” but arguing that as a normative matter, drivers should be deemed employees).

143. See, e.g., Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1515 (2016) (arguing that “existing laws fail to provide adequate guidance regarding the distinction between independent contractors and employees, especially when applied to the hybrid working arrangements common in a modern economy,” and arguing that “the classification of workers as independent contractors or employees should be shaped by an overarching inquiry: How much flexibility do individuals have in determining the time, place, price, manner, and frequency of the work they perform?”); Jeremias Prassi & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms and Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL’Y J. 619, 620 (2016) (“Instead of dwelling on the well-rehearsed debates as to employee or independent contractor status . . . by adopting a functional concept of the employer, we suggest, the courts might be able to sidestep the current impasse and allocate rights and responsibilities in a flexible, yet coherent manner.”); Robert Sprague, *Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. LAB. & EMP. L. 53, 54 (2015) (arguing that “current classification tests . . . fail when applied to new, sharing-economy enterprises,” and instead advocating that “analysis of work in the sharing economy should turn from the worker’s dependence on the company to the company’s dependence on the worker”).

144. See, e.g., HARRIS & KREUGER, *supra* note 113. But see Miriam A. Cherry & Antonio Aloisi, “Dependent Contractors” in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635 (2017) (discussing the results of the creation of a category of worker between independent contractor and employee in several other countries).

B. Court & Agency Decisions on App-Based Economy Worker Classification

Most courts and agencies have yet to reach final decisions on the merits of whether workers in the app-based economy are employees or independent contractors, and even conclusive agency decisions concerning individual workers are not necessarily generalizable to other workers. Moreover, as of the date this article went to print, the authors were not aware of any U.S. state or federal decisions regarding app-based worker classification at the appellate court level. Thus, it is too early to say whether or when a consensus will emerge regarding the classification of these workers. Moreover, app-based economy companies are constantly adjusting their business models in response to legal developments, so their methods of workforce management are moving targets. Accordingly, this Section has a modest goal: it describes the court and agency decisions that have addressed the status of app-based economy workers,¹⁴⁵ highlighting their approaches to app-based worker classification. As will become apparent, nearly all of these decisions to date concern for-hire drivers.¹⁴⁶

1. Court Decisions

To our knowledge, there are not yet any U.S. court decisions involving the alleged misclassification of app-based economy workers that conclusively determine their status.¹⁴⁷ Among other barriers to

145. This Section does not discuss other classification cases in which, at least as of the date of publication, their respective courts have not reached classification questions at even the summary judgment stage. Some of these cases settled before a court could issue a decision addressing the merits of the classification question; in others, the parties are litigating other issues, including motions to compel arbitration. Moreover, it does not discuss cases that have not resulted in decisions beyond the motion to dismiss stage, beyond noting their existence. For an excellent and comprehensive overview of other app-based economy cases, see Cherry, *supra* note 125, at 583.

146. One quasi-exception is *Tan v. Grubhub, Inc.*, concerning alleged employees of a food-delivery service. The court denied the defendants' motions to dismiss, concluding that the plaintiff adequately alleged an employment relationship, and set the case for trial in June 2017. *Tan v. Grubhub, Inc.*, 171 F. Supp. 3d 998, 1004 (N.D. Cal. 2016) (noting that defendants did not dispute that plaintiffs adequately pled misclassification); Order re: Defendant's Motion to Dismiss Second Amended Complaint, *Tan v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2016 WL 3743365 (N.D. Cal. July 13, 2016); Pretrial Order No. 1, No. 15-cv-05128-JSC (N.D. Cal. Sept. 16, 2016), available at <https://scholar.google.com/scholar_case?case=9077343749616302038q=tan+v.+grubhub&hl=en&as_sdt=6,26&as_vis=1>.

147. An English employment tribunal has conclusively determined that at least when the app is turned on, Uber drivers are employees of Uber. *Aslam v. Uber* [2016] Case Nos. 2202550/2015 & Others (Emp. Trib.), available at <<https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>>.

judicial resolution, the ubiquity of arbitration clauses that apply to such workers mean that misclassification claims filed in courts tend to get bogged down in motions to compel arbitration, which are frequently granted.¹⁴⁸

Nonetheless, the Northern District of California has held that misclassification claims brought by Uber and Lyft drivers under California law were at least sufficient to survive summary judgment, and appropriate for resolution by a jury.¹⁴⁹ On the same day, two judges of that court issued decisions denying the companies' respective motions for summary judgment;¹⁵⁰ these two cases are also the furthest developed of the cases raising app-based for-hire drivers' employment status, and therefore the primary cases discussed in this Subsection. However, many other misclassification cases exist, and they fall into two categories: first, cases involving workers' eligibility for benefits and protections that hinge on employee status;¹⁵¹ and second, cases in which customers seek to impose *respondeat superior* liability on companies as a result of drivers' misconduct.¹⁵² As the Working Group observed in 2009, it is not necessarily the case that the same considerations should govern both groups of cases: to the contrary, as the Working Group stated, *respondeat superior* principles are "not the best way to go about defining 'employee' in any general sense."¹⁵³ At a minimum, the two sets of cases involve different policy

148. See, e.g., *Mohamed v. Uber Techs., Inc.*, 863 F.3d 1102, 1112-14 (9th Cir. 2016) (holding Uber's arbitration agreement is enforceable as to most claims in case alleging violation of, *inter alia*, the Fair Credit Reporting Act).

149. California law contains a presumption of employee status, and uses a multi-factor test emphasizing the putative employer's right to control the details of the putative employee's work. *S.G. Borello & Sons, Inc., v. Dep't of Indus. Relations*, 769 P.2d 399, 406-07 (Cal. 1989).

150. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

151. See, e.g., *Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998 (N.D. Cal. 2016); *Razak v. Uber Techs., Inc.*, No. 16-573, 2016 WL 5874822 (E.D. Pa. Oct. 7, 2016) (holding that plaintiffs adequately pleaded that they were misclassified as independent contractors in FLSA case); *Alatraqchi v. Uber Tech., Inc.*, No. C-13-03156, 2013 WL 4517756 (N.D. Cal. Aug. 22, 2013) (dismissing complaint without prejudice "so that Plaintiff may clearly . . . allege the nature of his relationship with Uber," and declining to rule as a matter of law that Uber drivers are independent contractors).

152. See, e.g., *Doe v. Uber Tech., Inc.*, No. 15-cv-04670-SI, 2016 WL 2348296 (N.D. Cal. May 4, 2016) (concluding, at motion to dismiss stage, that plaintiffs alleging assault by Uber drivers "have alleged sufficient facts to claim plausibly that an employment relationship exists"); *Search v. Uber Tech., Inc.*, 128 F. Supp. 3d 222 (D.D.C. 2015) (declining to dismiss claim involving plaintiff who was stabbed by Uber driver, because "a reasonable factfinder could conclude that Uber exercised control over [driver] in a manner evincing an employer-employee relationship" (alteration added)).

153. *Working Group, supra* note 1, at 47 (contrasting the *Restatement's* reliance on *Restatement (Second) of Agency* § 220, on "Definition of Servant," with *Restatement (Third) of Agency* § 7.07, on "Employee Acting Within Scope of Employment" for purposes of *respondeat*

considerations; for example, only the second group of cases requires factfinders and policymakers to balance the interests and expectations of third-party plaintiffs.

The *Cotter v. Lyft* court began its ruling by remarking on the difficulty of the ultimate classification question, noting that the drivers “don’t seem much like employees,” but also “don’t seem much like independent contractors either.”¹⁵⁴ This observation seemingly reflected the court’s perception that it was difficult to square Lyft drivers with the court’s “gut instincts” regarding either employees or independent contractors, rather than dissatisfaction with the governing legal test. In discussing those expectations, the court began by discussing the ultimate purpose of classifying workers as either independent contractors or employees: “[i]ndependent contractors do not receive [employment] protections because they generally are in a far more advantageous positions” than employees.¹⁵⁵ Or, per a source that the *Cotter* court quoted at some length, “a true contractor does not suffer the effects of unequal bargaining power to any degree comparable to that suffered by employees.”¹⁵⁶ In our view, this is a useful frame to guide decisionmaking in this new and challenging context, and the *Restatement* missed an opportunity by failing to adopt a similar framing of the purpose of employee status. To be sure, similar considerations are at times implicit in the *Restatement*, but they should have been expanded upon and made more prominent as drivers of the various multi-factor tests of employment status.¹⁵⁷

In both *O’Connor* and *Cotter*, the companies unsuccessfully pressed the argument that the drivers could not possibly qualify as employees, because they did not even perform services for the companies.¹⁵⁸ The *Cotter* court called this argument “obviously

superior).

154. *Cotter*, 60 F. Supp. 3d at 1069.

155. *Id.* at 1074.

156. *Id.* (quoting Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 130 (1997)).

157. *E.g.*, RESTATEMENT OF EMP’T LAW § 1.01 cmts. d, e (AM. LAW INST. 2015) (observing that where an employer exercises the “power” to “control the manner and means by which an individual renders services,” the employee “generally cannot further his or her economic interest”; and that “independent businessperson-service providers are in a different economic position from employee-service providers”).

158. *Cotter*, 60 F. Supp. 3d at 1078; *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015).

wrong.”¹⁵⁹ For its part, the *O’Connor* court gave the argument more detailed consideration, but still rejected it based on “logic and common sense,” as well as caselaw.¹⁶⁰ Further, both courts observed that the respective companies marketed themselves as ride or transportation services.¹⁶¹ This conclusion – and the ease and certainty with which both courts reached it – is significant, both for future cases in which app-based economy companies make similar arguments, and because California law contains a presumption that workers who perform services for companies are employees of those companies. Thus, in the home of the app-based economy, workers will often benefit from presumptive employee status under state law. Moreover, the question of whether app-based economy workers and companies are in the same business is relevant to workers’ classifications under many statutes and in many jurisdictions; these cases should be persuasive authority, and future *Restatements* should endorse their approach.

Turning to drivers’ working conditions, the *Cotter* court focused primarily on the ways in which Lyft controlled drivers’ service, including by issuing a pamphlet of “rules to live by,” which included such minutiae as “[g]reet every passenger with a big smile and a fist bump,” and “[k]eep your seats and truck clear for use by your passengers.”¹⁶² These and other instructions to Lyft drivers were more comprehensive than those issued by Uber to its drivers; still, the *O’Connor* court observed that Uber sought to control behavior such as “whether drivers ‘have an umbrella in [their] car for clients.’”¹⁶³ While the *Cotter* court seemed fairly certain that the facts in the Lyft case showed that the extent of control that the company exercised over drivers “tends to cut” in favor of employee status,¹⁶⁴ the *O’Connor* court was more circumspect, leaving the extent of Uber’s control over drivers for the factfinder to consider at trial.¹⁶⁵ Nonetheless, the *O’Connor* court noted that Uber’s “level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the

159. *Cotter*, 60 F. Supp. 3d at 1078.

160. *O’Connor*, 82 F. Supp. 3d at 1143.

161. *Cotter*, 60 F. Supp. 3d at 1078; *O’Connor*, 82 F. Supp. 3d at 1141-42.

162. *Cotter*, 60 F. Supp. 3d at 1072.

163. *O’Connor*, 82 F. Supp. 3d at 1149 (internal quotation marks and alteration in original).

164. *Cotter*, 60 F. Supp. 3d at 1079.

165. *O’Connor*, 82 F. Supp. 3d at 1151.

‘manner and means’ of its drivers’ performance.’¹⁶⁶ Finally, both the Lyft and Uber courts concluded that other factors relating to employee status were more mixed; in the companies’ favors, the courts pointed to the facts that drivers use their own cars and set their own routes and schedules.¹⁶⁷

Ultimately, these cases should give app-based economy companies pause. They suggest that those companies’ algorithmically based management systems are – at least from a legal standpoint – less “disruptive” of traditional employment relationships than the companies have claimed. However, as the next Subsection discusses, their track record before state agencies is more mixed.

2. Agency Decisions and Guidance

Various state agencies have also had the opportunity to consider whether app-based economy workers are employees. For example, individual Uber drivers have sought unemployment benefits in a list of states, requiring states to decide whether they are employees as a threshold matter. While many of these decisions are not public, Uber reports that it has prevailed in cases involving individual drivers in eight states: Georgia, Pennsylvania, Colorado, Indiana, Texas, New York, Illinois, and California.¹⁶⁸ In addition, a UK employment tribunal recently issued a detailed merits decision concluding that Uber drivers were employees entitled to receive minimum wage and paid leave.¹⁶⁹ That tribunal first observed that it is “unreal to deny that Uber is in business as a supplier of transportation services.”¹⁷⁰ It went on to write that:

the notion that Uber in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous. In each case, the “business” consists of a man with a car seeking to make a living by driving it. [Uber’s attorney] spoke of Uber assisting the drivers to “grow” their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Nor can

166. *Id.* (citing MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan ed., 1979)).

167. *Id.* at 1153; *Cotter*, 60 F. Supp. at 1081.

168. Heather Somerville, *Former Uber Driver Was an Employee, Rules California Department*, REUTERS (Sept. 8, 2016, 11:44 PM), <<http://www.reuters.com/article/uber-tech-california-ruling-idUSL1N11F1KT20150910>>.

169. *Aslam v Uber*, [2016] Case Nos. 2202550/2015 & Others (Emp. Trib.), available at <<https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>>.

170. *Id.* para. 88.

Uber's function sensibly be characterized as supplying drivers with "leads." That suggests that the driver is put into contact with a possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree to a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms.¹⁷¹

Reaching the opposite conclusion, the Florida Department of Economic Opportunity held that an Uber driver was an independent contractor who was therefore ineligible for Florida's "reemployment assistance" benefit.¹⁷² Key to the opinion was the Department's conclusion that Uber was a "middleman"; in the Department's words, "Uber is no more an employer to drivers than is an art gallery to artists."¹⁷³ In our view, this analogy is beside the point; presumably, an art gallery could employ an artist or contract with her, depending on how their relationship was structured. Moreover, the decision applied the *Restatement of Agency* factors¹⁷⁴ in a manner inconsistent with the *Restatement of Employment Law*; specifically, the Department first looked to "the agreement between the parties," crediting the parties' own characterization of their relationship even though the Uber driver agreement was an adhesion contract. We think Florida's approach is badly flawed because the key consideration described by the *Cotter* court – whether a driver is or is not in an "advantageous position" vis-à-vis his putative employer – will also often determine whether that driver is able to negotiate the terms of his work, including how that work is described. In other words, work contracts describing the parties' arrangements as that of "independent contractors" are likely to capture both arrangements where both sides have meaningful bargaining power, and also those where the opposite is true.

In any event, with the likely exception of the Florida decision,¹⁷⁵ the decisions rejecting Uber drivers' unemployment applications may not be generalizable to all drivers in the relevant states, a point that is

171. *Id.* para. 90 (footnotes omitted).

172. *Raiser LLC v. Fla. Dep't of Econ. Opportunity, Protest of Liability Nos. 0026 2825 90-02, 0026 2834 68-02, & 0026 2850 33-02* (Exec. Dir. Dec. 3, 2015), available at <<http://miamiherald.typepad.com/files/uber-final-order-12-3-15.pdf>>, *aff'd on review sub nom.*, *McGillis v. Dep't of Econ. Opportunity, No. 3D15-2758* (Fla. Dist. Ct. App. Feb. 1, 2017), available at <<https://casetext.com/case/mcgillis-v-dept-of-econ-opportunity>>.

173. *Id.* at 2. The *O'Connor* court specifically rejected the "middleman" analogy. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1143 n.13 (N.D. Cal. 2015).

174. *Raiser LLC, Protest of Liability Nos. 0026 2825 90-02, 0026 2834 68-02, & 0026 2850 33-02*, at 7 (quoting *Keith v. News & Sun Sentinel*, 667 So. 2d 167 (Fla. 1995)).

175. Although the Florida decision on its face concerns only three Uber drivers, it relies on facts that seem to us to be applicable to all Uber drivers.

underscored by the fact that two of those states – New York and California – have also ruled that other Uber drivers are employees who qualify for unemployment or other benefits.¹⁷⁶ In addition, California has generated an “Employment Relationship Questionnaire” tailored to Uber drivers, which prompts drivers to answer a list of eighty-nine separate questions related to their relationship with Uber.¹⁷⁷ Alaska and Oregon officials have also signaled that they regard Uber drivers to be employees under their respective state laws; a commissioner of the Oregon Bureau of Labor & Industries issued a non-binding opinion indicating that under Oregon’s “economic realities” test, “Uber drivers are employees.”¹⁷⁸ And Alaska settled a workers’ compensation investigation with Uber on terms that require the company to pay nearly \$80,000 to the state and agree not to contract with drivers in the state again, unless Alaska law is changed to specifically exempt Uber from workers’ compensation requirements.¹⁷⁹

This discussion has sought to outline some of the key questions in determining whether app-based economy workers are employees or independent contractors – few of which are discussed in necessary detail in the *Restatement*. This issue is sure to attract more focused attention from courts, agencies, and legislatures in the coming years, including from the NLRB, before which is pending several complaints alleging that Uber drivers are employees. The NLRB’s analysis is particularly significant in light of the Board’s rule that employees cannot be required to sacrifice their right to address their employment-related disputes on a class basis in either arbitration or litigation;¹⁸⁰ this rule could prompt merits decisions in other jurisdictions by invalidating near-ubiquitous app-based economy

176. Doe v. Uber, No. 5371509 (Cal. Unemp’t Ins. Appeals Bd. June 1, 2016); Uber Tech., Inc. v. Berwick, No. 11-46739 EK (Cal. Labor Comm’r June 3, 2015); Noam Scheiber, *Uber Drivers Ruled Eligible for Jobless Payments in New York State*, N.Y. TIMES (Oct. 12, 2016), <http://www.nytimes.com/2016/10/13/business/state-rules-2-former-uber-drivers-eligible-for-jobless-payments.html?_r=1>.

177. Employment Relationship Questionnaire, available at <<https://www.scribd.com/doc/302246376/Uber-employment-Relationship-Questionnaire-1>>.

178. Advisory Opinion of the Comm’r of the Bureau of Labor & Indus. of the State of Ore., Regarding the Employment Status of Uber Drivers (Oct. 14, 2015), available at <<https://www.oregon.gov/boli/SiteAssets/pages/press/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf>>.

179. In the Matter of the Petition for a Finding of the Failure to Insure Workers’ Compensation Liability, And Assessment of a Civil Penalty Against, Uber Technologies, Inc., and Rasier LLC, Respondents, No. 15-0093, 2015 WL 4699265 (Alaska Workers Comp. Bd. July 31, 2015).

180. Murphy Oil USA, Inc., 360 N.L.R.B. 619 (2014).

individual arbitration agreements that will otherwise stymie the generation of precedent in this area. We think the *Restatement* offers some useful guidance to decision-makers grappling with these issues, but that it did not do all that it could to promote consistency and justice. In particular, a clearly articulated statement regarding the various purposes of the employee/independent contractor dichotomy in different contexts would have been useful to decision makers, and would have promoted justice by making it more difficult for enterprises to evade employer status by offloading supervision tasks onto customers and control onto algorithms.

V. UNRESOLVED ISSUES

In its earlier work, the Working Group identified several other areas as to which it urged that the *Restatement* should be changed or clarified. While some of those suggestions were taken, others were not. Significantly, many of our remaining concerns arise with respect to the *Restatement's* descriptions of the reasons for various principles; in our view, some of these descriptions are under-theorized, and therefore miss an opportunity to guide the development of common law by providing a robust conceptual framework. As a complement to this discussion, we encourage readers to revisit the Working Group's earlier article.

I. Volunteers. The Working Group critiqued the draft *Restatement's* assertion that, at least for purposes of certain employment protections and benefits, volunteers are not employees because they “have not made the same kind of commitment to the service recipient or the same sort of investment in their relationship as do employees.”¹⁸¹ As the Working Group put it, this assertion is problematic for two reasons: first, “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”; and second, many volunteers provide services to organizations for decades precisely because of their commitment to the service recipient.¹⁸² One can imagine employees (such as social workers) who at least sometimes perform work similar to the work done by some volunteers out of similar ideological commitments; conversely, one can equally easily imagine employees

181. *Working Group, supra* note 1, at 50-51; see also RESTATEMENT OF EMP'T LAW § 1.02 cmt. a (AM. LAW INST. 2015).

182. *Working Group, supra* note 1, at 50-51.

who have only a tenuous commitment to a short-term job. Thus, our view is that a new theoretical basis is needed to distinguish employees from volunteers that avoids resting on either ideological commitment to the work, or on the circular proposition that volunteers are unpaid or do not expect payment.

2. *Prisoners*. Similarly, the Working Group suggested that the *Restatement* should give a more comprehensive accounting of both principles and decisions underlying the treatment of prison labor.¹⁸³ However, this discussion remains scant. For example, the *Restatement* asserts that “[p]resumably, extending employment laws to work done under a prison’s control pursuant to a penal sentence could threaten prison discipline and conflict with the imposition of punishment.”¹⁸⁴ But it is not obvious why this is true with respect to either employment benefits or protections, as the Working Group explained; to give one obvious counter-example, a prison policy of assigning prisoners of only one race to jobs or paying different rates to prisoners of different races would likely exacerbate prison conflict, in addition to violating the Constitution.¹⁸⁵ At minimum, we think prison systems should bear the burden of justifying to a court why they should be exempt from particular employment obligations that they would otherwise owe to prisoner workers, and that the *Restatement* erred in simply assuming that the justification for such exemptions exist.¹⁸⁶ Finally, we note that the *Restatement* does little to explore the effects of prison labor on the free labor market.¹⁸⁷

3. *Controlling Owners*. As the Working Group pointed out, the black-letter rule does not accurately reflect the law as explained in section 1.03 of the *Restatement*. Specifically, the black letter rule suggests that part ownership in itself means that the putative employee is a controlling owner. Yet the subsequent text makes clear

183. *Id.* at 60-63.

184. RESTATEMENT OF EMP’T LAW § 1.02 cmt. c, reporters’ note.

185. See *Johnson v. California*, 543 U.S. 499, 507-08 (2005) (holding that strict scrutiny applies to racial classifications of prisoners).

186. While the procedural mechanisms through which prisoners would enforce their employment rights are beyond the scope of this article, we observe that the conflict and disorder that the *Restatement* predicts could also be mediated by the effects of prison grievance systems and limits on prisoner access to courts. See generally 42 U.S.C. § 1997e (2012) (Prison Litigation Reform Act).

187. See, e.g., NOAH ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR & EMP’T, UCLA LABOR CTR., A NEW WAY OF LIFE REENTRY PROJECT, RESEARCH BRIEF: GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (2016), <<http://www.labor.ucla.edu/downloads/get-to-work-or-go-to-jail/>>; Noah Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016).

that that, in fact, the worker must actually exercise control over “significant economic and operational decisions.”¹⁸⁸ Given the risk that a harried lawyer or judge may fail to read the commentary as closely as would be ideal, the mismatch between that commentary and the black-letter statement is unfortunate.

VI. CONCLUSION

In an area as fast moving as employment law, it was nearly inevitable that events would begin to overtake the *Restatement* as soon as it hit shelves. This article has discussed key areas in which subsequent events have indeed called into question the adequacy of the *Restatement's* approach to aspects of defining employment relationships. In our view, this lack of durability is in large part attributable to the *Restatement's* failure to contextualize the rules and standards it articulates, which in turn makes it more difficult for decision-makers to apply them in new situations. Thus, our recommendation is that decision-makers grappling with questions of whether an employment relationship exists begin with that fundamental question.

188. RESTATEMENT OF EMP'T LAW § 1.03 cmt. a.

