Rethinking the Worker Classification Test:

Employees, Entrepreneurship, and Empowerment

GRIFFIN TORONJO PIVATEAU[1]

1. J.D., Assistant Professor of Legal Studies, Spears School of Business, Oklahoma State University. I wish to thank Casey Robison Gfeller for her assistance in the research of the initial draft of this Article.

I. INTRODUCTION

The structure of the American workplace depends on the ability to distinguish between employees and independent contractors.[2] Most labor and employment laws apply only to employees. Unfortunately, while the law recognizes a difference between the types of workers, it provides little to guide employers in making the proper classification. The agreement between employer and worker, which theoretically would be the touchstone of determining status, is of little importance, as an employer and worker cannot simply enter into an agreement on employee status.[3] Moreover, statutory definitions of employee status are of limited utility.[4] Without a reliable means to define an employee, government agencies and courts use different legal tests designed to answer the question of worker status.

The legal tests to determine worker status are confusing, yield inconsistent results, and are not suited to the evolving employment relationship.[5] The tests differ between agencies, between courts, and between contexts. Traditionally, courts determined worker status by examining the amount of control exerted over the putative employee by the employer. This common law, or right of control, test focuses on the right of the employer to control the work of the worker.[6] The test dictates that the more control exerted by the employer over the work of the worker, the more likely it is that the worker will be considered an employee. Conversely, the less control exert-

2. Craig v. FedEx Ground Package Sys., 686 F.3d 423, 430 (7th Cir. 2012).

3. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 608 (2012).

4. *Id.* at 612-13.

5. *See generally* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001) ("[T]he trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships.").

6. *See, e.g.*, Nat'l Labor Relations Bd. v. Servette Inc., 313 F.2d 67, 71 (9th Cir. 2012).

ed, the more likely it is that the worker will be considered an independent contractor.

The lack of an adequate definition of employee presents difficulties for many parties. A worker may be confused as to her legal rights and obligations: whether to pay quarterly taxes, whether to make a workers' compensation claim, or whether to organize or join a union. Administrative agencies must wrestle with the question of whether they are permitted to regulate the relationship between employer and worker, as most employment regulations apply only to employees. Courts must question their jurisdiction, as statutes and common law often limit the power of the court to employees only. But, perhaps most importantly, the employer seeking assistance on proper classification of its employees will find little guidance in statutory definitions and the multitude of tests.

The National Labor Relations Board (NLRB) and courts construing NLRB decisions use the right to control test to determine whether workers are covered by the National Labor Relations Act (NLRA).[7] This test, often referred to as the common law agency test, has multiple components. While the right to control dominates, the test involves a number of other factors. None of these additional factors control, but all of them may be considered. One of these additional factors, the presence of opportunity for entrepreneurial profit, recently gained more attention. In *FedEx Home Delivery v. NLRB*,[8] the court faced the question of whether drivers working for a delivery service were employees or independent contractors. The D.C. Circuit Court, while retaining all of the common law agency factors, shifted focus away from the control inquiry. The court found that the most important factor in determining worker status was whether the putative independent contractors have "significant entrepreneurial opportunity for gain or loss."[9] Entrepreneurship, according to the court, provides the best prism with which to view the employer-worker relationship. Entrepreneurial risk and opportunity more accurately reflect the difference between employee and independent contractor.[10] Entrepreneurial risks and opportunities should be the "animating principle" by which to evaluate the common law factors.[11]

In this Article, I explore the expanded use of the entrepreneurial opportunity factor. In doing so, I advocate turning the right of control test on its head. I propose a test focused on worker opportunity rather than employer control. This proposed employee-centric classification test provides

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7. 29 U.S.C. §§ 151-169 (2006).

8. FedEx Home Delivery v. Nat'l Labor Relations Bd., 563 F.3d 492 (D.C. Cir. 2009).

9. *Id.* at 497 (quoting Corp. Express Delivery Sys., 332 N.L.R.B. No. 144, 6 (Dec. 19, 2000)).

10. *Id.*

11. *Id.*

that only those workers who enjoy genuine entrepreneurial opportunity will be considered independent contractors. Those workers who are not given the opportunity will be labeled employees.

By focusing on the presence of genuine entrepreneurial opportunity, the test shifts from the amount of employer control to the amount of worker opportunity. Moving the emphasis away from employer control to employee opportunity empowers workers. I discuss this change in greater detail below, but essentially an employer wishing to classify its workers as contractors, rather than employees, will necessarily have to cede opportunity to its workers.

Obviously, critics will have genuine concerns. Employers could manipulate factors to make it appear as if entrepreneurial opportunity exists when in fact it does not. In doing so, employers could arbitrarily designate low-level employees as independent contractors, costing the worker rights and benefits. The prospect of increased employee participation raises the question of whether, by giving employees a role in classification, the employees become vulnerable to exploitation by the employer.

I address these concerns by focusing on the presence of genuine entrepreneurial opportunity. Theoretical entrepreneurial opportunity, while it may be important, will not be enough to make a worker an independent contractor. Instead, workers must actually do entrepreneurship to be classified as independent contractors. These questions arise—how is it that one can determine the presence of actual entrepreneurial opportunity? What exactly is entrepreneurship?

Fortunately, a readily available reference exists. The study of entrepreneurship exists as a separate academic discipline.[12] Entrepreneurship scholars have spent much time studying, debating, and defining what is and is not entrepreneurship. In this Article, I rely on these studies to rethink the worker classification test. To determine the presence of entrepreneurial opportunity, I look to the study of the entrepreneurship process, examine the various definitions of entrepreneurship, and create a workable legal test.

To ensure proper classification, courts and government agencies may not rely on bare-boned allegations of opportunity, but must instead employ an entrepreneurship test to define those who are independent contractors and those who are not. This proposed test requires employers to make hard choices about the freedom, as well as the potential rewards, it provides to its workers. At a minimum, an employer who designates workers as independent contractors must cede control. Moreover, the employer must also accept the possibility that workers will achieve larger rewards, monetary and otherwise, than they would otherwise have achieved as employees.

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12. *See generally* Christine Volkmann, *Entrepreneurship Studies—An Ascending Academic Discipline in the Twenty-First Century*, 29 HIGHER EDUC. IN EUR. 177 (2004).

In Part II of this Article, I provide a brief review of the problems caused by the lack of a proper worker classification test. In Part III, I summarize current worker classification tests to determine their potential as alternatives to the right to control test. In Part IV, I sift through the many definitions of entrepreneurship. In Part V, I provide my thoughts on the reformation of the worker classification test. In Part VI, I offer my conclusions.

II. THE PROBLEM OF WORKER CLASSIFICATION

A. THE CONSEQUENCES OF EMPLOYEE MISCLASSIFICATION

Numerous federal statutes apply only to employees. The NLRA,[13] the Fair Labor Standards Act (FLSA),[14] the Employee Retirement Income Security Act,[15] the Internal Revenue Code,[16] the Family and Medical Leave Act,[17] and the Social Security Act[18] cover only employees. Any party seeking the protection of, or asserting the jurisdiction of, these acts must be able to establish employee status.[19] The vast complicated structure of employment regulation applies only to those workers classified as employees. Those classified as independent contractors fall outside the scope of most state and federal employment statutes.[20]

State and federal agencies consider employee misclassification to be a significant problem. Penalties for employee misclassification are high and likely to grow even more severe. In fiscal year 2013, the U.S. Department of Labor (DOL) increased its "support for agencies that protect workers' wages, benefits, health, and safety and invests in preventing and detecting the inappropriate misclassification of employees as independent contractors."[21] This follows the authorization of twenty-five million dollars to the DOL in fiscal year 2011 to target employee misclassification by hiring "90 additional investigators and 10 additional lawyers to pursue 'a joint pro-

13. 29 U.S.C. §§ 151-169 (2006).
14. 29 U.S.C. §§ 201-219 (2006).
15. 29 U.S.C. §§ 1001-1003 (2006).
16. 26 U.S.C. §§ 1-9602 (2006).
17. 29 U.S.C. §§ 2601-2654 (2006).
18. 42 U.S.C. §§ 401-434 (2006).
19. *See* Allan L. Bioff & Robert E. Paul, *Employee and Independent Contractors: Legal Implications of Conversion from One to the Other*, 4 HASTINGS COMM. & ENT. L.J. 649 (1982).
20. 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, 76 (1997).
21. U.S. DEP'T OF LABOR, THE BUDGET FOR FISCAL YEAR 2013, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/labor.pdf.

posal that eliminates incentives in law for employers to misclassify their employees,' and 'enhances the ability of both agencies to penalize employers who misclassify.'"[22]

The DOL has also created a "Misclassification Initiative"[23] in which it has entered into memorandums of understanding with numerous states to coordinate enforcement efforts and share information between state and federal agencies about non-compliant companies. Since September 11, 2011, the DOL has executed agreements with fourteen states to address the problem of misclassification.[24]

The Internal Revenue Service (IRS) has also actively pursued what it estimates as billions of dollars in lost tax revenues due to misclassification of independent contractors. The IRS has announced agreements with a number of state revenue commissioners and workforce agencies to share information and enforcement techniques about employers suspected of misclassifying employees. The IRS has entered into agreements with thirty-four states to share information and enforcement techniques.[25]

In August 2009, the Government Accountability Office (GAO) issued a report on employee misclassification.[26] According to the report, in fiscal year 2007, states discovered numerous workers, at least 150,000, who may not have received protections and benefits to which they were entitled because their employers misclassified them as independent contractors and not employees.[27] According to the Bureau of Labor Statistics, approximately 10.3 million workers, or 7.4% of the employed workforce, were classified as independent contractors in the United States in 2005, although it is not clear how many of these workers were misclassified.[28]

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22. Richard Reibstein et al., *Independent Contractor Misclassification: How Companies Can Minimize the Risks*, PEPPER HAMILTON LLP (Apr. 26, 2010), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=1769 (quoting U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FY 2011 CONGRESSIONAL BUDGET JUSTIFICATION 23; U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FY 2011 DEPARTMENT OF LABOR BUDGET IN BRIEF 44).

23. *See Employee Misclassification as Independent Contractors*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/workers/misclassification/ (last visited Dec. 21, 2013).

24. *US Department of Labor, Iowa Workforce Development Sign Agreement to Reduce Misclassification of Employees as Independent Contractors*, U.S. DEPARTMENT OF LABOR (Jan. 17, 2013), http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20130117.xml.

25. *State and Federal Regulatory and Enforcement Initiatives*, PEPPER HAMILTON LLP, http://www.pepperlaw.com/pracarea/ICC/ICC_FandS_RegandEnforceInitiatives.aspx (last visited Dec. 13, 2013).

26. U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (Aug. 2009), *available at* http://www.gao.gov/assets/300/293679.pdf.

27. *Id.* at 1.

28. *Id.*

States too have targeted worker misclassification. In just the last two years, eleven states enacted laws designed to limit or discourage the use of independent contractors: California, Connecticut, Florida, Kansas, Maine, Nebraska, New York, Pennsylvania, Utah, Vermont, and Wisconsin. Ten states had passed laws of a similar nature in the three years prior to 2010, bringing the total number of states to twenty-one that have targeted independent contractor misclassification. In addition, numerous state legislatures have proposed bills intended to limit the use of independent contractors or make misclassification more costly.[29] Many of these laws provide for both civil and criminal penalties. For instance, the California statute prohibits "willful misclassification," creates heavy penalties for violations, and even calls for the imposition of "joint liability on any outside non-legal consultant or other person that knowingly advises an employer to treat an individual as an independent contractor to avoid employee status if an individual is found not to be an independent contractor."[30]

B. WHY DO EMPLOYERS MISCLASSIFY?

First, the obvious: worker misclassification occurs because numerous financial incentives weigh on the side of independent contractor status. An employer has a strong monetary "incentive[] to classify workers as independent contractors" rather than as employees.[31] At a minimum, an employer who uses independent contractors in lieu of employees is no longer responsible for wages.[32] Furthermore, an employer who classifies his workers not as employees but as self-employed entrepreneurs may avoid costly regulations, the payment of fees and expenses, the costs of withholding—including the necessary administrative staff to oversee the withholding, the payment of benefits, and the funding of retirement plans.[33] The costs of employees are high. In March 2013, the Bureau of Labor Statistics estimat-

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29. *See, e.g.*, RICHARD CORDRAY, OHIO ATTORNEY GEN.,*Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (Feb. 18, 2009), *available at* http://www.faircontracting.org/PDFs/prevailing_wages/Ohio_on_Misclassification.pdf.

30. Richard Reibstein et al., *Independent Contractor Misclassification Update 2012: How Companies Can Minimize the Risks*, PEPPER HAMILTON LLP (May 14, 2012), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2365 (internal quotations omitted).

31. Burdick, *supra* note 20, at 76.

32. *See* Micah Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313 (2011).

33. *Id.*

ed that: "[p]rivate industry employers spent an average of $28.89 per hour worked for employee compensation in December 2012."[34]

Moreover, private industry employer costs for legally required benefits (Social Security, Medicare, unemployment insurance, and workers' compensation) averaged $2.37 per hour worked (8.2% of total compensation), insurance benefits (life, health, and disability insurance) averaged $2.34 (8.1%), paid leave (vacation, holiday, sick leave, and personal leave) averaged $1.97 (6.8%), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses) averaged $0.82 (2.9%).[35]

Some have estimated that employers can realize savings of up to 30% by avoiding "payroll taxes, unemployment insurance, workers' compensation and disability, as well as benefits that include pensions, sick days, health insurance, and vacation time."[36] An employer who relies on independent contractors can avoid numerous minimum wage and overtime issues.[37]

Employers are required to withhold income and employment tax, as well as state income tax from payments to employees.[38] The employer must also pay part of the employment tax burden. In contrast, payments to independent contractors are done via a gross check with no withholding. Employers simply report the payment (to the independent contractor and to the IRS) on Form 1099.[39]

Another area that an employer will consider involves the question of vicarious liability, i.e., liability to third parties for the torts of their employees. Most states hold an employer liable for the negligent acts of its employees, as long as the acts were committed while the employee was in the course and scope of his employment.[40] Thus, an employee who harms an-

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34. *Employer Costs for Employee Compensation, December 2012*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR (Mar. 21, 2013), http://www.bls.gov/opub/ted/2013/ted_20130321.htm. The report stated further: "Wages and salaries averaged $20.32 per hour worked and accounted for 70.3 percent of these costs, while benefits averaged $8.57 and accounted for the remaining 29.7 percent …[o]f total benefit costs, private industry employer costs for paid leave benefits in December 2012 averaged $1.98 per hour worked, or 6.9 percent of the total compensation …[i]ncluded in this amount were employer costs for vacations, holidays, sick leave, and personal leave." *Id.*

35. *Id.*

36. Jennn Fusion, *Cost of an Employee vs. Independent Contractor*, HOUSTON CHRON., http://smallbusiness.chron.com/costs-employee-vs-independent-contractor-1077.html (last visited Dec. 21, 2013).

37. *Id.*

38. *See generally* DEP'T OF TREASURY, INTERNAL REVENUE SERV., (CIRCULAR E), EMPLOYER'S TAX GUIDE, 2013 (Feb. 5, 2013), *available at* http://www.irs.gov/pub/irs-pdf/p15.pdf.

39. *Id.*

40. An employer may be held liable for the tortious acts of an employee if the acts are within the course and scope of employment. *See, e.g.*, Baptist Mem'l Hosp. Sys. v.

other in an auto accident, even if the employer was not at fault, can create liability on the part of the employer. In contrast, in most situations an employer does not have potential liability for the acts of its independent contractor. An independent contractor remains liable for her own acts and liability cannot be imputed to the organization that hired her.

Perhaps most importantly though, workers hired as independent contractors are not entitled to the rights and protections of the NLRA.[41] Workers may not be able to engage in concerted activity in an effort to improve their wages and working conditions. Workers who are not employees have no rights in conjunction with forming or joining a union, striking, picketing, or using other forms of collective action.

C. WHAT CAN AN EMPLOYER DO?

So what is the employer to do? Faced with severe consequences for misclassification, an employer may be unwilling to take a chance on classifying workers as independent contractors, even though both employer and worker intend independent contractor status. An employer that wishes to use independent contractors must do so with the knowledge that government agencies are taking a more aggressive approach in oversight of worker classification.[42] An employer faces severe fines and penalties if it incorrectly classifies its workers, even if the misclassification is not intentional. If the employer incorrectly classifies its workers as independent contractors, risks include state and federal tax liabilities and penalties potentially dating back years, workers' compensation penalties, unemployment insurance penalties, wage and hour liabilities and penalties, and possibly attorneys' fees and costs. Worker misclassification can result in substantial liability for unpaid wages, and taxes, penalties, and fines, among other consequences.[43] In California, an employer even faces the threat of incarceration.[44]

Sampson, 969 S.W.2d 945, 947 (Tex. 1998). "In order to render the master liable for an act of his employee, the act must be committed within the scope of the general authority of the employee, in furtherance of the master's business, and for the accomplishment of the object for which the servant was hired." Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972).

41. Burdick, *supra* note 20, at 77.

42. *See generally* Richard Reibstein et al., *Congress Reintroduces the "Employee Misclassification Reinvention Act," Which Would Create a Federal Offense for Misclassification of Employees as Independent Contractors*, INDEP. CONTRACTOR COMPLIANCE (Oct. 17, 2011), http://independentcontractorcompliance.com/2011/10/17/congress-reintroduces-the-employee-misclassification-prevention-act-making-misclassification-of-employees-as-independent-contractors-a-federal-offense/. *See also* Mary Ann Mibourn, *Contract Workers Get Help from Government*, THE ORANGE COUNTY REGISTER (Feb. 9, 2012), http://www.ocregister.com/articles/workers-339642-contract-benefits.html .

43. *See* Jeffrey P. Mogan, *Employers Risk Heavy Financial Penalties for Misclassification of Employees as Independent Contractors*, CONN. LAB. & EMP. L.J. (Aug. 25, 2011),

III. DEFINING WORKER STATUS IS DIFFICULT

Defining worker status is difficult. In the words of the Supreme Court, "there are innumerable situations . . . where it is difficult to say whether a particular individual is an employee or an independent contractor."[45] The numerous legal tests and vague definitions provide little assistance to an employer wishing to make the proper classification. Below, I discuss the various tests used and the contexts in which they are applied.

A. THE COMMON LAW AGENCY TEST

The "right to control" forms the heart of the common law agency test.[46] Most legal classification tests include analysis of the amount of control exerted over the employee. The factors for this test come from the Restatement (Second) of Agency, under the subheading "Torts of Servants."[47] The need to define worker status, for purposes of agency, arose out of the need to define when an employer had vicarious liability for the tortious acts of its agents.[48] The factors considered under the common law agency test include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;

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http://www.connecticutlaboremploymentlawjournal.com/wage-hour/employers-risk-heavy-financial-penalties-for-misclassification-of-employees-as-independent-contracto/.

44. CAL. LAB. CODE § 226.8 (West 2013).

45. Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

46. Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257 (2006).

47. RESTATEMENT (SECOND) OF AGENCY § 220 (2)(a-j) (1958).

48. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 610 (2012).

> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[49]

The factors are each considered and weighed. No magic formula exists to determine exactly how the factors should be balanced. It is not important that all the factors be met. Instead, the focus is on control—does the employer retain control over the right to control the work that is done and how the work is performed?[50] If the employer retains the right to control that work, even if the right is never used, then the worker is likely classified as an employee.[51]

B. THE NLRA AND THE COMMON LAW TEST

Worker status is especially important in determining labor disputes between employers, workers, unions, and government agencies. In 1935, Congress enacted the NLRA.[52] Among its express goals, the National Labor Relations Act was intended to protect the rights of employees to organize themselves into unions and to engage in collective bargaining.[53] An employer who interferes with this goal commits an unfair labor practice.[54] The

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49. FedEx Home Delivery v. Nat'l Labor Relations Bd., 563 F.3d 492, 506 (D.C. Cir. 2009).

50. Jenna A. Moran, Comment, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105 (2009-2010).

51. *Id.*

52. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-153, 157, 159-161, 163, 165-167 (2006)).

53. *Id.* § 151.

54. *See* 29 U.S.C. § 158 (2006).

rights guaranteed by the Act have an important limitation: only "employees" within the meaning of the Act are protected.[55]

Unfortunately, the NLRA fails to include a precise definition of "employee."[56] Nevertheless, the statute states who is not an employee—an independent contractor. The NLRA specifically excludes independent contractors from the definition of employee.[57] As excluded workers, independent contractors are not guaranteed the rights to organize, join unions, or bargain collectively.[58] Only employees are permitted to organize under the NLRA.[59] Some employers have tried to take advantage of the exclusion, "by creating new classes of independent contractors beyond the reach of NLRA protections."[60]

The NLRA did not initially contain an explicit exclusion for independent contractors.[61] The law specifically excluded only "agricultural laborers, domestic servants, and persons hired by a parent or spouse."[62] Nevertheless, in construing the NLRA, the Board excluded independent contractors from coverage. Independent contractors were not treated as employees because, traditionally, independent contractors did not fit within that organized labor context.[63] The reasons for the specific exclusion are discussed in further detail below.

The NLRA's omission of a statutory definition of employee required the NLRB, and courts construing its decisions, to rely on judicial tests for employee status. Courts classifying workers for the purposes of the NLRA determine status based on the common law principles found in the Restatement of Agency.[64] The common law test focuses on the employer's ability to control the worker in the scope of his duties. Courts examine whether the

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55. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. § 152 (2006)) (stating that "independent contractor[s]" and "supervisor[s]" are exempt from NLRB's jurisdiction).

56. *See id.* § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . . .").

57. 29 U.S.C. § 152 (2006).

58. 29 U.S.C. § 157 (2006).

59. *See* 29 U.S.C. § 152(3) (2006) (defining the term "employee" and listing categories of workers excluded from the NLRA's coverage).

60. Burdick, *supra* note 20, at 77.

61. *Id.*

62. *Id.*

63. *Id.*

64. David Millon, *Keeping Hope Alive*, 68 WASH. & LEE L. REV. 369, 371 (2011). *See generally* Burdick, *supra* note 20, at 90 (providing background as to the role of the RESTATEMENT in conjunction with the question of employee status).

hiring party was able "to control the manner and means by which the product is accomplished."[65] The control test dates from the middle of the nineteenth century.[66] The test resulted from the work of American and British courts seeking to establish the limits of an employer's vicarious liability for the torts of its workers.[67] The control test was adopted by the United States Supreme Court in *Singer Manufacturing Co. v. Rahn*.[68] According to the Court, "the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'"[69] The common law agency test "inquires whether the person in question was under the control of another to such a sufficient degree to allow the latter to be held accountable for the torts of the former."[70] Black's Law Dictionary echoes the common law test. It defines an independent contractor as "one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."[71]

Nevertheless, the right to control is not the only factor to consider in applying the test. While the primary question has focused on the right to control, there are additional factors to consider.[72] The common law test is composed of numerous factors, each to be weighed individually by the decision maker.[73] There is no consensus on how the various factors should be weighed, which are more important, and which are less important. The nature of the test ensures that no bright-line rule of worker status exists. Since the common law test contains "no shorthand formula or magic phrase that

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65. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

66. *See* Boswell v. Laird, 8 Cal. 469, 489-90 (1857) (applying English common law, which holds a master vicariously liable for the torts of his servant under the theory of respondeat superior).

67. Thomas M. Murray, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 306 (1998).

68. Singer Mfg. Co. v. Rahn, 132 U.S. 518 (1889),*cited by* Murray, *supra* note 67, at 307.

69. *Singer Mfg.*, 132 U.S. at 523 (internal quotes omitted) (citing R.R. Co. v. Hanning, 82 U.S. 649 (1872)).

70. Jamison F. Grella, *From Corporate Express to Fedex Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit*, 18 AM. U. J. GENDER SOC. POL'Y & L. 877, 882 (2010).

71. BLACK'S LAW DICTIONARY 785 (8th ed. 2004).

72. *See* Millon, *supra* note 64, at 371.

73. The RESTATEMENT OF AGENCY includes a list of ten factors. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). The RESTATEMENT cautions that the list is non-exhaustive. *See id.* (noting that the factors should be considered "among others"). *See also* Millon, *supra* note 64, at 371.

can be applied to find the answer . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[74]

The Supreme Court, in *Community for Creative Non-Violence v. Reid,*[75] named thirteen factors that constituted a non-exhaustive list of factors to consider when applying the common law agency test:

> 1. The hiring party's right to control the manner and means by which the product is accomplished. . . .
>
> 2. The skill required;
>
> 3. The source of the instrumentalities and tools;
>
> 4. The location of the work;
>
> 5. The duration of the relationship between the parties;
>
> 6. Whether the hiring party has the right to assign additional projects to the hired party;
>
> 7. The extent of the hired party's discretion over when and how long to work;
>
> 8. The method of payment;
>
> 9. The hired party's role in hiring and paying assistants;
>
> 10. Whether the work is part of the regular business of the hiring party;
>
> 11. Whether the hiring party is in business;
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> 12. The provision of employee benefits; and
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> 13. The tax treatment of the hired party.[76]

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74. FedEx Home v. Nat'l Labor Relations Bd., 563 F.3d 492, 496 (D.C. Cir. 2009) (quoting Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 259, 258 (1968)) (internal quotation marks omitted).

75. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1976).

76. *Id.*

C. EARLY ATTEMPT TO REFORM THE COMMON LAW TEST

The NLRB and courts construing NLRB decisions use the common law "right to control" test on an individual case-by-case basis. In fact, there is no alternative. "The common law of agency is the standard to measure employee status . . . [and the courts] . . . have no authority to change it."[77]

It has not always been so. In *NLRB v. Hearst Publications*,[78] the Court attempted to create a standard for coverage under the Act that coincided with the legislative purposes of the NLRA. The Court held that employee status is relative and might change from one case to the next, depending on the goal of the statute at issue.[79] By changing the test for employee status, the Court effectively broadened the scope of workers subject to the NLRA. In *Hearst Publications*, the Supreme Court found that the men who distributed Los Angeles newspapers (called "newsboys" despite their age) were employees within the coverage of the NLRA.[80] In arriving at this conclusion, the Court dedicated much of its decision to rejecting the agency test, which varied according to each state's common law.[81] Emphasizing the national nature of labor issues, the Court rejected the possibility that the states' common law principles could be productively distilled into a workable national standard.[82] The Court noted that using common law principles to identify employees subject to the Act was cumbersome.[83] Further, the right to control test might yield results that were inconsistent with Congress's intent to provide comprehensive labor reform.[84]

Ultimately, the Court found that, regardless of how a technical common law analysis might decide the case, the purposes of preserving industrial peace and protecting dependent workers who lacked bargaining power mandated employee status for the newsboys.[85] Rather than the control test,

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77. Roadway Package Sys., Inc., 326 N.L.R.B. 842, 849 (1998). *See* Chevron, U.S.A., Inc., v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984) (stating that courts should defer to agency determinations).

78. Nat'l Labor Relations Bd. v. Hearst Publ'ns, 322 U.S. 111 (1944).

79. *See id.* at 129.

80. *See id.* at 113-19 (discussing the newsboys' work arrangement); *id.* at 131-32 (upholding the NLRB's determination that they were employees).

81. *Id.* at 123 ("Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining.").

82. *Hearst Publ'ns*, 322 U.S. at 125-26 ("Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law.").

83. *Id.* at 122.

84. *See id.* at 122-23.

85. *See id.* at 128 ("[W]hen the . . . economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends

the Court used a test that focused on the work relationship in light of the purpose of the Act.[86] Applying this new statutory purpose test, the Court found that the workers were employees within the scope of the NLRA, even though the employer had little control over the work performance of the newsboys.[87] The evidence established that the newsboys provided an integral part of the employer's business: the distribution of newspapers.[88] The Court reasoned that the close relationship between work of the newsboys and the employer's business was more important than whatever common law agency principles the parties shared.[89]

In essence, the Supreme Court found that the best way to classify workers under the NLRA was to determine if the Act's purposes encompassed the economic situation in which the worker found himself.[90] The Court found that the *Hearst Publications* plaintiffs were sufficiently "economically dependent" that the employer could harm them; therefore, the employees would "benefit from the remedies" found in the NLRA.[91]

The use of the statutory purpose test in the NLRA context was short-lived. Congress disapproved of the Supreme Court's change of the worker classification test.[92] Fearful that a revised definition of employee would greatly broaden the scope of the Act and bring its protections to virtually all workers, Congress revised the NLRA to exclude independent contractors from its coverage.[93] The definition of employee was rewritten to state, "[t]he term 'employee' . . . shall not include . . . any individual having the status of an independent contractor."[94] Moreover, in the 1947 Taft-Hartley amendments to the NLRA, Congress expressly overruled the Supreme Court's statutory purpose test in favor of the common law principles of agency.[95]

Following Taft-Hartley, the NLRB focused its classification analysis on the employer's right to control the means and manner of the worker's

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sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification . . . .").

86. *See id.* at 127-28 (finding that employee status should turn on the characteristics of a given industry in light of the vast differences between the industries subject to the NLRA).

87. *Hearst Publ'ns*, 322 U.S. at 121.

88. *See id.* at 131-32.

89. *Id.* at 131.

90. Moran, *supra* note 50, at 116.

91. *Id.* at 114.

92. Carlson, *supra* note 5, at 321.

93. *Id.*

94. 29 U.S.C. § 152 (2006).

95. *See* 93 CONG. REC. 6,441-42 (1977) (statement of Sen. Taft) (reading into the record that "the general principles of the law of agency" are intended to determine section 2(3) "employees" under the amendments to the NLRA).

performance.[96] The Supreme Court followed. In *NLRB v. United Insurance Co. of America*,[97] the Supreme Court held that Congress intended "the Board and the courts" to "apply the common-law agency test . . . in distinguishing an employee from an independent contractor" under the NLRA.[98] The statutory purpose test was essentially dead.

D. THERE ARE OTHER WORKER CLASSIFICATION TESTS

For contexts beyond labor relations, the battle over how to distinguish employees from independent contractors continues. The continuing struggle over whether to classify workers as employees or independent contractors is a battlefield.[99] Distinguishing between classifications has created a "lengthy and confused" struggle.[100] Legal disputes over worker classification fill the court system.[101]

There are numerous legal tests, other than the right to control test, used to assist courts and government agencies to determine proper worker classification. The tests differ by agency, by court, by state, and sometimes by context. In a 2006 report prepared by the Government Accounting Office, the Agency stated, "the tests used to determine whether a worker is an independent contractor or an employee are complex, subjective, and differ from law to law."[102]

There is no single federal agency that has primary responsibility for regulating proper worker classification. Instead, several federal agencies are responsible for ensuring that workers receive the benefits and protections to which they are entitled as employees.[103] As noted, the Department of Labor (DOL) applies the common law test for purposes of ensuring employer compliance with the NLRA. For other labor laws, including the Fair Labor Standards Act of 1938 (FLSA), the Agency applies a different test. The Internal Revenue Service (IRS) is not responsible for ensuring that employee protections are provided, but is responsible for ensuring that employers and employees pay proper payroll tax amounts and that employers properly

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96. *See* Steinberg & Co., 78 N.L.R.B. 211, 220-21 (1948) (quoting 93 CONG. REC. 6,441 (1947)) (determining that the Board "should follow the 'ordinary tests of the law of agency'").

97. Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 254 (1968).

98. *Id.* at 256.

99. Millon, *supra* note 64, at 370.

100. Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 353 (2011).

101. Millon, *supra* note 64, at 370.

102. U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (July 2006), *available at* http://www.gao.gov/new.items/d06656.pdf.

103. *Id.* at 1-2.

withhold taxes from workers' pay. The IRS also seeks to provide general information to employers about worker classification.[104]

A thorough discussion of the other tests is beyond the scope of this Article, but it may prove helpful to review the numerous other tests available.

1. The ABC Test

Many state workforce agencies use the ABC test in determining an employer's obligation for payment of unemployment taxes.[105] The employer must prove: a) the worker is free from control or direction in the performance of the work; b) the work is done "outside the usual course" of the firm's business and is done off the premises of the business; and c) the worker is "customarily engaged in an independent trade, occupation, profession, or business."[106] The ABC test is broad and results in coverage for most workers.[107] The ABC test places several burdens on the employer to establish that the worker is an independent contractor.

As an example of actual use, the State of Illinois summarizes the test as follows:

> Service performed by an individual for an employing unit, whether or not such individual employs others in connection with the performance of such services, shall be deemed to be employment unless and until it is proven in any proceeding where such issue is involved that:
>
> a. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
>
> b. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

104. *Id.*
105. Moran, *supra* note 50, at 109.
106. *Id.*
107. *See id.*

> c. Such individual is engaged in an independently established trade, occupation, profession, or business.[108]

The ABC test creates a presumption of employment. The ABC test is simple—it is much easier to evaluate three factors than thirteen. There are disadvantages, however, to the ABC test. Its variance with federal law tests means that workers that fall within the federal definition of independent contractors may be considered employees under the state law test. The test involves such a broad scope that it may reach workers in areas that are traditionally independent contractors, while at the same time, preventing the growth of the employment market.[109]

2. The IRS Test

Because it is charged with enforcement of wage withholding, classification of workers is important to the IRS. The IRS classification test was originally made up of twenty factors that it used to distinguish employees from independent contractors.[110] The factors fell within three categories: behavioral control, financial control, and relationship of the parties.[111] The IRS test focused on the following factors:

> 1. Behavioral Control
>
> (1) Instructions: If the employer directs where, when, or how work is done, the worker is likely an employee. This is similar to the right-of-control common law test.
>
> (2) Training: If the employer provides training so that the worker performs in a particular manner and with a particular result, the worker is likely an employee. This is especially true if the training is provided at regular intervals.
>
> (3) Order or sequence: If the employer requires the worker to perform his tasks in a particular order or sequence, or retains the right to

108. *Employee v. Contractor*, ILL. DEPARTMENT OF EMP. SECURITY, http://www.ides.illinois.gov/page.aspx?item=3686 (last visited May 23, 2013).

109. Moran, *supra* note 50, at 109.

110. *See* Rev. Rul. 87-47, 1987-1 C.B. 296-301.

111. INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR? OR EMPLOYEE?, *available at* http://www.irs.gov/pub/irs-pdf/p1779.pdf.

establish a particular order or sequence, the worker is likely an employee.

(4) Assistance: If the employer hires, supervises, and pays assistants to aid the worker, the worker is likely an employee.

(5) Furnishing of tools and materials: If the employer provides the supplies, materials, equipment, and other tools necessary to perform the work, the worker is an employee dependent on his employer.

(6) Oral or written reports: If the employer requires the worker to submit reports at regular intervals, the worker is likely an employee.

(7) Payment: If the employer pays the worker by salary or by hour, week, or month, the worker is likely an employee. If the worker is paid when he or she bills for services performed, or is paid on commission, the worker is likely an independent contractor.

(8) Doing work on employer's premises: If the employer requires the worker to perform his/her services on the premises, where the employer can have control over the worker, the worker is likely an employee.

(9) Set hours of work: If the employer requires the worker to perform a set number of work hours, sets the worker's schedule, or retains approval rights over the worker's schedule, the worker is likely an employee. If the employer does not approve the worker's schedule, the worker is likely an independent contractor.

(10) Full time required: If the employer requires the worker to work on a full-time basis, the worker is likely an employee.

(11) Working for more than one firm at a time: If the employer does not allow the worker to perform work for another firm so long as it is performing work for the employer's firm, the

worker is likely an employee. However, a worker can be an employee of multiple firms at the same time.

(12) Making services available to the public: If the employer does not allow the worker to perform his work for the public as a free service, the worker is likely an employee.

2. Financial Control

(13) Significant monetary investment: If the worker must make a significant monetary investment in order to perform his services, he is independent of the employer and is not an employee. There is no set dollar limit that qualifies as a "significant investment;" it is determined on a case-by-case basis.

(14) Payment of business and/or traveling expenses: If the worker must expend money for business or business-related travel, and the employer pays these expenses, the worker is likely an employee. In this case, the employer generally has the ability to control the extent of the employee's business or travel expenses.

(15) Realization of profit or loss: If the worker does not have the opportunity to profit (or lose) from his work, he is an employee. The employer is in the capacity of receiving the money directly from the client and has the opportunity for profit or loss.

3. Relationship of the Parties

(16) Services rendered personally: If the worker must perform the work personally, and cannot delegate the tasks, he/she is an employee.

(17) Integration: If the employer uses the worker as part of the course of normal business operations, the worker is likely an employee. In this case, the success of the business may be directly related to the success of the individual employee.

> (18) Continuing relationship: If the employer and the worker have a longstanding, continuing relationship, the worker is likely an employee. This includes work that is done at recurring intervals or services performed by a worker who is "on call."
>
> (19) Right to discharge: If the employer may fire or dismiss the worker, the worker is likely an employee.
>
> (20) Right to terminate: If the worker can terminate the work relationship and not be liable for completion of a particular job or service, the worker is likely an employee. If the worker remains liable for a job or service, he or she is an independent contractor.[112]

As might be expected, a twenty-factor test proved unwieldy. In response, the IRS reduced the test to three factors based on the categories of the twenty-factor test. The IRS later modified the test, by grouping the twenty factors into three categories: behavioral control, financial control, and type of relationship.[113]

The IRS summarizes the tests for the categories in the following manner:

> 1. Behavioral: Does the company control or have the right to control what the worker does and how the worker does his job?
>
> 2. Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how the worker is paid, whether expenses are reimbursed, who provides tools and supplies, etc.)
>
> 3. Type of relationship: Are there written contracts or employee type benefits? (i.e. pension plans, insurance, and vacation pay, etc.)? Will the

112. Moran, *supra* note 50, at 110-12.

113. *See* DEP'T OF TREASURY, INTERNAL REVENUE SERV., EMPLOYER'S SUPPLEMENTAL TAX GUIDE, 2013 at 6-8 (Feb. 5, 2013), *available at* http://www.irs.gov/pub/irs-pdf/p15a.pdf.

> relationship continue and is the work performed a key aspect of the business?[114]

The IRS maintains that no single factor, or combination of factors, is dispositive on the issue of employee classification. Businesses are required to consider all factors when making classification decisions. "There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor, and no one factor stands alone in making this determination."[115] The IRS recommends examining the relationship as a whole, considering "the degree or extent of the right to direct and control."[116]

The IRS provides a limited amount of protection for employers who misclassify employees. Employers who are unclear on classification may submit the SS–8 form, which permits the IRS to examine the facts and circumstances and provide a determination of status.[117]

3. ERT: The Economic Reality Test

The economic reality test focuses on financial considerations. Worker status is not based on the work itself, but on the financial reality that accompanies the work. The economic reality test, in some variation, is used to classify workers under the FLSA, the Equal Pay Act of 1963, Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988.[118]

The DOL uses the economic reality test to determine coverage and compliance with the minimum wage and overtime requirements of the FLSA.[119] The FLSA regulates wages and overtime pay for employees. Like many statutes, its definition of "employee" is of little use. According to the FLSA, an employee is "any individual employed by an employer."[120] The statute defines "employ" as "to suffer or permit to work."[121] Courts and agencies determining the scope of the FLSA apply the "economic reality

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114. *Independent Contractor (Self-Employed) or Employee?*, U.S. DEP'T OF TREASURY, I.R.S., http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee (last updated Nov. 5, 2013).

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* MICHAEL S. HORNE, THE CONTINGENT WORKFORCE: BUSINESS AND LEGAL STRATEGIES § 4.07 (2005).

119. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

120. 29 U.S.C. § 203(e)(1) (2008).

121. *Id.* § 203(g).

test" to distinguish between employers and independent contractors.[122] This classification test focuses not just on employer control, but also whether the employee is economically dependent on the employer; The economic reality test goes beyond technical, common law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on an employer.[123] "The focal point in deciding whether an individual is an employee is whether the individual is *economically dependent* on the business to which he renders service, or is, as a matter of economic fact, in business for himself."[124]

> Six factors comprise the economic reality test:
>
> > (1) The degree of control exerted by the alleged employer over the worker;
> >
> > (2) The worker's opportunity for profit or loss;
> >
> > (3) The worker's investment in the business;
> >
> > (4) The permanence of the working relationship;
> >
> > (5) The degree of skill required to perform the work; and
> >
> > (6) The extent to which the work is an integral part of the alleged employer's business.[125]

The test also "includes inquiries into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records."[126] The court may not focus on any single factor; instead, it "must employ a totality-of-the-circumstances approach."[127]

4. The Hybrid Common Law/Economic Realities Test

Some courts employ a hybrid of the common law and economic realities test. The Fifth Circuit, for example, considers the "economic realities . .

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122. Moran, *supra* note 50, at 66.
123. Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).
124. Doty v. Elias, 733 F.2d 720, 722-23 (10th Cir. 1984) (emphasis added).
125. *Baker*, 137 F.3d at 1440.
126. *Id.* (citing Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).
127. *Id.* at 1441 (citing Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)).

. of the work relationship, and the extent to which the one for whom work is being done has the right to control the details and means by which the work is to be performed, with emphasis on this latter control factor."[128] Under this standard, courts must evaluate the following factors:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
>
> (2) the skill required in the particular occupation;
>
> (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
>
> (4) the length of time during which the individual has worked;
>
> (5) the method of payment, whether by time or by the job;
>
> (6) the manner in which the work relationship is terminated; *i.e.,* by one or both parties, with or without notice and explanation;
>
> (7) whether annual leave is afforded;
>
> (8) whether the work is an integral part of the business of the "employer;"
>
> (9) whether the worker accumulates retirement benefits;
>
> (10) whether the "employer" pays social security taxes; and
>
> (11) the intention of the parties. [129]

Once again, however, none of these factors control, as an agency or court must analyze all the factors together to reach its determination.[130]

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128. Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 272 (5th Cir. 1988) (citing Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985)).

129. *Id.* at 272-73 (quoting Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986)).

130. *Id.*

Moreover, adding additional factors cannot easily improve accuracy. Two recent cases out of the Fifth Circuit illustrate the problem of inconsistent results. The cases, decided in the same state within months of each other, contained remarkably similar fact patterns. Nevertheless, the application of the tests resulted in different determinations.

In both *Cromwell v. Driftwood Electrical Contractors, Inc*.,[131] and *Thibault v. BellSouth Telecommunications, Inc*.,[132] the Fifth Circuit was called upon to make a determination of employee or independent contractor status. The plaintiffs in both cases were cable splicers, who provided services for BellSouth Telecommunications in Louisiana, in conjunction with its post-Katrina repair efforts. The cases each involved FLSA claims brought by skilled cable splicing technicians who were hired by BellSouth (or a contractor of BellSouth) for specific Katrina-related jobs.

The cases contained other similarities. In both cases, the plaintiffs were classified as contractors and were responsible for their own insurance and employment taxes. The splicer plaintiffs supplied their own tools and trucks. Each splicer worked shifts of thirteen days on and one day off, with workdays that lasted at least twelve hours. Each morning, the cable splicers received their work assignments from a BellSouth representative. The plaintiffs did not receive training from BellSouth, and they performed their daily work mostly without supervision.

Despite these remarkably similar facts, the cases yielded differing results. One panel deemed the *Cromwell* plaintiffs employees; another found the *Thibault* plaintiff an independent contractor.

The *Cromwell* court focused on the permanency of the relationship, noting that the plaintiffs worked full-time, exclusively for the defendants, for approximately eleven months.[133] Deciding the case on permanency was a bit ironic, considering that the post-Katrina cleanup was a temporary job by its very nature.[134] Nevertheless, the long assignment and the long hours required by BellSouth meant that the plaintiffs had little opportunity for working for anyone else or taking other jobs during that period. The court found also that the employers' furnishing of work assignments limited the need for the plaintiffs to demonstrate initiative in the performance of their work.[135]

Although decided less than ten months later, the Fifth Circuit reached a very different conclusion in *Thibault*. In that case, the court found that a cable splicer, providing the same splicing services for BellSouth, and work-

131. Cromwell v. Elec. Contractors, Inc., 348 F. App'x 57 (5th Cir. 2009).
132. Thibault v. BellSouth Telecomms., Inc., 612 F.3d 843 (5th Cir. 2010).
133. *Cromwell*, 348 F. App'x. at 60.
134. *Id.*
135. *Id.* at 61.

ing a similar schedule under similar work conditions, was actually an independent contractor. As in *Cromwell*, the court recognized that the individual (Thibault) controlled the method and manner of his work, performed work requiring a high level of skill, and had a higher relative investment in the work performed than his putative employer because he provided his own tools and equipment and traveled from his home to provide services.

However, unlike *Cromwell*, the court found that Thibault's relationship with BellSouth's contractor was temporary and non-exclusive because: (1) his splicing work lasted for only three months; and (2) Thibault demonstrated a degree of economic independence not present in *Cromwell*, as he was involved in business ventures besides splicing.[136] Those ventures included operating a Delaware-based sales company, owning eight drag-race cars, and owning and managing commercial rental property.[137] The court appeared to find it significant that, while working as a splicer, Thibault managed to simultaneously manage his sales company's operations. Although Thibault had the same duties as the splicers in *Cromwell*, the court found that, unlike the *Cromwell* plaintiffs, Thibault controlled his opportunity for profit and loss to a greater degree since he demonstrated an "economic independence" from the splicing job.[138] As the court noted, the evidence indicated that Thibault was "a sophisticated, intelligent business man who entered into a contractual relationship to perform a specific job for the defendants."[139]

E. A FOCUS ON ENTREPRENEURIAL OPPORTUNITY

1. The FedEx Home Delivery *Case*

In *FedEx Home Delivery v. NLRB*, the court used the common law test, but rejected the primacy of the right to control factor.[140] The *FedEx Home Delivery* case formed part of a continuing battle between the International Brotherhood of Teamsters and FedEx Home over the company's classification of its drivers.[141] FedEx Home had for some time attempted to

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136. *Thibault*, 612 F.3d at 845.
137. *Id.* at 849.
138. *Id.* at 849.
139. *Id.*
140. FedEx v. Nat'l Labor Relations Bd., 563 F.3d 492, 497 (D.C. Cir. 2009).
141. *See* Erin Johansson, *Fedup with Fedex: How Fedex Ground Tramples Workers' Rights and Civil Rights*, AM. RIGHTS AT WORK (Am. Rights at Work, D.C. & Leadership Conference on Civil Rights, D.C.), Oct. 2007, *available at* www.civilrights.org/publications/fedex/fedupwithfedex.pdf (citing NLRB decisions finding FedEx drivers to be employees in five organizing campaigns at east coast FedEx facilities since 2004).

classify its delivery drivers as independent contractors.[142] The standard contract between FedEx Home and its drivers was crafted in a manner designed to establish independent contractor status.[143] The standard contract provided each individual driver with the ability to organize his or her work as an independent business, potentially managing several routes, owning several trucks, and hiring drivers to work as employees.[144] The standard contract also gave to the drivers the right to sell their routes without permission from FedEx.[145]

This particular dispute arose when FedEx Home Delivery drivers in Wilmington, Massachusetts, joined a union to negotiate with FedEx over hours and pay.[146] The NLRB determined that the majority of the drivers were employees.[147] After a majority of the drivers voted for the union, the NLRB certified the union as the exclusive collective bargaining representative of all full-time and regular part-time contractors employed by FedEx Home.[148]

On appeal of the NLRB's decision, the D.C. Circuit announced its resolve to approach employee classification with a revised focus.[149] The court held that it would change its emphasis "away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss."[150]

The court effectively created an entrepreneurial standard for the worker classification test. Under the modified standard, the most important factor of the common law test is "whether the position presents the opportunities and risks inherent in entrepreneurialism."[151] The court indicated that entrepreneurial opportunity should be the "animating principle" in the classification analysis.[152] This was a "subtle refinement" of the common law test.[153]

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142. *Millon*, *supra* note 64, at 371.

143. *Id.*

144. *Fed Ex*, 563 F.3d at 498.

145. *Id.* at 497.

146. *Id.* at 495.

147. *Id.* at 497.

148. *See In re* FedEx Home Delivery, No. 1-RC-22034, 22035, slip op. at 2 (NLRB Sept. 20, 2006), *available at* http://www.llrlaw.com/pdfs/NLRB%20RD%20Decision%201-RC-22034%20and%2022035%20(Wilmington).pdf.

149. *FedEx*, 563 F.3d at 497-98.

150. *Id.* at 497 (internal quotation marks omitted) (citing Corp. Express Delivery Sys. v. Nat'l Labor Relations Bd., 292 F.3d 777, 780 (D.C. Cir. 2002)).

151. *Id.*

152. *Id.*

153. *Id.* Jeffrey Hirsch notes that this statement was an "unwarranted understatement." Hirsch, *supra* note 100, at 355.

The court focused on theoretical opportunity and not actual opportunity. The court expressed little concern that many of the FedEx drivers had chosen not to organize their work in the form of independent businesses.[154] The court was not swayed by the Board's findings that the opportunity for profit was miniscule and that the company dictates the routes that the drivers must follow.[155] The decision in *FedEx Home Delivery* received much criticism for its supposed reliance on entrepreneurial rights and not actual exercise of those rights.[156] In that case, the court stressed the mere presence of such rights, even where the evidence indicated that few took advantage of the opportunity.[157] "Even one instance of a driver using such an opportunity can be sufficient to show there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right."[158] According to the court, entrepreneurship opportunity exists where evidence indicates that "routes have been sold for a profit; substitutes and helpers have been hired without FedEx's involvement; one contractor has negotiated for higher rates; and contractors have incorporated."[159]

The court held that entrepreneurial potential offered to all drivers, even where the opportunity was not pursued, should be determinative. "[T]he fact that many carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so."[160] The court noted that the drivers executed "a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx "for any purpose" and confirms the "manner and means of reaching mutual business objectives" is within the contractor's discretion, and FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance"; "contractors are not subject to reprimands or other discipline"; contractors must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety requirements; and "contractors are responsible for all the costs associated with operating and maintaining their vehicles."[161] The drivers had the ability to "remove or mask all FedEx Home logos and markings" and use their vehicles "for other com-

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154. *FedEx*, 563 F.3d at 502.

155. *Id.* at 497.

156. *See generally* Hirsch, *supra* note 100.

157. *FedEx*, 563 F.3d at 498.

158. *Id.* at 503 (quoting C.C.E., Inc. v. Nat'l Labor Relations Bd., 60 F.3d 855, 860 (D.C. Cir. 1995)) (internal quotation marks omitted).

159. *Id.* at 503.

160. *Id.* at 498 (quoting Arizona Republic, 349 N.L.R.B. 1040, 1045 (2007)).

161. *Id.* (quoting FedEx Home Delivery and Local 25, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 10-14, 2006 NLRB Reg. Dir. Dec. LEXIS 264, *19 (First Region, Sept. 20, 2006)).

mercial or personal purposes."[162] Drivers could "independently incorporate."[163]

Drivers retained their right to hire employees.[164] This factor appeared especially important. "This ability to hire others to do the Company's work is no small thing in evaluating entrepreneurial opportunity."[165] Finally, the Standard Contractor Operating Agreement permitted the drivers to "assign at law their contractual rights to their routes, without FedEx's permission."[166] The agreement between FedEx and its drivers allowed the drivers to "sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship."[167]

2. Other Cases Supporting the Primacy of Entrepreneurial Opportunity

Two previous D.C. Circuit Court cases hinted at the court's willingness to embrace a new entrepreneurial standard. The *FedEx Home Delivery* court relied on a previous D.C. Circuit decision, *Corporate Express Delivery Systems v. NLRB*.[168] The *Corporate Express* court did not state that it was supplanting the right to control test. The court, however, reflected on the changing nature of the common law definition of employee.[169] The court enforced the NLRB's determination of the status of owner-operator truckers who, despite a contractual designation as independent contractors, were restricted from hiring helpers or using their vehicles for other jobs.[170] In *Corporate Express*, the court stated that the central focus of the employee/independent contractor inquiry should move away from the control factor to whether the putative employees possess entrepreneurial opportunity.[171] These truckers "lacked all entrepreneurial opportunity," and were therefore employees.[172]

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162. *FedEx*, 563 F.3d at 498.
163. *Id.* at 499.
164. *Id.* at 499.
165. *Id.*
166. *Id.* at 500.
167. *FedEx*, 563 F.3d at 500.
168. Corp. Express Delivery Sys. v. Nat'l Labor Relations Bd., 292 F.3d 777 (D.C. Cir. 2002).
169. *Id.* at 779-81.
170. *Id.* at 780-81 (discussing lack of entrepreneurial opportunity among drivers as a factor in the agency test).
171. *Id.* at 780 ("[W]e uphold . . . the . . . focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'" (citing *In re* Corp. Express Delivery Sys. & Teamsters Local 886, 332 NLRB 1522, 1524 (2000))).
172. *See id.* (suggesting that the court would have upheld the Board's finding under the "means and manner" control test as well, but upholding the Board's focus on entrepreneurialism rather than decide this question).

By contrast, drivers found to be independent contractors in *C.C. Eastern v. NLRB*,[173] another D.C. Circuit case, were paid by the job rather than by the hour or day. These drivers also enjoyed the freedom to employ helpers and lease out, or otherwise use, their own tractors for other work on weekends or in the evenings.[174]

Other courts have advocated use of entrepreneurial opportunity as an important factor in deciding issues of employee status. In *NLRB v. Friendly Cab Co*.,[175] the Ninth Circuit analyzed whether the alleged employees possessed "entrepreneurial freedom to develop their own business interests like true independent contractors."[176] The Friendly Cab Company had designated its cab drivers as independent contractors but specifically forbade them from pursuing any outside business opportunities.[177] As a condition of leasing the cab, drivers had to agree to comply with Friendly's Standard Operating Procedures, including the following:

> All calls for service must be conducted over company provided communications system and telephone number. No private or individual business cards or phone numbers are allowed for distribution to customers as these constitute an interference in company business and a form of competition not permitted while working under the lease.[178]

The restriction on entrepreneurial activities carried "particular significance."[179] The court found that the restriction "strongly supports" a designation of statutory employee rather than independent contractor.[180] Despite the existence of several indicators of an independent contractor relationship, the court found that the lack of entrepreneurial opportunity outweighed those factors.[181]

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173. C.C. E., Inc. v. Nat'l Labor Relations Bd., 60 F.3d 855, 860-61 (D.C. Cir. 1995) (applying the control test and noting contractually granted entrepreneurial potential in finding truck drivers to be independent contractors).

174. *See id.* at 859-60 (describing the relationship between the drivers and the company).

175. Nat'l Labor Relations Bd. v. Friendly Cab Co., 512 F.3d 1090 (9th Cir. 2008).

176. *Id.* at 1098.

177. *Id.* at 1094.

178. *Id.* at 1094, 1098.

179. *Id.* at 1094.

180. *Friendly Cab Co.*, 512 F.3d at 1098.

181. *Id.*

F. REMAKING THE COMMON LAW TEST TO EMPOWER WORKERS

The common law agency test is, at a minimum, "unwieldy."[182] The emphasis on the right to control yields results that are confusing and inconsistent. Furthermore, because of the changing nature of the employment relationship, it is not suited for classifying future working arrangements. The common law test has "continued wasteful litigation of the employee status issue, manipulation of working relations by employers seeking to avoid employment regulations, and never-ending uncertainty about the status of the growing number of workers who toil in the gray area between 'employee' and 'independent contractor.'"[183] The "uncertainty can become a breeding ground for litigation."[184]

But there is another troubling aspect of the right to control test. The common law test is employer centered. The test depends on analysis from the aspect of the employer—does the employer control its worker or does it not? The putative employee has little voice in the process. Courts have made it clear that the determination of employee status can occur regardless of what the employee has agreed to or, in fact, wants. The relationship remains almost completely in the hands of the employer.

The NLRA states that the law is meant to equalize bargaining power between employees and employers.[185] One way to give effect to that statement is to increase the bargaining power of employees by empowering them and by providing them with actual entrepreneurial opportunity.

I maintain that the employee should be provided with at least partial ability to control his classification. Obviously, there are concerns. This prospect of increased employee participation raises the question of whether, by giving employees a role in classification, the employees become vulnerable to possible exploitation by the employer. Employers could arbitrarily designate low-level employees as independent contractors, costing the worker rights and benefits.

To protect against manipulation of workers, my proposed test requires genuine entrepreneurial opportunity. Courts and government agencies will not rely on bare-boned allegations of opportunity but must instead use the academic definition of entrepreneurship to define those who are independent contractors and those who are not. This proposed test empowers employees and offers them real choices. At the same time, the proposed test requires employers to make real choices. An employer will need to make hard choices about the freedom, as well as the potential rewards, it provides

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182. FedEx Home Delivery v. Nat'l Labor Relations Bd., 563 F.3d 492, 497 (D.C. Cir. 2009).

183. Carlson, *supra* note 5, at 301.

184. Rubinstein, *supra* note 3, at 609.

185. *See* 29 U.S.C. § 151 (2006).

to its workers. Designating workers as independent contractors will require the company not only to cede control, but also to cede the possibility that workers will achieve larger rewards, monetary and otherwise, than they would otherwise have achieved as employees.

IV. EMBRACING ENTREPRENEURSHIP

A. DEFINING ENTREPRENEURSHIP

1. The Difficulty of Finding a Definition

I propose rethinking the employee status test to focus on the presence of entrepreneurial opportunity. But doing so requires that we prevent employers from manipulating factors to make it appear as if opportunity exists when in fact it does not. The proposed entrepreneurial test must measure genuine entrepreneurial opportunity. In other words, workers must actually do entrepreneurship. To analyze the presence of entrepreneurial opportunity, I look to the academic field of entrepreneurship, examine the various definitions of entrepreneurship, and create a workable legal test.

Unfortunately, finding a definition of entrepreneurship that satisfies everyone is difficult. Despite the concept's seeming ubiquity, entrepreneurship remains difficult to define. "Entrepreneurship is a broad and complex concept."[186] It is difficult to find a "precise, inherently consistent, and agreed-upon definition."[187] Some may associate entrepreneurship with small businesses and sole proprietors, while others may associate the word with industry leaders such as Richard Branson and Steve Jobs.[188] Still others may view the concept less charitably.[189]

The "who" and "what" of entrepreneurship remains difficult to capture. Who is an entrepreneur? How can someone recognize an entrepreneur

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186. Domingo R. Soriano & Ma A. Montoro-Sanchez, *Introduction: The Challenges of Defining and Studying Contemporary Entrepreneurship*, 28 CAN. J. ADMIN. SCI. 297-301 (2011).

187. PER DAVIDSSON, RESEARCHING ENTREPRENEURSHIP 3 (2005).

188. *See generally* June Thomas, *Why Do TV Writers Hate Entrepreneurs?*, SLATE (Dec. 7, 2012, 5:00 PM), http://www.slate.com/blogs/browbeat/2012/12/07/entrepreneurs_on_television_why_are_they_such_dolts.html.

189. In the movie *The Social Network*, the story of how Facebook made the leap from a concept to a global phenomenon, one of the lead characters is in bed with his girlfriend. "What do you do?" she asks. "I'm an entrepreneur," he replies. "You're unemployed," she retorts. *The Social Network Quotes*, MOVIE QUOTES AND MORE, http://www.moviequotesandmore.com/social-network-quotes-2.html#.UPRDgYnjl94 (last visited Jan. 13, 2013).

or an entrepreneurial opportunity?[190] Despite a tradition of study dating back hundreds of years,[191] creating a single description of the elements of entrepreneurship remains controversial.[192] Nevertheless, while entrepreneurship remains difficult to define in precise terms, the phenomenon seems to be "broadly understood."[193]

Entrepreneurship is a vital component to the economic health "of companies, sectors, and entire nations."[194] Entrepreneurship plays a critical role in "new economic activity—boosting innovation, wealth, growth, and employment."[195] Entrepreneurship is "an engine of economic development."[196] It is "vital for the competitiveness of enterprises in existing or emerging markets."[197] Entrepreneurship "strengthens competition between developed economies and supports social welfare within developing countries."[198]

2. Discovering Common Aspects of Entrepreneurship

Study of entrepreneurship has yielded numerous varied definitions.[199] The difficulty of definition has even caused some to question the legitimacy

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190. Hampering our ability to understand entrepreneurship is the media's bipolar portrayal of entrepreneurship, from lionization of such entrepreneurs to the denigration of small businesses. *See, e.g.*, Thomas, *supra* note 188.

191. The first author to give entrepreneurship an economic meaning was Richard Cantillon in ESSAI SUR LA NATURE DU COMMERCE EN GÉNÉRAL (1755/1999). Cantillon "outlined the principles of the early market economy based on individual property rights and economic interdependency." Hans Landström et al., *Entrepreneurship: Exploring the Knowledge Base*, 41 RES. POL'Y 1154, 1155 (2012).

192. *See* Candida G. Brush et al., *Doctoral Education in the Field of Entrepreneurship*, 29 J. MGMT. 309 (2003).

193. Nadim Ahmad & Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection* (Org. for Econ. Co-Operations and Dev. Statistics Working Paper No. STD/DOC(2008)1), *available at* http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=std/doc(2008)1.

194. *See* Soriano, *supra* note 186, at 297.

195. *Id.*

196. Sana El Harbi & Alistair R. Anderson, *Institutions and the Shaping of Different Forms of Entrepreneurship*, 39 J. OF SOCIO-ECONOMICS 436 (2010).

197. COMMISSION OF THE EUROPEAN COMMUNITIES, COMMISSION GREEN PAPER ON ENTREPRENEURSHIP IN EUROPE 5 (Jan. 1, 2003), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0027en01.pdf, *summarized in Entrepreneurship in Europe*, EUROPA, http://europa.eu/legislation_summaries/other/n26023_en.htm (last visited Dec. 27, 2013) *?*

198. *See* Soriano, *supra* note 186, at 297.

199. For an overview of the academic study of entrepreneurship, including a list of 135 core entrepreneurship works, see Landström, *supra* note 191, at 1154-1181.

of the academic study of entrepreneurship.[200] Entrepreneurship can involve the creation of new firms.[201] Entrepreneurship can focus on activities, generally new and innovative, taken in response to perceived business opportunities.[202] "Entrepreneurship is the process whereby an individual or a group of individuals use organized efforts and means to pursue opportunities to create value and grow by fulfilling wants and needs through innovation and uniqueness, no matter what resources are currently controlled."[203] It is "the set of practices involving the creation or discovery of opportunities and their enactment."[204]

Amid the definitions, one can find some aspects in common. There are certain elements often used in defining entrepreneurship:

> 1. The environment within which entrepreneurship occurs.
>
> 2. The people engaged in entrepreneurship.
>
> 3. Entrepreneurial behaviors displayed by entrepreneurs.
>
> 4. The creation of organizations by entrepreneurs.
>
> 5. Opportunities identified and exploited.
>
> 6. Innovation, whether incremental, radical or transformative.
>
> 7. Assuming risk, at personal, organizational, and even societal levels.
>
> 8. Adding value for the entrepreneur and society.[205]

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200. *See* Margaret Kobia & Damary Sikalieh, *Towards a Search for the Meaning of Entrepreneurship*, 34 J. EUR. INDUS. TRAINING 110 (2010) ("In the past decade or so, researchers and educators in this field have had and still have to confront the question 'what are we talking about when we talk about entrepreneurship?' The answer to this question however, has been and still is unclear, delayed and overlaps with other sub fields.").

201. *See* Sang M. Lee & Suzanne J. Peterson, *Culture, Entrepreneurial Orientation, and Global Competitiveness*, 35 J. WORLD BUS. 401 (2000).

202. McDougall, P.P. & Oviatt, B.M., *International Entrepreneurship Literature in the 1990s and Directions for Future Research*, *in* ENTREPRENEURSHIP 2000 at 291 (Sexton, D.L., & Smilor, R.W. eds., 1997).

203. MARY COULTER, ENTREPRENEURSHIP IN ACTION 6 (2001).

204. *See* El Harbi, *supra* note 196, at 43.

205. *See* Timothy M. Stearns & Gerald E. Hills, *Entrepreneurship and New First Development: A Definitional Introduction*, 36 J. BUS. RES. 1 (1996).

3. The Three Dimensions of Entrepreneurship

Attempts to define entrepreneurship have focused on three areas: the skills and traits that characterize the entrepreneur, the processes and events that are part of entrepreneurship, and the results that entrepreneurship generates.[206] The many definitions of entrepreneurship can be categorized according to three main dimensions of entrepreneurship.[207] These three dimensions of entrepreneurship are processes, behaviors, and outcomes.[208]

The process dimension of entrepreneurship focuses on the development of a new business or innovative strategy. Entrepreneurship is "a process by which individuals–either on their own or inside organizations–pursue opportunities without regard to the resources they control."[209] Entrepreneurship can also be defined as "the process of creating something new of value by devoting the necessary time and effort, assuming the accompanying financial, psychic and social risks, and receiving the resulting rewards of monetary and personal satisfaction and independence."[210]

Defining entrepreneurship as a behavior involves examination of the actions of the individual.

> Entrepreneurship is the manifest ability and willingness of individuals, on their own or in teams, within and outside existing organizations to: perceive and create new economic opportunities (new products, new production methods, new organizational schemes, and new product-market combinations) and to introduce their ideas in the market, in the face of uncertainty and other obstacles, by making decisions on location, form and the use of resources and institutions.[211]

We may also define entrepreneurship by its outcome. Genuine entrepreneurship "results in the creation, enhancement, realization and renewal of value not just for the owners but all participants and stakeholders."[212] There must be a concrete result of either the entrepreneurial process or the

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206. *See generally* Margaret Kobia & Damary Sikalieh, *Towards a Search for the Meaning of Entrepreneurship*, 34 J. OF EUR. INDUS. TRAINING 110 (2010).

207. *See* DAVID STOKES ET AL., ENTREPRENEURSHIP 4 (2010).

208. *See id.*

209. Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MGMT. J.: SPECIAL EDITION CORP. ENTREPRENEURSHIP 17, 23 (1990).

210. ROBERT D. HISRICH & MICHAEL P. PETERS, ENTREPRENEURSHIP 8 (5th ed. 2002).

211. Sander Wennekers & Roy Thurik, *Linking Entrepreneurship and Economic Growth,* 13 SMALL BUS. ECON. 27 (1999).

212. JEFFRY A. TIMMONS & STEPHEN SPINELLI, NEW VENTURE CREATION ENTREPRENEURSHIP FOR THE 21ST CENTURY 47 (2004).

set of behaviors that characterize entrepreneurship. In other words, without actual creation of value, entrepreneurship does not exist.

B. CREATING A LEGAL DEFINITION

Entrepreneurship consists of three dimensions: process, behavior, and outcome. All three dimensions of entrepreneurship are important to the creation of a legal definition. The proposed legal test should incorporate elements of each of the three dimensions to create a workable test. Our proposed definition of entrepreneurship should incorporate a synthesis of all three dimensions:

1. Process: the identification, evaluation and exploitation of an opportunity.

2. Behavior: the management of a new or transformed organization so as to facilitate the production and consumption of new goods and services.

3. Outcome: the creation of value through the successful exploitation of a new idea.[213]

If we are to create a new definition, we should start with these three dimensions. These three dimensions provide the basis for the creation of a new definition. What word or phrase takes into account entrepreneurship processes? Innovation. What word or phrase encompasses entrepreneurial behavior? Risk. Finally, what word or phrase incorporates the notion of entrepreneurial outcomes? Results. Thus, we have the three dimensions of entrepreneurship are innovation, risk, and results. These elements will provide touchstones in developing a new legal test to determine the presence of genuine entrepreneurial opportunity.

V. RETHINKING THE WORKER CLASSIFICATION TEST

A. THE INNOVATION COMPONENT

The definition of entrepreneurship has long been tied to innovation. In 1934, Joseph Schumpeter defined entrepreneurs as innovators who implement entrepreneurial change within markets. Schumpeter's definition integrated innovation into the mainstream definition of entrepreneurship.[214] Entrepreneurial innovation reflects five aspects:

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213. *See* STOKES, *supra* note 207, at 8.
214. Ahmad & Seymour, *supra* note 193, at 2, 8.

> 1. the introduction of a new (or improved) good,
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> 2. the introduction of a new method of production,
>
> 3. the opening of a new market,
>
> 4. the exploitation of a new source of supply, and
>
> 5. the re-engineering/organization of business management processes.[215]

Schumpeter's definition equates entrepreneurship with business innovation—identifying market opportunities and using innovative approaches to exploit them.[216] Simply put, innovation leads to new demand, and thereby creates wealth.

The entrepreneur as innovator establishes change within markets by executing new combinations. These new combinations may appear as:

> 1. The introduction of a new good or quality thereof
>
> 2. The introduction of a new method of production
>
> 3. The opening of a new market
>
> 4. The conquest of a new source of supply of new materials or parts
>
> 5. The carrying out of the new organization of any industry.[217]

Entrepreneurship represents "an attitude of helping innovative ideas become reality by establishing new business models and at the same time replacing conventional business systems by making them obsolete."[218] Thus, genuine entrepreneurship requires the presence of an opportunity for innovation. The first component in the remade worker classification test must be the opportunity for innovation.

How much innovation should be required to establish entrepreneur status for the purposes of the proposed employee classification test? I propose

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215. *See id.*
216. *Id.*
217. *Id.* at 7.
218. George M. Korres et al., *Measuring Entrepreneurship and Innovation Activities in E.U.*, 3 INTERDISC. J. CONTEMP. RES. BUS. 1155 (2011).

that this element be viewed broadly. The worker classification test will examine factors that indicate that the job requires or rewards innovation and creativity. How might the innovation analysis take place in real life? In evaluating this factor, courts might well look to many of the factors commonly designated as "control" factors. The innovation analysis will focus on factors similar to the control question. The emphasis will, however, change to the employee's perspective. How much freedom does an employer give to its workers in the performance of their work? If an employee is given the freedom to create newer and better productivity solutions, then the employer's ability to control the manner of the work is lessened. In essence, the innovation component is the control analysis, turned on its head.

Employers wishing to restructure their independent contractor relationships must permit their workers to create or modify their own work processes. This could include permitting work to take place at a different time or place than normal. Workers may set their own hours and work from home or from another location.

B. THE RISK COMPONENT

The notion of risk is important to the concept of entrepreneurship. The presence of risk forms the second part of my proposed analysis. Risk-taking and profit have long been part of the key features defining entrepreneurship.[219]

The concept of risk impliedly encompasses an element of uncertainty.[220] Genuine entrepreneurship requires that an element of uncertainty exist in the venture. The entrepreneur will be uncertain of duration, uncertain as to success or failure, and uncertain as to profit or loss. Therefore, for an employer to classify a position as that of an independent contractor, there must be both the potential for loss as well as the potential for reward. Ideally, the two aspects should be proportional. The presence of actual entrepreneurial opportunity will be signaled by potentially large rewards accompanying a potentially large loss.

Under this new test, the employer may be required to allow the worker to work for other companies. The employer must also assume the risk that the worker may use its innovations for the benefit of a competitor.

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219. *See generally* Ahmad & Seymour, *supra* note 193, at 2.

220. Jeffrey G. York & S. Venkataraman, *The Entrepreneur–Environment Nexus: Uncertainty, Innovation, and Allocation*, 25 J. BUS. VENTURING 449 (2010), *available at* http://effectuation.org/sites/default/files/research_papers/jbv-2010-nexus-york-venkat.pdf.

C. THE RESULTS COMPONENT

Entrepreneurship requires not just the trying but the doing.[221] This third proposed element of the worker classification test requires genuine market opportunity. In other words, to be an entrepreneur there must be an opportunity to succeed and make a profit. Effective entrepreneurship requires market outcome. This third factor may prove more difficult to analyze.

It is impossible to understand entrepreneurship without understanding the market process. Entrepreneurship consists of "the competitive behaviors that drive the market process."[222] Entrepreneurship is more than simply creating new ideas or reintroducing discarded ideas. Instead, entrepreneurship, if it is to be considered entrepreneurship, must "make[] a difference."[223] The activity must have a level of success to constitute entrepreneurship.

Under the proposed entrepreneurial analysis, the burden will be on the employer to demonstrate that a genuine market opportunity exists. This provision is included to prevent employers from attempting to game the system by creating entrepreneurial opportunities that are not actually opportunities. To meet this standard, employers must find some way to demonstrate the presence of actual opportunity, and not just a theoretical opportunity.

The best evidence of actual opportunity would be to present evidence of other entrepreneurs, either at the firm or in similarly situated firms, who have achieved market success. If there is actually an entrepreneurial opportunity, someone should have been able to take advantage of it.

D. THE ADVANTAGES OF THE ENTREPRENEURSHIP TEST

Others have recognized the advantages of an entrepreneurial opportunity test.[224] The Restatement (Third) of Employment Law links the definition of independent business, which is crucial in analyzing whether or not an individual is an employee, to entrepreneurial control.[225] The comment to the Restatement explains that the right to control inquiry is only part of the

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221. As Star Wars character Yoda put it, "Do or do not. There is no try." *Yoda Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/do_or_do_not-there_is_no_try/250565.html (last visited Feb. 27, 2013).

222. PER DAVIDSSON, RESEARCHING ENTREPRENEURSHIP 6 (2005) (emphasis in original omitted).

223. *Id.*

224. *See generally* Micah Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH & LEE L. REV. 311 (2011).

225. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(2)-(3) (2009).

common law analysis, in that "the more fundamental question of whether the service provider has entrepreneurial discretion to operate an independent business."[226]

The presence of indicia of entrepreneurship could eliminate much of the uncertainty involved in the right to control analysis. "The entrepreneurialism analysis promulgated by *FedEx Home Delivery* has the potential to serve as a better focus than 'control' because it can be applied . . . to mitigate the arbitrariness of the common-law line-drawing."[227]

The remade worker status test improves on the entrepreneurial approach used in *FedEx Home Delivery* by focusing on more than just the presence of entrepreneurial potential. In my proposed worker classification test, the focus rests on genuine entrepreneurship. The test focuses not merely on the presence of entrepreneurial rights, but on the exercise of those rights. It is not enough that the rights exist in the abstract; they must be made concrete by their exercise. If only a small percentage of contractors take advantage of entrepreneurial opportunity, it is good evidence that such opportunity is lacking.

VI. CONCLUSION

The presence of entrepreneurial opportunity provides a better market for independent contractor status. Entrepreneurship is an important signal for independence, which is ultimately the question that courts are attempting to answer when construing employee status. Adoption of an entrepreneurship test that relies on an accurate definition of entrepreneurship will result in improved accuracy. Using the academic definition of entrepreneurship, and specifically the factors of innovation, risk, and result, provides the best means of testing independent contractor status.

The NLRA states that the law is meant to equalize bargaining power between employees and employers.[228] One way to give effect to that statement is to increase the bargaining power of employees by empowering them by providing them with actual entrepreneurial opportunity. For too

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226. *Id.* § 1.01 cmt. d (citing Corp. Express Delivery Sys. v. Nat'l Labor Relations Bd., 292 F.3d 777, 780 (D.C. Cir. 2002)) (stating that the critical distinction between employee and independent contractor is "the degree to which each functions as an entrepreneur-that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder"); Nat'l Labor Relations Bd. v. Friendly Cab Co., 512 F.3d 1090, 1097-99 (9th Cir. 2008) (placing particular significance on the fact that drivers cannot engage in entrepreneurial opportunities and that they lack a substantial investment in property). *See also* Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 337 (Cal. Ct. App. 2007) (holding that drivers are employees because they do not have a separate business and are not given a "true entrepreneurial opportunity").

227. Jost, *supra* note 224, at 343.

228. 29 U.S.C. § 151 (2006).

many years, worker status tests have been determined by analyzing the extent of employer control.

A focus on worker opportunity rather than employer control ultimately empowers workers. If courts and government agencies use a test focused on opportunity rather than control, it fosters an atmosphere of innovation, of excitement, and of entrepreneurship. Fortunately, the common law test is flexible enough to permit the use of factors other than the employer's right to control.

To create a sustainable independent contractor/employee model, changes must be made. The fix is not easy and will not come swiftly. But restructuring and re-implementation of a test designed to test genuine entrepreneurial opportunity provides the best means of preserving the distinction, providing certainty, and, most importantly, boosting worker opportunity.