THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

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Marc Linder, "What is an Employee? Why It Does, But Should Not, Matter," Law & Inequality.
The Definition of "Employee" as the Threshold to Protection under Current United States Federal Statutes

The foregoing analysis of modern labor protective statutes has focused on the discretion afforded employers to manipulate legal forms in order to deny employees coverage under such important statutory protection schemes as the Fair Labor Standards Act, the Social Security Act, and the National Labor Relations Act. These laws, however, represent only a small segment of the panoply of federal and state laws the protections of which are denied to those who do not fall under the definition of "employee" provided either statutorily or by judicial interpretation. The point of this Appendix is to illustrate the extraordinarily broad and interconnected impact—in terms both of sheer numbers of workers and of sectors of the economy—that the "employee" definition can have.

The statutes are classified according to certain formal and substantive characteristics of the "employee" definition. The groups are arranged in descending order of the comprehensiveness and certainty of the definition. Within groups, the statutes are set out chronologically. For the sake of convenience, only federal statutes are included. The one exception is state workers' compensation laws, the historical importance of which in the evolution of an "employee" definition has been stressed.

I. INDEPENDENT CONTRACTORS EXPRESSLY COVERED BY STATUTE


"[O]perator" means any owner, lessee, or
other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.°

"[M]iner" means any individual working in a coal or other mine.°

Judicial Gloss:

By requesting support for differentiation between owner-operated mines from non-owner mines where employees labor, the defendants seek to place a value on an owner-operators's life as far below that of a miner in any employer-employee setting. The fact that one is part owner of an enterprise does not, in and of itself, give a court leave to allow such an owner the right to expose himself to unnecessary harm where Congress has otherwise directed.°

Tandem Truck Safety Act of 1984:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

No person shall discharge, discipline, or in any manner discriminate against an employee...for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

"[E]mployee" means--

(A) a driver of a commercial vehicle (including an independent contractor while in
the course of personally operating a commercial motor vehicle). ... 10

Legislative History:

Independent owner-operators' employment status posed a unique problem to the drafters. An independent owner-operator owns his own truck and drives it. He also may own several other trucks and have several drivers working for him. ... Yet the Committee was sensitive to the fact that the financial status of certain owner-operators is closer to that of employees who are subject to much lower penalties. Therefore, in the actual language of section 9 relating to penalties..., the Committee makes clear that, in determining the penalty, financial status...is to be taken into account. 11

CURRENT FEDERAL STATUTES

Motor Carrier Safety Act of 1984:

"Employee" means--

(A) an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)

... who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety.... 12

Commercial Motor Vehicle Safety Act of 1986:

The term "employee" means an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) who is employed by an employer. 13

II. STATUTORY AMBIGUITY: JUDICIAL INCLUSION OF INDEPENDENT CONTRACTORS

Labor-Management Reporting and Disclosure Act of 1959:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys...or other assets
of a labor organization...by which he is employed, directly or indirectly, shall be fined...or imprisoned...or both.\textsuperscript{14}

Judicial Gloss:

Lawyer on retainer though technically not on union's payroll was employed by union: "Whether he was an independent contractor, agent, or servant, was not the concern of Congress." "In such cases it should make no difference whether the person employed is an employee or an independent contractor. The employer's degree of control over the thief is simply not relevant." United States v. Capanegro, 576 F.2d 973, 978, 979 n.6 (2d Cir.),\textsuperscript{14} cert. denied, 439 U.S. 928 (1978).

III. STATUTORY EXPANSION OF EMPLOYEE DEFINITION: JUDICIAL LIMITATION

Clayton Act (1914):

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations...; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.\textsuperscript{15}

No restraining order or injunction shall be granted by any court of the United States...in any case between an employer and employees...unless necessary irreparable injury to property....\textsuperscript{16}

Norris-La Guardia Act (1932):

The term "labor dispute" includes any controversy concerning terms or conditions of employment...regardless of whether or not the disputants stand in the proximate relation of employer and employee.\textsuperscript{17}

Judicial Gloss:

Act does not protect union of fishermen who own or lease their boats and "carry on their own business as independent entrepreneurs, uncontrolled by petitioner"
processor. "But the statutory classification, however broad,...does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing" such as a "controversy...between fish sellers and fish buyers." Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145, 146-47 (1942).

For the purpose of determining whether alleged violators of the antitrust laws (union horseshoers) are employees (of horse owners and trainers) or independent contractors, "[t]he usual test is...the nature and the amount of control reserved by the person for whom the work is done." The trial court's economic reality of dependence test was expressly rejected as irrelevant to distinguishing between employees and independent contractors. Moreover, the court saw no reason not to import the common-law test of employment (mandated by Congress) for adjudications under the National Labor Relations Act. From the fact that the horseshoers were independent contractors, the court concluded that no employer-employee relationship could be the matrix of a controversy that would exempt the workers from antitrust injunction. Taylor v. Local No. 7, Int'l Union of Horseshoers, 353 F.2d 593, 596, 597, 601, 606 (4th Cir. 1965).

IV. EMPTY STATUTORY DEFINITION: REGULATION—ECONOMIC REALITIES

Equal Pay Act (EPA) (1963):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work.

Regulation:

The words "employer," "employee," and "employ" as used in the EPA are defined in the FLSA. Economic reality rather than technical concepts determine whether there is employment within the meaning of the EPA. The common law test based upon the power to control the manner of performance is not
V. EMPTY STATUTORY DEFINITION: JUDICIAL GLOSS--ECONOMIC REALITIES

Bankruptcy Code (1841): 26

The following expenses and claims have priority in the following order:

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick pay leave--

(A) earned by an individual within 90 days before the date of filing the petition... but only

(B) to the extent of $2,000 for each such individual. 27

Judicial Gloss:

Former § 104 of this title was intended to give priority to persons of menial positions and low income who as a class could have ill afforded to be classified as general creditors. In re Paradise Catering Corp., 36 F. Supp. 974 (D.N.Y. 1941). Former § 104 was for the benefit of those who were dependent on their wages for a livelihood and who were not expected to to know the credit standing of their employer, but must have accepted employment as it came. In re Inland Waterways, 71 F. Supp. 134 (D. Minn. 1947), rev'd on other grounds, 164 F.2d 26 (8th Cir. 1947). "[T]he purpose of Congress has constantly been to enable employees, displaced by bankruptcy to secure... the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." United States v. Embassy Restaurant, 359 U.S. 3, 32 (1959).

Seaman's Act of 1915 (Jones Act):

Any seaman who shall suffer personal injury in the course of his employment may... maintain an action for damages at law.... 28

Judicial Gloss:
The Jones Act was welfare legislation that created new rights.... As welfare legislation, this statute is entitled to a liberal construction to accomplish its beneficent purposes. In considering similar legislation in other fields, we have concluded that Congress intended that the purposes of such enactments should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality part of the processes and dependent upon the businesses to which they rendered service. ... We assume without deciding, that the rule of the Hearst Case applies, that is, the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied. Yet this Court may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest definitions of employment or employer. 29

Occupational Safety and Health Act (OSHA) (1970):

The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce. 30

Regulation:

[T]he broad remedial nature of this legislation demonstrates a clear legislative intent that the existence of an employment relationship, for purposes of section 11(c) [anti-discrimination provision], is to be based upon economic realities rather than upon the common law doctrines and concepts. See, U.S. v. Silk...; Rutherford Food Corp. v. McComb.... 31

VI. PARTIAL STATUTORY DEFINITION:
INCLUSION OF GOVERNMENT CONTRACTOR'S EMPLOYEES

Davis-Bacon Act (1931):

The advertised specifications for every contract in excess of $2,000, to which the United States is a party, for construction...shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics...; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and and not less often than once a week...the full amounts accrued at time of payment...regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics....

Walsh-Healey Government Contracts Act (1936):

That all persons employed by the contractor...will be paid...not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work....

Service Contract Labor Standards Act (1965):

The term "service employee" means any person engaged in the performance of a contract entered into by the United States...; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

Regulation:

Prime contractor jointly and severally liable with subcontractor for any underpayments.
CURRENT FEDERAL STATUTES

VII. EMPTY STATUTORY DEFINITIONS: JUDICIAL GLOSS--MIXED/UNCLEAR

Longshore and Harbor Workers’ Compensation Act (1927):

The term "employee" means any person engaged in maritime employment.

Judicial Gloss:


Consumer Credit Protection Act (1968):

The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise.

...[T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage...

whichever is less.

Judicial Gloss:

The fact that the percentage subject to garnishment is figured on a weekly basis or other pay period basis implied that Congress contemplated that garnishment restrictions apply only to garnishments from employers; garnishment restrictions are to be applied only to wage garnishments affecting the employer-employee relationship. John O. Melby & Co., Bank v. Anderson, 88 Wis.2d 252, 276 N.W.2d 274 (1979).
The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title.

VIII. PARTIAL STATUTORY DEFINITION: JUDICIAL GLOSS--CONTROL TEST

Texas Workers' Compensation Statute (1917, as amended 1937):

"Employee" shall mean every person in the service of another under any contract of hire, express or implied, oral or written...except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer;...provided...that such persons, other than independent contractors and their employees, as may be engaged in the work of the employer of the enlargement, construction...of the premises or buildings used or to be used in the conduct of the business of the employer shall be deemed employees....

Judicial Gloss:

Control test is determinative: Continental Ins. Co. v. Wolford, 526 S.W.2d (1975); Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469 (1965).

Federal Tort Claims Act (1946):

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States...and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation.

Judicial Gloss:

Employees of federally funded community action agency are not employees of federal government because

IX. EMPTY STATUTORY DEFINITION: JUDICIAL GLOSS—CONTROL TEST

Employers' Liability Act (FELA) (1908):

Every common carrier by railroad while engaging in commerce...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...

Judicial Gloss:


Civil Rights Act of 1964 (Title VII):

The term "employee" means an individual employed by an employer.

Judicial Gloss:


Age Discrimination in Employment Act (ADEA) (1967):

The term "employee" means an individual employed by any employer...

Judicial Gloss:

Employee Retirement Income Security Act (ERISA)
(1974):

The term "employee" means any individual employed by an employer.49

Judicial Gloss:

The absence of a comprehensive definition of "employee" in ERISA and other features of that legislation indicate plainly enough that Congress intended the Secretary of the Treasury and the Secretary of Labor, who were administrators of various ERISA provisions, to continue their practice of defining "employee" in terms of common-law agency principles.50

Railroad Retirement Act of 1974:

The term "employee" means (i) any individual in the service of one or more employers for compensation, (ii) any individual who is in the employment relation to one or more employers....51

Regulations:

An individual is in the service of an employer...if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer.52

Immigration Reform and Control Act of 1986:

It is unlawful for a person or other entity to hire...for employment...--

(A) an alien knowing the alien is an unauthorized alien with respect to such employment. ...

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien...knowing the alien is (or has become) an unauthorized alien with
respect to such employment.\textsuperscript{53}

Regulation:

The term "employee" means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section.\textsuperscript{...}

The term "independent contractor" includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity:

- Supplies the tools or materials;
- Makes services available to the general public;
- Works for a number of clients at the same time;
- Directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.\textsuperscript{54}

X. CONTROL TEST INCORPORATED INTO STATUTE

Railway Labor Act (1926):

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee...in the orders of the Interstate Commerce Commission.\textsuperscript{55}

Railroad Unemployment Insurance Act (1938):\textsuperscript{56}

The term "employee"... means any individual who is or has been (i) in the service of one or more employers for compensation....

An individual is in the service of an employer...if (i) he is subject to the continuing authority of the employer to
supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used by in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation.\textsuperscript{57}

Judicial Gloss:

Determination as to whether one is employee or independent contractor must be made on basis of entire situation. \textit{Railway Express Agency, Inc. v. Railroad Retirement Bd.}, 250 F.2d 832 (7th Cir. 1958), cert. denied, 356 U.S. 967 (1958).

Civil Service Reform Act of 1978:

For the purpose of this title, "employee"...means an officer and an individual who is--...
subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.\textsuperscript{58}

XI. NO STATUTORY DEFINITION: NO JUDICIAL GLOSS

Communications Act of 1934:

Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to...their...employees.... The term "employees"... shall include furloughed, pensioned, and superannuated employees.

Byrnes Anti-Strikebreaking Act (1936)

Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of
any of the rights of self-organization or collective bargaining...

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.\textsuperscript{60}

Arbitration Act (1947)

[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.\textsuperscript{61}

Urban Mass Transportation Act of 1964:

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance.\textsuperscript{62}

Rail Passenger Service Act (1970):\textsuperscript{63}

Protective Arrangements for Employees.

Regional Rail Reorganization Act of 1973:\textsuperscript{64}

Employee Protection Agreement.

Employee Polygraph Protection Act of 1988:

The term "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.\textsuperscript{65}

Worker Adjustment and Retraining Notification Act (1988):

[T]he term "employer" means any business enterprise that employs--100 or more employees...\textsuperscript{66}

[T]he term "affected employees" means employees who may reasonably be expected to experience an employment loss as a
APPENDIX

consequence of a proposed plant closing or mass layoff by their employer.

NOTES

1. "[T]he employer...must make the initial determination as to whether a person performing services for him is an employee...." Paul Streer and Joseph Boyd, "Employee or Independent Contractor? Proposed Guidelines May Lessen the Controversy" 56 Taxes 489, 492 (1978).

2. For a European discussion of the tension between a common theoretical-abstract concept of "employee" (derived from Roman law) and the interpretation of the purpose of individual statutory schemes, see Ole Hasselbalch, Arbedisrettens almindelige del 69-72 (1984).

3. Even here no claim of comprehensiveness is made, although no statute has been knowingly omitted.

4. Older overviews of adjudication of the necessity and definition of a master-servant relationship to trigger coverage of certain protective statutes are available in: 5 C.B. Labatt, Commentaries on the Law of Master and Servant §§ 1972-74 (1913); 43 A.L.R. 335 (1926). As a result of the judicial orientation of the older literature, these two comprehensive works rarely cite to the statutes themselves. But see Joseph Jacobs, "Are 'Independent Contractors' Really Independent?" 3 De Paul L. Rev. 23, 24-25 (1953).


18. For closely reasoned arguments that this case was wrongly decided because the fishermen were employee-like dependent workers subject to the evils of inferior bargaining power, which Norris-La Guardia was meant to cure, see Comment, "Labor -- Trade Regulation--Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers," 42 Colum. L. Rev. 702, 703-4 (1942); Gottesman, "Restraint of Trade--Employees or Enterprisers?" 15 U. Chi. L. Rev. 638, 651-57 (1948). See generally Note, "Employee Bargaining Power under the Norris-La Guardia Act: The Independent Contractor Problem," 67 Yale L.J. 98 (1957).


20. The trial court had derived the owners' control over the horseshoers from the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family, and not simply for his own amusement." The appellate court held that "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed." Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965).


22. But see American Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968) (independent contractors are a party to a labor dispute where job or wage competition or other economic interrelationship affects legitimate union interests between union members and independent contractors).

23. This case was followed in San Juan Racing Ass'n, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc., 590 F.2d 31, 32 (1st Cir. 1979). A trial court held that the fact that defendant-truck owners were undisputedly independent contractors (employing their own employees, bearing all maintenance costs, and being paid pursuant to mileage/tonnage rates established by state agency) and thus not plaintiff's employees was not dispositive of issue of coverage. Rather, the court "must look to the nature of the dispute...to determine whether an
employer-employee relationship has central bearing on" the question of the existence of a labor dispute. Since the court concluded that "a group of independent business men [was] attempting to take away the business of another group of independent business men," it held that the facts had no bearing on an employer-employee relationship. Betteroads Asphalt Corp. v. Federacion de Camioneros de Puerto Rico, Inc., 391 F. Supp. 1035, 1038-39 (D.P.R. 1975). Since the court's quasi-apodictic description of the nature of the dispute apparently reflected its view of the defendants as independent contractors, its reasoning was circular. Consequently, the mere fact of being an independent contractor may have sufficed to deny the labor status of the dispute.

26. The current language dates to 1978. Congress first granted priority for wages on account of labor as an operative by the Act of August 19, 1841, 5 Stat. 445. For a brief description of the subsequent amendments, see United States v. Embassy Restaurant, 359 U.S. 29, 35-37 (1959) (Black, J., dissenting). "[I]n 1956, Congress took occasion to guard against a narrow interpretation of the class of workers covered by adding... 'and for the purposes of this clause, the term "travelling or city salesman" shall include all such salesman, whether or not they are independent contractors....'" Id. at 36 (citing 70 Stat. 725, 11 U.S.C. [Supp. V] § 104).
29. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790-91 (1949) (citations omitted). In spite of this clear directive from the Supreme Court to apply the economic reality of dependence test instead of the common-law control test, the appeals courts have persistently applied the latter. See, e.g., Wheatley v. Gladden, 660 F.2d 1024, 1026 (4th Cir. 1981); Spinks v. Chevron Oil Co., 507 F.2d 216, 224 (5th Cir. 1975); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 171 (2d Cir. 1973). As authority for applying the common-law control test all these courts refer to United States v. Webb, 397 U.S. 179 (1970). Webb, however, was a social security (FICA/FUTA) case. In 1948 (the year before McAllister was decided) Congress expressly proscribed the economic reality test and prescribed the control test for social security
cases. See supra ch. 6. Since this congressional action did not apply to Jones Act cases, Webb constitutes an incorrect and inappropriate standard for the latter.


33. Neither the cases nor the regulations define "employed" in the sense relevant to the present context. But see United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963) (Walsh-Healey Act does not make contractor responsible for the labor standards of its independent contractor-suppliers).


37. The definition referred to in the text was added when the Act was amended in 1972. The original Act of 1927 defined "employee" only negatively; 33 U.S.C. § 902(3) (1986). The Act defines "employer" to mean "an employer of any of whose employees are employed in maritime employment...." 33 U.S.C. § 902(4) (1986).


40. For an example of a state garnishment statute, see Tex. Const. art. 16, § 28 (Vernon Supp. 1989): "No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments"; and Tex. Code Ann. Civ. Prac. & Remedies Code, § 63.004 (Vernon 1986): "Current wages for personal service are not subject to garnishment" (repealing Vernon's Ann. Civ. Stat. § 4099, the text of which was identical). Judicially it has been held that, although the statute is to be liberally construed in favor of the laborer, it implies the existence of a master-servant, employer-employee relationship, and excludes compensation to independent contractors. The control test—as developed in workers' compensation cases—applies. Brasher v. Carnation Co. of Texas, 95 S.W.2d 573, 575 (Civ. Ct. App. Austin 1936); Shahan v. Biggs and Co., 123 S.W.2d 686, 688-89 (Civ. App. Ft. Worth 1928).

42. For a discussion of a trend in the case law in some states away from the control test and toward the so-called relative-nature-of-work test, see Arthur


44. In Texas "[t]he claimant has the burden of proving
that he is an employee and not an independent
contractor." Continental Ins. Co. v. Wolford, 515
S.W.2d 364, 366 (Civ. App. 1974), rev’d on other
grounds, 526 S.W.2d 539 (1975).


50. Holt v. Winpisinger, 811 F.2d 1532, 1538 n.44 (D.C.
Cir. 1987). Accord, Short v. Central States, South,
and Southwest Areas Pension Fund, 729 F.2d 567, 571-73
(8th Cir. 1984). The court bottomed this view on cases
decided under the National Labor Relations Act (NLRA).
Given the specific congressional mandate regarding
employee status under the NLRA, those cases are not
relevant to ERISA. See supra ch. 6.


52. 20 C.F.R. § 203.1 (1988). See also 20 C.F.R. §
203.3(a) (1988).


54. 8 C.F.R. § 274a.1(f) and (j) (1988). "The criteria
and factors which have been enumerated are consistent
with current Internal Revenue Service guidelines." 52


56. Part of §(e) was amended in 1946.

57. 45 U.S.C. § 351(d), (e) (1986).

enacted in 1966).

59. 47 U.S.C. § 210(a) (1962) (as amended by Act of


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