Note - Not Everything That Glitters Is Gold, Misclassification of Employees: The Blurred Line between Independent Contractors and Employees under the Major Classification Tests

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NOTE - NOT EVERYTHING THAT GLITTERS IS GOLD, MISCLASSIFICATION OF EMPLOYEES: THE BLURRED LINE BETWEEN INDEPENDENT CONTRACTORS AND EMPLOYEES UNDER THE MAJOR CLASSIFICATION TESTS.

I. INTRODUCTION

Today’s workplace has become increasingly regulated and complex. In distinguishing employees from independent contractors, employers face challenges due to a lack of statutory authority and often make lasting, even detrimental, business decisions as a result. Currently, the federal government has not established a substantive statutory scheme.
to clarify this issue. However, many states have decided to address the problem by providing guidance through a series of common law classification tests. The three major classification tests are: the control test, the economic reality test, and the relative nature of the work test. Although mostly similar, the factors of these three major classification tests vary from jurisdiction to jurisdiction. Other states have decided to resolve the problems by enacting legislation to clarify the issues in some specified industries.

In Chaves v. King Arthur’s Lounge an exotic dancer in Massachusetts was ruled to be an employee of the establishment because she performed her service in the lounge, the service was not customary in independently established businesses of the same nature, and the lounge asserted direct control over her. In other states, if the same facts applied, the outcome may have differed, it may have also differed if the dancer’s classification was made under the tax statutes or under the Fair Labor Standards Act. For instance, an exotic dancer from New York in the same circumstances would be classified as an independent contractor under New York law, but for tax purposes and under the FLSA she may be viewed as an employee. Although the test to determine if an individual is an employee for tax purposes has been extensively litigated, it is unclear how

\[\text{3 See DRETLER & KURTZ, supra note 2, at § 1.6.1 (noting lack of statutory support in Massachusetts).}\]

\[\text{4 See id. (illustrating federal government's increased enforcement of legislation efforts to curtail misclassification of workers).}\]

\[\text{5 See infra Part IV (exploring varying tests across court and states).}\]

\[\text{6 See infra Part V.}\]

\[\text{7 See Christopher Buscaglia, Crafting a Legislative Solution to the Economic Harm of Employee Misclassification, 9 U.C. DAVIS BUS. L.J. 111, 135 (2009) (listing appendix of states using misclassification statutes versus common law factor tests).}\]


\[\text{9 See id. at *7 (holding worker was acting as employee). The court emphasized that the employer hired and fired the individual and had them perform according to a set shift schedule the employer set. Id. at *9-10. Therefore, it was “unnecessary to determine whether King Arthur’s has satisfied the first prong of the independent contractor test, because it has failed to establish either the second or third prong.” Id.}\]

\[\text{10 See Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947) (holding that meat boners were employees of slaughterhouse under FLSA); Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1440-41 (10th Cir. 1998) (applying economic realities test); Walling v. Rutherford Food Corp., 156 F.2d 513, 516-17 (10th Cir. 1946) (defining workers as employees under FLSA using economic realities rather than traditional rules).}\]

\[\text{11 See 303 W. 42nd St. Enter., Inc. v. IRS, 916 F. Supp. 349, 356 (S.D.N.Y. 1996) (holding dancers were not independent contractors because training indicated employer-employee relationship), rev’d and remanded 181 F.3d 272 (2d Cir. 1999); Jeffcoat v. Alaska Dep’t of Labor, 732 P.2d 1073, 1077 (Alaska 1987) (finding workers were employees because no long-term training existed like independent contractors).}\]
a court will rule on the issue given that different jurisdictions have contrasting ways of evaluating the classification of an individual for tax or other purposes.\textsuperscript{12} Misclassification of employees has been the source of intense legal and political controversy since a variety of state independent contractor statutes and common law tests are used to determine when an individual is an employee or an independent contractor.\textsuperscript{13} It can still be difficult for employers to know how to properly classify employees, especially if they employ workers in multiple jurisdictions.\textsuperscript{14}

Given the growing complexities in employment law, employers are recognizing the importance of complying with misclassification statutes, and therefore are trying to educate their executives and in house counsel on the process.\textsuperscript{15} This note will explore some of the largest obstacles a litigator will likely face when trying an employee misclassification claim.\textsuperscript{16} This note will then outline the facts a litigator needs to show the court to establish whether an individual is an independent contractor or an employee.\textsuperscript{17} Additionally, the use of a combination of different common law classification tests can be a persuasive method in convincing the court that an individual should be an independent contractor or an employee.\textsuperscript{18} The current legal climate creates an environment where employers lack an incentive to properly classify workers because the risk of getting caught or punished is substantially outweighed by the financial benefit involved in misclassifying workers.\textsuperscript{19} Although that may be true, the majority of misclassification is not motivated by financial gain, but rather by employers misclassifying their employees due to their misinterpretation of the law.\textsuperscript{20}

\textsuperscript{12} See DRETLER \& KURTZ, supra note 2 (“One of the things that can make it difficult to properly classify workers as employees or independent contractors is that there are different statutory and common law tests which are applicable for different purposes.”).

\textsuperscript{13} See id. (noting tests can lead to differing results even though they rely on similar factors).

\textsuperscript{14} See id.

\textsuperscript{15} See id. \S 1.21 (“The classification of a worker as an employee or an independent contractor is a critical decision that must be made at the inception of a working relationship, monitored over time, and revised, if necessary, to reflect both the true nature of the relationship and to ensure compliance with changes in the law.”); see also Silverman \& Sandhu, supra note 2, at 492 (stressing importance of wage and hour classification audits to ensure proper assignment of employees).

\textsuperscript{16} See infra Part III (a) (describing facts applicable to common law test and state statutes).

\textsuperscript{17} See infra Part IV (illustrating common law test’s applicability in persuading court).

\textsuperscript{18} See infra Part II (discussing historical background of tests and development of employment law); see also infra Part IV (explaining social significance of employee misclassification and proposed litigation tactics).

\textsuperscript{19} See Buscaglia, supra note 7, at 127 (explaining why independent contractor statutes do not work as intended).

\textsuperscript{20} See Jane P. Kwak, Note, Employees Versus Independent Contractors: Why States Should
This note will begin with a brief overview of the current state and federal laws governing employee misclassification, followed by a brief overview of the historical development of labor and employment law.\textsuperscript{21} Next, the note will analyze the current obstacles a litigator faces when defending an employer, or bringing suit on behalf of an employee or independent contractor.\textsuperscript{22} Finally, this note will conclude with a prediction of the anticipated development of employee misclassification law and suggestions on how to frame an argument to obtain a more favorable outcome.\textsuperscript{23}

II. HISTORICAL BACKGROUND

A. Evolution of Employment Law

Regulation of the workplace and of employees unifying to protect their rights was not always a popular idea.\textsuperscript{24} For years, unionizing was illegal and frowned upon, however, as time progressed employee rights became an acceptable idea.\textsuperscript{25} The regulation of the employer and employee relationship began in 1913 with the Organic Act, which established the Department of Labor.\textsuperscript{26} The Department’s purpose is not only to protect the interest and rights of the wage earners, but also to administer those rights fairly in order to also protect businesses and the public at large.\textsuperscript{27} The next significant governmental action was the National Labor Relations Act of 1935, which gave workers the right to be represented by a union, establishing the National Labor Relations Board as an independent agency charged with investigating and remedying unfair labor practices.\textsuperscript{28} In a


\textsuperscript{21} See infra Part II.

\textsuperscript{22} See infra Part IV.

\textsuperscript{23} See infra Part V.

\textsuperscript{24} See Commonwealth v. Hunt, 45 Mass. 111, 134 (1842) (allowing employees to come together to protect themselves, stating unions were not necessarily criminal).

\textsuperscript{25} See id. (overturning defendants’ indictment for conspiracy and finding labor unions lawful).


\textsuperscript{28} See \textit{The 1935 Passage of the Wagner Act}, NAT’L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited Oct. 01,
highly contested attempt to improve the workplace, the government passed The Fair Labor Standards Act of 1938, a federal statute that provided a minimum standard for all workplaces. As time passed, Congress enacted multiple Amendments to the FLSA to keep the act current and effective.

The FLSA has not always been widely accepted and was often challenged by employers who did not like the law because they believed it impeded business and increased costs. Although the FLSA covers most industries, it does not protect workers from all unfair practices and therefore, at times, state and local governments have to enact laws to provide greater protection for workers.

As the workplace continued to become more complex, the law governing the workplace and employers ability to control their workers has grown, affording workers more rights. Congress expanded its role governing the employee-employer by regulating termination conditions, regulating the type of information that can be disclosed in references and other inquiries about past employment, and how employers should participate in employee retirement.

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29 See Jonathan Grossman, Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage, U.S. DEP’T OF LABOR, http://www.dol.gov/dol/aboutdol/history/flsa1938.htm (last visited Sept. 06, 2014) (“Against a history of judicial opposition, the depression-born FLSA had survived, not unscathed, more than a year of Congressional altercation. In its final form, the act applied to industries whose combined employment represented only about one-fifth of the labor force.”).


31 See id. (establishing minimum wage and overtime rights with exemptions); see also Bartlow v. Costigan, 974 N.E.2d 937, 953-54 (Ill. App. Ct. 2012) (holding Illinois’ Employee Classification Act did not violate equal protection), aff’d in part vacated in part 13 N.E.3d 1216 (Ill. 2014). The court also found the legislature had the power to address the misclassification of employees. Bartlow, 974 N.E.2d at 953-54.


33 See Jewell Ridge Coal Corp. v. United Mine Workers of Am., 325 U.S. 161, 188 (1945) (holding employee’s commute inside work area constituted working). The Court ruled this way because; (1) commuting required physical and mental exertion; (2) commute was controlled and required by the employer; and (3) commuting was for the employer’s benefit. Id. at 164-66.

B. The History of the Major Common Law Classification Tests

1. The History of the Control Test

In the mid-nineteenth century, the English and American courts established the foundation of what we now know as the common law control test to determine whether an individual is an employee for the purpose of vicarious liability through the doctrine of respondeat superior. In *Railroad Co. v. Hanning*, the United States Supreme Court used the control test for the first time to find that an individual was an employee rather than an independent contractor, and held that a business could be liable for the injury that an individual in its control negligently caused. The Court considered the terms of Carvin’s contract with the railroad company, under which the railroad company had complete control over the work. The court found that because of these factors, and because the contract between the parties did not define the work to be performed in specificity, the business reserved the right to control the work of the hired individual; therefore the individual was an employee.

Although many jurisdictions define the control test differently, the core elements of the control test, as defined in *Singer Mfg. Co. v. Rahn*, remain generally the same. The court held that “the relation of master [employer] and servant [employee] exists whenever the employer retains the right to direct the manner in which the business shall be done, as well

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35 See Sadler v. Henlock, 119 Eng. Rep. 209, 212 (Q.B. 1855) (establishing standard for modern day control test); see also Boswell v. Laird, 8 Cal. 469, 492 (1857) (characterizing worker as independent contractor when employer lacks apparent capacity to supervise or control); Thomas M. Murray, Note, Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relation Act, 16 CARDozo ARTS & ENT. L.J. 303, 306-07 (describing birth and historical development of right to control test).

36 82 U.S. 649, 656 (1872).

37 See id. at 656-58 (describing holding of case).

38 See id. at 656-57 (detailing specific terms of Carvin’s agreement with railroad company). Under the terms of the contract the railroad company had control over every aspect of the work, such as how much material the workers used, and “how it shall be laid to make the old wharf as good as new.” Id. at 656.

39 See id.

40 132 U.S. 518 (1889).

as the result to be accomplished, or, in other words, ‘not only what shall be
done, but how it shall be done.’”

In light of new social welfare legislation
driven in part by the New Deal, the Supreme Court had to determine
whether the control test, which was primarily used to determine tort
liability, could be used to determine whether an employment relationship
existed for the purposes of employment liability, employee coverage, and
protection. The evolution of using the control test to determine the
employment relationship led to further complications in determining
whether an individual is properly classified as an independent contractor or
an employee, to the point where Congress and the NLRB disagreed on the
fundamental definition of an employee.

2. The History of the Economic Reality Test

In United States v. Silk, the United States Supreme Court
established the foundation of the economic reality test. In deciding
whether an individual was an employee or independent contractor under
the economic reality test, the Court considered the following factors: the
degrees of control; the opportunities for profit or loss; the investment in
facilities; the permanency of relation; and the skill required to complete the
job in question. The Court recognized the common law control test did
not always fairly represent the individual’s relationship to the business;
therefore, it decided to use the economic reality test to better define the
employee-employer relationship. The economic reality test does not
replace the control test, rather it is to be viewed as a supplement. When
using the economic reality test, the court will often tailor the test based on

\[\text{References}\]

42 See Sullivant, supra note 41, at 993 (quoting Hanning, 82 U.S. at 657) (discussing what
can determine employee/employer relationship).

43 See John Bruntz, The Employee/Independent Contractor Dichotomy: A Rose is Not Always
 a Rose, 8 HOFSTRA LAB. & EMP. L.J. 337, 348-49 (1991) (illustrating transition control test from
torts to employment relationship context); see also Murray, supra note 35, at 310-11 (reviewing
context under which Supreme Court had to make determinations).

44 See Murray, supra note 35, at 311-12 (stating Congress, hostile toward NLRB’s
interpretation, passed Taft-Hartley Act, amending NLRA to include independent contractors).


46 See id. at 713 (noting Congress’ change in interpretation of word “employee” as used in
NLRA).

47 See id. at 716 (describing factors when determining employee or independent contractor).

48 Id. at 720-21 (reasoning economic reality test aligned with intended meaning of statute).

49 See Murray, supra note 35, at 313 (“Despite claiming it was appropriate to adhere to the
Hearst rule, the Silk Court refused to substitute the economic realities test for the control test.”).
the purposes of the issue presented.\textsuperscript{50} The Court recognized that in some situations, businesses will unfairly control individuals in methods which will not satisfy the basic elements of the control test.\textsuperscript{51}

In applying the economic reality test, the court must determine whether the employees are economically dependent upon the business.\textsuperscript{52} In the economic reality test, the dependence element indicates the employee status.\textsuperscript{53} If the total evaluation of the important factors establishes that the individual is so dependent upon the business with which they are connected to, then that individual is an employee.\textsuperscript{54}

The economic reality test is often used by many different jurisdictions and venues, including: the U.S. Department of Labor, the Social Security Administration, the Fifth circuit court, and the NLRB.\textsuperscript{55} The emphasis of the economic reality test is particularly on the economic dependence of the worker.\textsuperscript{56} Typically, a simple common sense approach can lead a reasonable business owner or manager to know whether an individual is an employee or independent contractor.\textsuperscript{57}

\textsuperscript{50} See id.

\textsuperscript{51} See Silk, 331 U.S. at 721 (noting problem with “differentiating between employee [or agent] and an independent contractor”).

\textsuperscript{52} See, e.g., Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987) (recognizing Silk factors not exhaustive and focus should be on employees’ economic dependence); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 665-66 (5th Cir. 1983) (considering totality of circumstances in determining economic reality); Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981) (“[T]he focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic fact, in business for himself”); see also Silk, 311 U.S. at 715-16 (listing five factors courts should consider when determining employee status).

\textsuperscript{53} See Mr. W Fireworks, Inc., 814 F.2d at 1044.

\textsuperscript{54} See id. (explaining totality of circumstances).

\textsuperscript{55} See Independent Contractor Tests, TEXAS WORKFORCE COMMISSION PUBLICATION, http://www.twc.state.tx.us/news/efte/independent_contractor_tests.html (last visited Sept. 6, 2014) (summarizing interaction between Texas policy and other jurisdictional interpretations). Hence, it is crucial to take the economic reality test into account when dealing with issues regarding the FLSA, NLRA and Social Security tax purpose. See id.

\textsuperscript{56} See Mr. W Fireworks, Inc., 814 F.2d at 1043, 1054-55 (detailing reasoning of using economic dependence).

\textsuperscript{57} See Independent Contractor Tests, supra note 55. Under the economic reality test, a worker who only invests and sells his services to a single business, and as a result is economically dependent on that business, is deemed an employee. See id. (describing economic reality test). Conversely, a worker who is not normally dependent on one customer, is in business for themselves, invest in their own equipment and supplies will be deemed and independent contractor. See id.
3. The History of the Relative Nature of the Work Test

Although not used in many jurisdictions, the relative nature of the work test is another way that some jurisdictions determine whether an individual is an employee or independent contractor.58 As early as 1953, the courts began to use the relative nature of the work test to define the employee-employer relationship.59 In Kughn v. Rex Drilling, the court determined that use of the relative nature of the work test can be appropriate to help determine whether an employment relationship exists.60 The court stated that in determining whether an employment relationship exists, the following factors should be considered:

(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; (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; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (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; and (i) whether or not the parties believe they are creating the relationship of master and servant.61

The control test remains the dominant test while the relative nature of the work or “economic reality” test is used in some circumstances to

58 See Sullivant, supra note 46, at 1004 (listing major test courts use to determine if individual is employee); see also Darryll M. Halcomb Lewis, After Further Review, Are Sports Officials Independent Contractors?, 35 AM. BUS. L.J. 249, 256 n.25 (1998) (listing some states that adopted “relative nature of the work” test).
59 See Kughn v. Rex Drilling Co., 64 So. 2d 582, 586 (Miss. 1953) (illustrating courts willingness to use relative nature of work test). The claim failed under the control test and the court thus suggested applying the nature of the work test to distinguish an employee relationship from that of an independent contractor. Id. The relative nature of the work test brings the nature of the claimant’s work in relation to the regular business of the employer. Id.
60 Id. at 585-86 (laying out Larson’s factors to consider when assessing servant versus independent contractor).
61 Id.
supplement the control test.\textsuperscript{62} The relative nature of the work test is used in circumstances where a potential employment relationship has been created by social legislation.\textsuperscript{63} It is also appropriate to use the relative nature of the work test in situations where public policy and public welfare are at issue, thus indicating a more liberal standard in determining an employee-employer relationship.\textsuperscript{64} Once viewed as too liberal, the nature of the work test has been accepted and thoroughly examined in as many as twenty-seven jurisdictions.\textsuperscript{65}

\textbf{C. History of the IRS Common Law Test}

The Constitution grants the federal government power to regulate interstate commerce, which includes the power to impose and collect taxes.\textsuperscript{66} The Social Security Act of 1935 began the taxing of employee and employer to help fund social welfare and social insurance programs; these programs are funded through the Federal Insurance Contributions Act and

\textsuperscript{62} See Merchant v. Vindick, No. A-3822-12T1, 2014 WL 1647134, at *18-21 (Ct. App. Div. Apr. 25, 2014) (applying control test and relative nature of work test in determining employee status); see also Murray, supra note 35, at 313 ("Despite claiming it was appropriate to adhere to the Hearst rule, the Silk Court refused to substitute the economic realities test for the control test.").

\textsuperscript{63} See Lowe v. Zarghami, 731 A.2d 14, 21 (N.J. 1999) (explaining limited circumstances in which relative nature of work test is appropriate).

\textsuperscript{64} See id.; see also Reyes v. D.C. Dep't of Emp't Servs., 48 A.3d 159, 164 (D.C. 2012) (discussing relative nature of work test requires fact-specific analysis).


\textsuperscript{66} See U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").
Self Employed Contributions Act Tax. FICA is a payroll tax imposed on both the employee and the employer to fund social programs and benefits; independent contractors and those who are self-employed similarly pay SECA. Misclassification of an individual can save employers a significant amount of money, this subsequently costs the government a great deal of tax revenue lost as employers with less employees pay significantly less FICA tax, hence why the IRS will pursue employers who misclassify their employees.

The IRS has tried to clarify how employers should classify individuals by posting advisory notices on the IRS website, having IRS agents available for questions, defining their interpretation of an employee, and by passing legislation. The “IRS common factor test” is designed to guide the court when deciding if an individual is an employee; over time, the court has focused on a few key factors. Over time, the courts focus on a few key factors, thus creating a narrower, more on point factor test to decide whether an individual is an employee or an independent contractor, the remaining factors are nonetheless to be considered when appropriate.

Although issues regarding the IRS common law test have been litigated for decades, and there has been significant simplification of the test at times,
many employers unintentionally misclassify employees as independent contractors.\textsuperscript{73}

\textbf{D. Statutory Development of Independent Contractor Statute}

The construction industry has traditionally run afoul of employee misclassification; many states have enacted independent contractor statutes geared towards preventing the willful misclassification of employees in the construction industry.\textsuperscript{74} One reason states have enacted independent contractor statutes is because misclassification of employees deprives individuals of receiving benefits that would be owed to them if they were properly classified.\textsuperscript{75} Misclassification of employees creates economic harm because it can be a significant competitive advantage for employers who intentionally or unintentionally misclassify their employees which can result in significant savings through lower operating costs.\textsuperscript{76} Realizing the ills associated with employee misclassification, Massachusetts enacted an independent contractor statute that covers all industries.\textsuperscript{77}

State independent contractor statues typically have their own test, which courts use to determine whether an individual is an independent contractor or an employee.\textsuperscript{78} However, no two state independent contractor statutes are alike, as they apply what can be viewed as a shorten amalgam of the IRS common law test.\textsuperscript{79} Most of the state independent contractor

\textsuperscript{73} See Ramirez v. Comm'r, T.C. Summ. Op. 2013-38 (T.C. 2013) (determining if radio personalities are employees or independent contractors). The degree of control exercised by a principal over the worker is the crucial test in determining the nature of a working relationship. \textit{Id.} at 11. In an employer-employee relationship the principal must have the right to control not only the result of the employee’s work, but also the means and method used to accomplish that result. \textit{Id.}


\textsuperscript{76} See Buscaglia, supra note 7, at 111-114 (illustrating larger economic harm of employee misclassification). Misclassification has a severe negative effect on competitive behavior in the marketplace. \textit{Id.} Employers who misclassify their workers avoid many of the costs of employment and thereby gain an unfair market advantage over their law-abiding competitors. \textit{Id.}

\textsuperscript{77} See MASS. GEN. LAWS ch. 149, \textsection{} 148B (2014) (establishing presumptive employee status unless individuals falls into one of five exceptions).

\textsuperscript{78} See \textit{id.} (detailing Massachusetts independent contractor test).

\textsuperscript{79} See OR. REV. STAT. \textsection{} 670.600 (2014) (setting specific guidelines to be classified as an
statutes will not impose severe penalties for misclassification of employees. However states like California and Massachusetts have increased the potential penalties by creating higher civil penalties for repeat offenders as well as criminal liability in Massachusetts.

The factor test used to determine if an individual is an employee or independent contractor for purposes other than tax liability or purposes covered by state independent contractor statutes will likely be covered under The Department of Labor’s economic reality test. The test shares many similarities—including many of the same successes and pitfalls—with those used by the IRS common law test and in many independent contractor statutes. However, the economic reality test may be viewed as more significant because it covers all industries for a broader purpose. Like the IRS common law factor test, the economic reality test has recently gone through some modification, shortening its factors in an attempt to provide more transparency in how to properly classify employees and independent contractors. Some states and circuits have tried to simplify
the test by reducing its factors while other states and circuits have continued to use the traditional factors creating confusion for the both employers and the working individual.  

III. FACTS

A. Applicable Circumstance

In today's competitive business environment, some businesses might prefer to use independent contractors rather than employees in certain situations. However, in doing so, employers must be careful to make sure they are not violating federal or state laws since violations can result in fines, civil penalties and, in some cases, criminal penalties. The existence of an employment relationship triggers rights and duties under numerous federal, state, and local statutes. Therefore, it behooves employers to know how courts decide exactly when the parties have entered into an employment relationship. Employers often attempt to

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86 See Hennighan v. Insphere Ins. Solutions, Inc., No. 13-CV-00638-JST, 2013 U.S. Dist. LEXIS 58888, at *11 (N.D. Cal. Apr. 24, 2013) ("California law presumes an employer/employee relationship once evidence has been presented that an individual provided services for an employer. The burden then shifts to the employer to prove, if it can, that the presumed employee was an independent contractor."); see also Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (illustrating economic realities, not contractual labels, determine employment status).

87 See Robert R. Berluti, Esq., MA Law Regarding Independent Contractors, Prepared for the Massachusetts Motor Transportation Association, BERLUTI MCLAUGHLIN & KUTCHIN LLP (Nov. 12, 2009), http://www.bmklegal.com/lawyer-attorney-1637395.html (explaining why businesses use independent contractors). Independent contractors not only provide flexibility in staffing, but they also enable businesses to react rapidly to changes in the marketplace. See id.

88 See Robert R. Berluti, Esq., Publication: Independent Contractors vs. Employees, BERLUTI MCLAUGHLIN & KUTCHIN, LLP (2009), http://www.bmklegal.com/lawyer-attorney-1637419.html ("Liability under this Statute opens an employer up to treble damages and attorney’s fees, and suits may be brought both by the Commonwealth and by the misclassified workers themselves."); see also Buscaglia, supra note 7, at 119 (expressing failure to comply with Independent Contractor statute can lead to criminal liability in three states).


90 See Silverman & Sandhu, supra note 2, at 492-96 (highlighting importance of knowing
take advantage of workers by misclassifying them as independent contractors in order to forgo paying benefits due to them.\textsuperscript{91}

In most jurisdictions, the proper test for determining whether an individual is an employee or an independent contractor depends on the purpose for which the employer is classifying that individual.\textsuperscript{92} An employer may properly classify an individual for tax purposes, but may violate an independent contractor statute unknowingly as most statutes have a more stringent test than the Internal Revenue Service’s “IRS” test.\textsuperscript{93} Most tests place the burden of properly classifying workers on employers, even allowing workers to be classified as employees although they signed an agreement to work as an independent contractor.\textsuperscript{94} To best avoid misclassification, employers should take into account all applicable tests in their jurisdiction and perform frequent audits to make sure that all employees are properly classified.\textsuperscript{95}

When trying to classify an individual for tax purposes, employers should use what has been established by the IRS as the common law factor test, which includes twenty factors.\textsuperscript{96} The state tax courts have also applied their own factor tests to determine whether a worker is an independent contractor or an employee; some state tax courts will follow the federal courts while others will not.\textsuperscript{97} The common law factor test does not require all elements of the test to be satisfied.\textsuperscript{98} Rather, the test is to be used as a guide in deciding the relationship between an employee and employer.\textsuperscript{99} In an attempt to further clarify the common law test, some government agencies and courts have consolidated the test to three key factors: the

\begin{itemize}
\item \textsuperscript{91} See Buscaglia, supra note 7, at 129-30 (discussing attempts at misclassification).
\item \textsuperscript{92} See DRETLER & KURTZ, supra note 2, § 1.6.1 ("One of the things that can make it difficult to properly classify workers as employees or independent contractors is that there are different statutory and common law tests which are applicable for different purposes.").
\item \textsuperscript{93} See id. (comparing IRS test with other applicable tests).
\item \textsuperscript{94} See CAL. LAB. CODE § 3357 (2014) (stating any person rendering service is presumed to be employee unless otherwise expressly excluded); MASS. GEN. LAWS ch. 149, § 148B (2014) (stating individuals performing any services is considered to be employee).
\item \textsuperscript{95} See Silverman & Sandhu, supra note 2, at 493 ("Prior to commencing a classification audit, the employer and its counsel should first identify the groups...and positions to audit...[and] familiarize themselves with the applicable legal classification test.").
\item \textsuperscript{96} See Rev. Rul. 87-41, 1987-1 C.B. 296, *9-194 (listing twenty factors to determining whether an individual qualifies as a common-law “employee”).
\item \textsuperscript{97} See Hetland & Assocs. v. Comm’r of Revenue, No. 8160 R, 2011 Minn. Tax. LEXIS 7, at *9-10 (Minn. Tax Ct. 2011).
\item \textsuperscript{98} See NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968) (noting common law factors must be assessed and weighed with no one factor being decisive).
\item \textsuperscript{99} See id. (same).
\end{itemize}
behavior control, financial control, and the relationship of the parties.\(^{100}\)

Few states have an independent contractor statute, but employers in those states must be sufficiently aware of such statutes when classifying its workers or when defending themselves against allegations of violating the statute.\(^{101}\) Kansas has an independent statute that covers the intentional misclassification of an employee as an independent contractor for the purpose of avoiding tax liabilities or similar responsibilities.\(^{102}\) In New Mexico, under its independent contractor statute, it is a misdemeanor for a contractor in the construction industry to willfully misclassify an employee as an independent contractor.\(^{103}\) In New Jersey, the law is clearly titled the “Construction Industry Independent Contractor Act.”\(^{104}\) This law only covers the construction industry and says that all workers are deemed to be employees, unless the employer can show that the worker satisfies the test spelled out in the statute.\(^{105}\)

Minnesota’s independent contractor statute takes a unique approach as it requires individuals working as independent contractors in the construction industry to be certified as such before working; it also provides a list of nine criteria that must be met in order to be certified as an independent contractor.\(^{106}\) The California employee presumption statute states that workers rendering services for another are presumed to be employees unless they are shown by the employer to be an independent contractor.\(^{107}\)

\(^{100}\) See Andrea M. Kirshenbaum, Labor Department Targets Independent Contractor Misclassification: Wage and Hour, THE LEGAL INTELLIGENCER, Jan. 31, 2013 (stating Labor Department is targeting Independent Contractor Misclassification). Additionally, the IRS is trying to help make it easier to properly classify employees by reducing its twenty factor test into a three factors. \textit{Id.}

\(^{101}\) See Buscaglia, supra note 7, at 137 (listing of states with an independent contractor statute); see also CAL. LAB. CODE § 3357 (2015) (“Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”).

\(^{102}\) See KAN. STAT. ANN. § 44-766(a) (2013) (focusing on penalizing employer for purposely misclassifying employees to escape tax liabilities). The statute focuses on the employer’s intent to purposely misclassify the employee. \textit{Id.}

\(^{103}\) See N.M. STAT. ANN. § 60-13-3.1 (2014) (making it unlawful to intentionally misclassify construction worker as an independent contractor). The statute only covers workers in the construction industry. \textit{See id.}

\(^{104}\) See N.J. STAT. ANN. § 34:20-4 (2014) (setting three prong test to establish whether workers are employees or independent contractors).

\(^{105}\) See \textit{id.}

\(^{106}\) See MINN. STAT. § 181.723(4) (2014) (highlighting standard for being classified as independent contractor in construction industry in Minnesota). To be certified as independent contractor individuals must complete an application and the application must satisfy nine criteria. See MINN. STAT. § 326B.701(3) (2014) (listing nine criteria for independent contractor certification).
contractor. The Massachusetts independent contractor statute may be the most comprehensive statute as it covers all industries, establishes a three-prong test, carries civil and criminal penalties, and violations can be alleged as willful or non-willful. However, the statute only applies if the employer has both misclassified the worker and, as a result of the misclassification, thereby violated another employment statute.

In jurisdictions without an independent contractor statute, employers should be aware of how to properly classify workers to avoid misclassifying workers for purpose of the Fair Labor Standard Act. In making such determination the court performed an analysis using a seven-factor common law test also known as the economic reality test. Not going completely away from the seven-factor test, the court in Scantland v. Jeffry Knight, Inc. applied a shortened multifactor test to guide the economic reality inquiry. The FLSA covers all industries, and therefore it exposes all employers to the possibility of misclassification claims against them. Many states without independent contractor statutes have taken a similar approach and have decided to apply their own version of the economic reality test. In some situations the court may even use a hybrid test combining multiple factors. Nevertheless, one of the important factors seems to be the control the employer appears to have over the worker.

Lastly, in addition to all of the tests named above, another test the

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108 See MASS. GEN. LAWS ch. 149, § 148B (2014) (performing any service renders worker employee unless employer can show worker satisfied statutory test).
109 See § 148B(d) (providing requirements and punishments for violation); see also Buscaglia, supra note 7, at 126 (noting misclassification alone is insufficient under Massachusetts statute).
110 See Kirshenbaum, supra note 100 (highlighting importance of being aware of how to properly classify employees).
111 See id. (highlighting government’s ongoing efforts to reduce employee misclassification).
112 721 F.3d 1308, 1312 (11th Cir. 2013).
113 See id.
117 See id. (determining employee classification using both economic realities of work relationship and control of employee); see also Oestman v. Nat’l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992) (applying hybrid test using common law right to control with economic realities test). The hybrid test focuses on the inquiry of the employer’s right to control the “means and manner” of the worker’s performance. See Oestman, 958 F.2d at 305-06.
court will use to determine if an individual is an employee or independent contractor is the “Relative Nature of the Work Test”. Some courts have stated that the relative nature of the work test should be used over other tests because it is usually the fairest and most accurate representation of the circumstances. The right to control is not “the underlying principle that really tips the scales in close situations.” . . . [Instead], “what actually influences the decision [is] not necessarily what appears in briefs or opinions on this kind of question.” [it] is “the nature of the claimant’s work in relation to the regular business of the employer.” In applying this test the court will look at the nature of the employer’s business. If the individual’s work is essential and integral to the employer’s business the court will likely classify the individual as an employee.

IV. ANALYSIS

A. Social Significances and Harms of Employer Misclassification

Put simply, “[e]mployees work for wages or salaries under direct supervision . . . [whereas] independent contractors undertake to do a job for a price, decide how the work will be done, usually hire others to do the work . . .” Although, it seems like a simple distinction, the current legal framework has made it difficult for individuals and businesses to differentiate between independent contractors and employees. Clarifying this confusion is important because of the social harm it may cause. Employee misclassification causes individuals to lose out on employment benefits, such as health insurance, sick days, overtime,
occupational safety laws, discrimination safeguard and retirement benefits. The cost of these unpaid benefits are picked up by businesses and taxpayers who are additionally taxed to cover the uninsured individuals’ healthcare cost and the elderlies’ cost of living because they do not have a retirement plan. Uniformity and clarification of employment laws can lead to a decrease in willful or non-willful misclassification of employees, and it can also increase accountability for businesses that violate employee classification laws.

Independent contractors struggle lobbying employers and lawmakers because they are not empowered to unionize. Independent contractors’ inability to effectively lobby lawmakers has led to, what some believe to be, a lax enforcement of employment laws by workforce agencies, which has thus increased misclassification of employees. The majority of independent contractor statutes are too specific and focus primarily on the construction industry providing little to no guidance for other industries. The FLSA, although more encompassing and covering all industries, provides no substantial penalty for employee misclassification; it merely requires that the employer repay what was originally owed had the worker properly been classified.

Another harm of employee misclassification is the uneveled competitive playing field it creates for employers who properly classify their employees. The cost advantages an employer receives from misclassifying an employee as an independent contractor are substantial in

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126 See id. at 111 (listing lost benefits from misclassification).
127 See id. at 116 (describing significant monetary tax losses caused by harmful effects of unpaid benefits).
128 See id. at 130 (proposing definition of independent contractor should be uniform for all purposes).
130 See Richard J. 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 (arguing economic advantages of using independent contractors has led businesses to unwittingly misclassify employees); Kwak, supra note 20, at 302 (“Some experts believe that lax enforcement by revenue and workforce agencies has contributed greatly to the misclassification of employees as independent contractors.”) (internal quotation marks omitted).
131 See Kwak, supra note 20 at 315 (describing shortcomings of certain state statutes).
132 See Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219 (2012) (requiring employers to pay what was originally owed). Employees are entitled to liquidated damages plus interest unless the employer can prove it acted in good faith under the FLSA. See Kwak, supra note 20, at 311 (discussing remedies for ECA violations).
133 See Buscaglia, supra note 7, at 116 (identifying additional costs shouldered by employers who properly classify employees).
contrast to the minimal penalties an employer will receive for misclassifying an employee. The lack of a substantial penalty makes it cost-beneficial for employers to misclassify individuals; employers prefer to reduce labor cost by misclassifying employees knowing that if they get caught they will only owe back-pay and will receive minimal punishment. When employee misclassification harms the individual, he is provided with the ability to bring a claim against the employer, however, a law abiding competing business is unable to receive relief from competitor businesses who gain an advantage by misclassifying employees.

The lack of clarity and uniformity regarding how to properly classify workers can lead employers to unintentionally misclassify their employees as independent contractors. Therefore, reform in this area would best serve businesses and individuals. The lack of uniformity in how a worker is properly classified for various purposes allows an individual to be correctly classified as an employee for FLSA purposes, all the while as independent contractor for tax purposes; this creates confusion for both businesses and individuals. Although many believe the lack of clarity is beneficial to employers because it allows them to save money, the truth is that the lack of clarity can unknowingly cost employers millions of dollars.

134 See Kwak, supra note at 20, at 302 (expressing possible penalties for employers who violate misclassification laws).
135 See id. (showing insignificant penalties of misclassification versus business benefits of misclassification).
136 See Buscaglia, supra note 7, at 121 (observing lack of remedies for competing businesses).
137 See Kwak, supra note 20, at 302 (recognizing misclassification is not always done deliberately).
138 See id. (describing benefits of reform).
140 See Vizcaino v. Microsoft Corp., 142 F. Supp. 2d 1299 (W.D. Wash. 2001), aff’d, 290 F.3d 1043 (9th Cir. 2002) (forcing Microsoft to withhold employee taxes). During 1989 and 1990, the IRS recategorized some Microsoft “freelancers” to “employees.” Id. at 1190. Consequently, the employees requested fringe benefits which Microsoft offered to all other employees. Id. at 1202. The Ninth Circuit nullified waivers of benefit provisions that the employees signed upon being hired, and concluded that the agreements were not controlling because of the assumption that the workers were independent contractors, construing ambiguity within Microsoft’s benefit plan. See id. at 1204 (recognizing ERISA benefits generally rules against drafter). “In addition to a substantial payment to the IRS, Microsoft paid $97 million to settle the case, plus millions more in legal fees for the workers’ class action lawyers.” Kwak, supra note 20, at 303.
B. Litigating Misclassification Under The Major Classification Tests

1. The Control Test

The control test is generally made up of three factors that an employer must prove to show that an individual is an independent contractor rather than an employee. These factors include: “(a) free from control or direction of the employing enterprise; (b) outside of the usual course of business . . . ; and (c) as part of an independently established trade, occupation, profession, or business of the worker.” Unlike the economic reality test, in most jurisdictions the factors in the control test are conjunctive; all the factors must be individually satisfied to establish the worker as an independent contractor. Although some jurisdictions have other names for the control test, the underlying idea is the same. If the employer controls the means and methods of the work, the court likely will deem the worker an employee for most purposes.

The broad potential readings of misclassification claims under the control test are obstacles to litigators. The lack of clarity concerning the requisite amount of control makes it difficult for workers to satisfy all three prongs of the test to prove that they are employees. The control test carries an understanding that employers need to exert some control over

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143 See Coverall N. Am., Inc., 857 N.E.2d at 1087 (noting test is conjunctive); Sullivant, supra note 41, at 1004.

144 See Sullivant, supra note 41, at 1004 (“[T]he basic, overarching idea behind the control test is … question[ing] whether the employer had the right to control the means and methods by which the worker performed the work as opposed to controlling the ultimate results of the service.”) (internal quotation marks omitted).

145 See id.

146 See Coverall N. Am., Inc., 857 N.E.2d at 1087 (using control test linked to the state statute requires that all factors be satisfied); see also Re/Max of New Jersey, Inc. v. Wausau Ins. Co., 697 A.2d 977, 980-81 (N.J. Super. Ct. Ch. Div. 1997) (reasoning that since all factors were satisfied, individuals were employees under workers’ compensation act). But see Monell v. Boston Pads, LLC, No. SUCV 2011-03756, 2013 Mass. Super. Ct. LEXIS 102, at *10-12 (Mass. July 15, 2013) (illustrating individual may be classified independent contractor although all factors of control test are met).

147 See Wausau Ins., 697 A.2d at 980-81 (reasoning regardless of employer’s intent providing individuals with excess supplies did imply control).
workers in their performance of services because otherwise any control 
over workers would render them employees. In Locations, Inc. v. 
Hawaii Dep’t of Labor & Indus. Relations, a real estate company 
supervised its real estate sales agents by providing them with equipment to 
do their job. The court found that the employer did not exert an amount of 
control which would render the agents employees. However, in Re/Max 
of New Jersey, Inc. v. Wausau Insurance Cos., a real estate company 
supervised its real estate agents by providing them with listings, phones, 
sales manuals and subjected them to the supervision of its local brokers. 
The court held under the control test that the employer exerted an amount 
of control which rendered the agents employees.

Under the control test, an employment relationship is established 
when “the person in whose behalf the work is done has the power, express 
or implied, to dictate the means and methods by which the work is to be 
accomplished.” Striking a balance of control that is not viewed as direct 
control over a worker can be subjective. Therefore, facts that can help 
show that the worker who performed the job is an independent individual, 
and did so in his own capacity, will help persuade the court that the worker 
is an independent contractor.

2. The Economic Reality Test

The economic realities test is based on the economic interactions 
between workers and the employer; the court will typically examine a 
series of factors to determine whether an individual is an employee or an

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149 900 P.2d 784 (Haw. 1995).
150 See id. at 792-94 (noting specifically sales manuals, sales division policies, listings, and other equipment).
151 See id.
152 See Re/Max of New Jersey, Inc. v. Wausau Insurance Cos., 697 A.2d 977, 980-81 (N.J. Super 1997) (refusing to limit classification determination to details included in employment arrangement).
153 See id.
154 Tomondong v. Ikezaki, 32 Haw. 373, 380 (1932).
155 See Silverman & Sandhu, supra note 2, at 478-87 (demonstrating businesses can direct individuals without exercising amount of control to render them employees). Supplying a worker with the necessary tools to perform the job or exercising a great deal of supervision over the worker’s performance indicates control test. See Re/Max of N.J. v. Wausau Ins. Cos., 697 A.2d 977, 980-81 (N.J. Super. Ct. Ch. Div. 1997) (finding control where Re/Max supplied listings, offices, phones, and other services to implement agent’s sales).
MISCLASSIFICATION OF EMPLOYEES

In some jurisdictions the following four factors are used to determine an individual’s classification: “whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records.” The courts have determined that no single factor is determinative to the outcome of a claim.

One of the most substantial obstacles litigators face is that there is no determinative single factor under the economic reality test, and courts use varying combinations of different factors to determine a worker’s classification. Under the economic reality test, the courts are focused on the big picture and, therefore, any of a variety of factors may influence the outcome of a case. One way to test if the employer and the individual truly have their own business is to test if the individual’s business can stand apart from the employer.

The best way to shield employers from a misclassification claim under the economic reality test is to make sure an employer’s business is not so intertwined with an individual’s business so that one cannot tell the difference between the employer and the employee. Overall, what distinguishes the economic reality test from other major classification tests is that it focuses on a wider picture; it looks at whether the worker truly has a legitimate business which stands on its own, the nature of the employer’s business, and the degree to which the worker’s activity is integrated into the employer’s business. This theory is demonstrated by the court’s

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159 See Astudillo, 2005 U.S. Dist. LEXIS 92, at *5 (“Because no single factor is determinative under the economic realities test, this Court may accord weight to the fact that U.S. News granted Astudillo’s FMLA leave.”).
160 See id. (asserting no single factor determinative and considering employer’s grant of FMLA leave as one factor).
161 See id. at *3 (illustrating economic reality test takes into account totality of circumstances).
162 See id. (“The key question is whether the person or entity possessed the power to control the workers in question.”).
163 See Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1195 (9th Cir. 1996) (illustrating lack of control and comingling of interests likely classify individuals as independent contractors).
analysis in *Chaves*, in which the court found the dancer was an employee of the club even though she had performed at private functions outside King Arthur’s.\textsuperscript{165}

3. Relative Nature of the Work Test

The relative nature of the work test considers the nature of a worker’s services relative to the employer’s business, and whether or not the worker operates as an independent business.\textsuperscript{166} Some jurisdictions believe that this test should be given the most weight because it is the most logical, clear, and forthright.\textsuperscript{167} The closer and more alike the nature of the work being done is, the more likely the court will determine that the worker is working as an employee.\textsuperscript{168} In *Wausau Ins. Cos.*, although the court found that the real estate agents were employees under the control test it also held that the agents were employees under the relative nature of the work test.\textsuperscript{169} New Jersey courts often use both the relative nature of the work test and the control test to determine whether a worker is an employee or independent contractor.\textsuperscript{170} The court ruled that the real estate agents were employees under the relative nature of the work test because they were economically-dependent on the employer Re/Max.\textsuperscript{171} The agents

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\textsuperscript{165} *Chaves* v. King Arthur’s Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *18 (Mass. Super. Ct. July 30, 2009) (“When the totality of circumstances in this working relationship are examined, it is more likely that Chaves was wearing the hat of an employee of King Arthur’s than the hat of her own enterprise, even if she performed exotic dancing for more than one employer.”) (internal quotation marks omitted).

\textsuperscript{166} See id. at *12-13 (“A worker is generally an employee if her services form a regular and continuing part of the employer’s business [and if her] method of operation is not such an independent business....”) (internal quotation marks omitted).


\textsuperscript{168} See id. (discussing relationship of Re/Max agents). Since the individuals were real estate agents and brokers, working for a company that sold real estate, the court determined that the surrounding circumstances made them employees. *Id.*

\textsuperscript{169} See id. at 157 (“Under the relative nature of the work test, the trial court also found the agents to be employees. The court concluded that the agents were economically-dependent upon Re/Max because the broker provides the listings, the office, the equipment and the support staff. In addition, the agents work for the Re/Max office exclusively....[T]he agents’ dependence has a statutory basis.”) (internal quotation marks omitted).

\textsuperscript{170} See Pollack v. Pino’s Formal Wear & Tailoring, 601 A.2d 1190, 1195-96 (N.J. Super. Ct. App. Div. 1992) (“To help determine if an individual is an ‘employee’ within the meaning of N.J.S.A. 34:15-36 or an independent contractor, the courts developed two tests: (1) the ‘control test’ and (2) the ‘relative nature of the work test’”); see also Smith v. E.T.L. Enter., 382 A.2d 939, 942 (N.J. Super. Ct. App. Div. 1978) (“Both tests are basically designed to draw a distinction between those occupations which are properly classified as separate enterprises and those which are in fact an integral part of the employer’s regular business.”).

\textsuperscript{171} See *Wausau Ins. Cos.*, 744 A.2d at 157 (“[T]he broker provides the listings, the office, the
were not in a business of their own, and were therefore properly classified as employees.\footnote{172}

Other jurisdictions will also use both the relative nature of the work test and the control test to determine whether a worker is an employee or an independent contractor.\footnote{173} In Boyd, a worker signed several short-term service contracts agreeing to load, haul, and deliver logs of timber that the employer owned.\footnote{174} The worker was found to be an employee because he was not truly independent, nor was he operating an independent business service, as he devoted all or most of his time to the employer under contracts for recurring services.\footnote{175} Applying the control test, the court found that Durham was an employee, rather than an independent contractor.\footnote{176} The court found that under the relative nature test, the worker was integral to the employer’s production process and was not performing an independent business service.\footnote{177}

The relative nature of the work test is unpopular, making it harder to pursue.\footnote{178} Many jurisdictions do not recognize the relative nature of the work test, and the ones that do will often only use it when the relationship between employer and employee cannot be sufficiently ascertained by use of the traditional control test.\footnote{179} In In re Compensation of Henn, a magazine salesperson’s contract expressly classified her as an independent contractor.\footnote{180} The salesperson was injured on the job, and then claimed her employer misclassified her as an independent contractor when she attempted to collect worker’s compensation.\footnote{181} The court denied the salesperson’s claim because under the control test, evidence that the employer had control over her was slight.\footnote{182}

\footnote{172} See id. (noting agents work exclusively for Re/Max).

\footnote{173} See Boyd v. Crosby Lumber & Mfg. Co., 166 So.2d 106, 109 (Miss. 1964) (using both control and relative nature of work test to determine whether individual is employee); see also Reforestation Gen. Contractors v. Nat’l Council on Comp. Ins., 872 P.2d 423, 431 (Or. Ct. App. 1994) (“Where the evidence is insufficient to support a finding under the right to control test, the nature of the work test is a rational method for making a finding as to an individual’s status.”).

\footnote{174} Boyd, 166 So.2d at 111-13.

\footnote{175} See id. at 111 (illustrating employer’s right to control plaintiff’s job).

\footnote{176} See id. at 110-11 (finding evidence of right of control suggestive of employment relationship under control test).

\footnote{177} See id. at 111-12 (identifying plaintiff’s work as “regular, recurring, substantial, and exclusive.”). Accordingly, he was an employee. See id. at 112.

\footnote{178} See In re Comp. of Henn, 654 P.2d 1129, 1132 (Or. Ct. App. 1982) (using relative nature of work test only when traditional control test doesn’t work).

\footnote{179} See id. (noting Oregon recognizes relative nature test but used control test instead).

\footnote{180} See id. at 1129

\footnote{181} See id. at 1129.

\footnote{182} See id. at 1131 (discussing reasoning). The salesperson argued that “under the relative...
The dissenter believed that under the relative nature of the work test, the salesperson would have been able to prove that she was an employee, since her job required close cooperation between herself and employer.\textsuperscript{183} Furthermore, the salesperson did not hold herself out to the public as performing independent business services.\textsuperscript{184} Consequently, the dissent argued that based on those facts and an analogous line of cases involving similar claims, she may have been able to convince the court that she was indeed an employee.\textsuperscript{185}

The relative nature of the work test is a logical and forthright test; it uses simple balancing examination which is more predictable than other common law tests.\textsuperscript{186} The test can even be applied and prevail where courts conclude that the control test is inconclusive, since there are a variety of situations in which control is not dispositive.\textsuperscript{187}

\textit{C. Litigating Misclassification Under Common Law Test for Tax Purposes}

There are multiple common law tests used to determine whether an individual is an independent contractor or an employee for tax purposes.\textsuperscript{188} The United States Tax Court uses a seven factors common law test to determine whether an individual is an employee or an independent contractor.\textsuperscript{189} None of these factors are independently determinative, and not all of the factors must be met for an individual categorized as an employee.\textsuperscript{190}

The Minnesota Tax Court identifies twenty factors in their common law test to determine whether a worker should be classified as

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\footnotesize{nature of the work test her work was so intricately involved with the business of the employer as to make her an employee.” Id. at 1132 (internal quotation marks omitted). However, the court did not allow the use of such test because under the control test it was clear to them that the salesperson was an independent contractor. Id. 
\textsuperscript{183} See In re Comp. of Henn, 654 P.2d at 1132 (Thornton, J., dissenting) (expressing that by using relative nature of work test plaintiff would be employee).
\textsuperscript{184} See id.
\textsuperscript{185} Id. at 1132 (discussing result if court used “relative nature of the work test”).
\textsuperscript{187} See Wausau, 697 A.2d at 980-82 (noting relative nature of work test more realistic than control test). The claimants were real estate agents and brokers whose everyday tasks were integral to the employer, and thus the court determined that the surrounding circumstances made them employees. See id. at 982.
\textsuperscript{188} See Atl. Coast Masonry, Inc. v. Comm’r, 104 T.C.M. (CCH) 895, at *5 (T.C. 2012) (listing seven factors to determine whether worker is employee).
\textsuperscript{189} See Atl. Coast Masonry, Inc., 104 T.C.M. (CCH) at *1.
\textsuperscript{190} See id. at *5.}
\end{footnotesize}
employee or independent contractor.\textsuperscript{191} These common law factors can be summarized into three overall categories: behavioral control, financial control, and relationship of the parties.\textsuperscript{192}

The multiple factor common law tests lack uniformity, and instead creates obstacles for litigators prosecuting misclassification claims because, at times, the attorneys have as many as twenty factors to consider.\textsuperscript{193} Although many of these common law tests have numerous factors, the court will not apply every factor in every case.\textsuperscript{194}

To best avoid employee misclassification when classifying individuals for tax purposes, employers should take into account all common law tests and applicable statutes within their jurisdiction when determining the classification of a worker.\textsuperscript{195} Employers should be cautious of factors tending to indicate control over their workers, as courts are likely to classify those individuals as employees.\textsuperscript{196} The IRS common law test has multiple factors but it places an emphasis on the control exerted, as it is the most indicative of the employee-employer relationship.\textsuperscript{197} Although the economic reality test and the control test are not explicitly used in all common law analyses, referring to both of them is a great guide to avoiding a majority of classification tests.\textsuperscript{198}

\textsuperscript{192} See Rev. Rul. 87-41, 1987-1 C.B. 296. (1987). The Department of Revenue summarized these twenty factors into three main categories, which are instructive to use in classifying who is an employee. Those factors “cover[] behavioral control, financial control, and relationship of the parties.” Id.; see Hetland, 2011 WL 1045457, at *3.
\textsuperscript{194} See id. at *9-10 (grouping factors into three categories focusing on behavior control, financial control, and relationship of parties); see also Scruggs v. Skylink Ltd., No. 3:10-0789, 2011 U.S. Dist. LEXIS 138759, at *6 (S.D. W. Va. Dec. 2, 2011) (highlighting no single factor is dispositive of employment relationship).
\textsuperscript{195} See supra Part II.B.
\textsuperscript{196} See Ramirez v. C.I.R., No. 9335-11S, 2013 Tax Ct. Summary LEXIS 38, at *4 (T.C. May 20, 2013) (“Although not the exclusive inquiry, the degree of control exercised by the principal over the worker is the crucial test in determining the nature of the working relationship.”). The employer merely needs to have the right to control the work. See id. Thus, the employer need not actually exercise control for finding of employer-employee relationship. See id.
\textsuperscript{197} See Blodgett v. Comm’r, No. 9449-11, 104 T.C.M (CCH) LEXIS 500, at *18 (2012) (emphasizing degree of control is of greatest importance in determining whether individual is employee). “While there are three factors weighing in favor of classifying Mr. Blodgett as an employee and four factors weighing in favor of classifying Mr. Blodgett as an independent contractor, the degree of control that the principal exercises over the worker is the crucial test in making the employer-employee determination.” Id. at *24.
\textsuperscript{198} See supra Part IV.B.
D. Litigating Misclassification Based on Independent Contractor Statutes

A growing number of jurisdictions are enacting independent contractor statutes. The majority of these statutes are narrowly drafted, focusing on the intentional misclassification of construction industry employees. Many of these statutes derive from the major classification test discussed in the previous sections. The Kansas misclassification statute makes it a civil infraction to intentionally misclassify an employee as an independent contractor for tax evasion purposes. However, the Kansas statute is silent on how an individual is classified as an employee or an independent contractor, leaving the interpretation of such question open to the court. Under the New Mexico statute, which applies to construction contractors, misclassification is a misdemeanor accompanied by civil penalties and possible revocation of one’s construction license. To determine whether an individual is an employee or independent contractor, the statute lists factors similar to the control test but has additional requirements.

The New Jersey Construction Industry Independent Contractor Act also makes it a crime for employers in the construction industry to improperly classify employees as independent contractors for any purpose. The statute uses the control test to determine whether an individual is an employee or independent contractor. The factors are conjunctive: all need to be satisfied for the individual to be an independent contractor, and the statute allows the New Jersey Commissioner of Labor

199 See Buscaglia, supra note 7, at 112 (specifying Kansas, Massachusetts, Minnesota, New Jersey, and New Mexico have statutes punishing acts of misclassification).
200 See CONN. GEN. STAT. § 31-57h. (2014) (establishing joint enforcement commission on employee misclassification); see also Buscaglia, supra note 7, at 112 (identifying jurisdictions with statutory treatment of misclassification). Three of the five statutes apply only to the misclassification of employees in construction (Minnesota, New Jersey, and New Mexico), and one statute punishes only the intentional misclassification for tax and worker’s compensation avoidance purposes (Kansas). See Buscaglia, supra note 7, at 112. “Only the Massachusetts statute punishes misclassification in all industries (with a few exemptions, including real estate brokers).” Id. “Massachusetts, New Jersey, and New Mexico also provide for the possibility of criminal prosecution.” Id.
201 See Buscaglia, supra note 7, at 113 (examining legislation in all 50 states and District of Columbia associated with worker classification).
203 See id.
204 See N.M. STAT. ANN. § 60-13-1.1(D) (West 2014).
205 See id. § (6)(a)-(f) (listing additional requirements to consider whether worker is employee or independent contractor).
207 Id. at § 34:20-4.
and Workforce Development to seek monetary penalties as an alternative to criminal prosecution.208

The Minnesota statute requires construction industry professionals to be certified by the state as independent contractors, and failure to do so results in a civil violation.209 The statute lists nine factors that must be satisfied for an individual to constitute an independent contractor.210 The Massachusetts statute covers all industries, providing civil and criminal penalties, and uses a three prong control test to determine classification.211

The independent contractor statutes are more explicit than the vast body of common law tests, but the majority of these independent contractor statutes are dependent on a common law factor test for interpretation.212 The obstacles litigators face remain constant, and are exacerbated by the possibility of having to meet additional factors in the statute but not in the major common law tests.213 There are also other formalities that jurisdictions require employers to follow in order to prove that a worker is an independent contractor under the statutes.214 Lastly, some statutes only cover specific industries and therefore have limited application, leaving other workers susceptible to the confusing array of law tests.215

The best way to prevent a claim of misclassification is to comply with the unique factors of the particular statute and apply the overall themes of the economic reality test and the control tests.216 The economic reality test focuses on the big picture, examining the legitimacy of the worker’s economic separation from the employer, which makes him an independent contractor.217 If one were to follow the factors of these two common law factor tests along with the unique factors of the inapplicable

210 See id. (creating presumption that worker is employee unless all nine factors are met).
211 See MASS. GEN. LAWS ch. 149, § 148B (2014); see also Buscaglia, supra note 7, at 129 (“Massachusetts has a comparatively progressive misclassification statute based on a 3-prong test.”).
212 See N.J.STAT. § 34:20-3 (2014) (describing violations based on whether they were made knowingly); see also MASS. GEN. LAWS ch. 149, § 148B(a)(1)-(3) (2012) (discussing employee classification based on control test).
213 See MINN. STAT. § 181.723 (2014) (requiring workers to retain own office and equipment).
214 See MINN. STAT. § 326B.701 (2014) (requiring independent contractors to register with state).
216 See supra notes 200-215 (comparing various independent contractor statutes); see also supra notes 157-165 (discussing how to litigate under economic reality test); supra notes 141-178 (analyzing process of litigating misclassification claims under control test).
217 See supra Part II.B (discussing history of major common law tests).
independent contractor statute, it is likely that a court will find that the individual is not an employee.218

V. CONCLUSION

The difference between an employee and an independent contractor can simply be described as follows: employees work for an entity, under its control and supervision, and for wages, whereas an independent contractor undertakes projects from an entity and completes said project under minimal control and supervision and is paid for that project. As the workplace continues to become more and more complex, and employee classification schemes continue to lack uniformity, guidance from Congress and the Supreme Court is inevitable. Meanwhile, employers and workers are left with a multitude of options to determine whether or not an individual should be classified as an employee or independent contractor. The predominant theme in all the common law tests and most independent contractor statutes is the level of control exerted. The crux of the courts’ determination of this is the control that the employer has over the worker. Most tests and cases have turned on the control element. Naturally, workers seeking fairness from the courts bring the majority of employee misclassification claims. In their quest for relief, workers often demonstrate that they had an employer-employee relationship by demonstrating that the employer had control over their work. Thus, to avoid employee misclassification claims, employers should be careful not to exert too much control over their independent contractors.

Although the majority of tests determining whether an individual is an employee or independent contractor hinge on the control factor, other factors are persuasive, thus creating the potential for complex litigation. Employee misclassification claims using the economic reality test hinge on a combination of factors, including the control test and its seven factors. This unpredictability makes it exceedingly difficult to properly classify employers and independent contractors. Likewise, the relative nature of the work test is often used in conjunction with a combination of factors, coupled with the control test and also makes its application difficult. The test used to determine whether an individual is an employee or independent contractor for tax purposes also lacks uniformity and sometimes has as many as twenty factors. The factors are used in varied combinations without clear guidance from the court.

Lastly, although the control test is the most widely used and easiest to apply with only three factors, it can be unpredictable because of its broad reading. The trend to remedy these broad and uneven readings of tests related to employee misclassification has led to the enactment of independent contractor statutes that clarify these issues. Unfortunately, these statutes have been limited to specific industries, typically the construction industry. However, Massachusetts’ independent contractor statute covers all industries and includes a modified narrow interpretation of the control test. This allows employers and employees to have a clearer understanding of whether and when an individual should be classified as an employee or independent contractor. Therefore, it is likely that other jurisdictions will follow Massachusetts’ lead and will and should enact comprehensive independent statutes that cover all industries.

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