> Because [the PDA] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised *her right to have an abortion*.

H.R.Conf.Rep. No. 95–1786, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S.C.C.A.N. pp. 4749, 4765–66 (emphasis added). Thus, the plain language of the statute, the legislative history and the EEOC guidelines clearly indicate that an employer may not discriminate against a woman employee because "she has exercised her right to have an abortion." Additionally, the Supreme Court has already considered the impact of the PDA in broadening the scope of prohibited sex discrimination under Title VII. In *International Union v. Johnson Controls, Inc*., 499 U.S. 187 (1991), the Court held that Title VII, as amended by the PDA, "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job." *Id*. at 206. In light of the plain language of the statute, the legislative history of the PDA, the EEOC guidelines, and the principles of Johnson Controls, the panel concludes that an employer who discriminates against a female employee because she has "exercised her right to have an abortion" violates Title VII.

Turic, however, did not claim, nor did the district court find, that she was terminated because she had exercised her right to have an abortion. (In fact, Turic did not terminate her pregnancy, but carried it to term.) Rather, Turic's claim, and the district court's conclusion, was that she was fired because she contemplated having an abortion. The panel concludes, however, that this distinction has no effect on its result. A woman's right to have an abortion encompasses more than simply the act of having an abortion; it includes the contemplation of an abortion, as well. Since an employer cannot take adverse employment action against a female employee for her decision to have an abortion, it follows that the same employer also cannot take adverse employment action against a female employee for merely thinking about what she has a right to do. As a result, the district court's legal conclusion that Title VII, as amended by the PDA, applies to the action of Holland Hospitality in discharging Turic, is affirmed.

Problem 2-4

Roger accompanied his wife, Chris, to her firm's annual holiday party. They were engaged in conversation about New Year's resolutions and shared that they are seeking to start a family. A manager was notified after the party, and Chris was fired on January 15. At that time, she was not pregnant, although she later did become pregnant. You are advising the firm. Are they exposed to liability?

Problem 2-5

Charisse is having difficulty becoming pregnant and so she begins in-vitro treatments. This requires her to miss time at work. Her employer learns that this may continue for some time, and subsequently fired Charisse. The company's president said that both men and women can be infertile and have related medical treatments, and so this was not a violation of the Pregnancy Discrimination Act. Is the president correct?

Problem 2-6

Gloria has been on maternity leave and is preparing to return to work. She calls her supervisor and tells him that she will need a private area to express milk when she returns. Her supervisor says that this is not welcome activity and fires her. Does Gloria have a claim under the PDA?

Mastery Problem 2-1

Practicing Employment Law in a Multicultural and Sexually Diverse World

The expansion of rights means that employment lawyers must work with and deal with new and different clients. As you read the following excerpts, consider your own interactions with those of different cultures and sexual orientations. While many of you have grown up in diverse cultures, there is still a skillset that you will need to develop when dealing professionally with a diverse client base. Read the following materials and think about how you will address dealing with a diverse group of clients.

Sexual Orientation

Nat'l Ctr For Lesbian Rights & California Rural Legal Assistance, *Tips for Legal Advocates Working with Lesbian, Gay, Bisexual, & Transgender Clients*, http://www.nclrights.org/wp-content/uploads/2013/07/Proyecto_Poderoso_Flyer_cd.pdf.

1. Become comfortable with the issues. Historically, society has been intolerant of lesbian, gay, bisexual, and transgender (LGBT) people and these negative attitudes may affect how we think about LGBT people. It is important for advocates to understand LGBT people and the issues they face. One can become a compassionate advocate by building relationships with local LGBT organizations and activists, attending trainings, visiting educational websites, and reading articles and books or watching movies with positive portrayals of LGBT people.

2. Make your office space friendly to LGBT people. Often, LGBT people will assume that a lawyer's office is unfriendly to LGBT people until he or she receives a clear indication otherwise. Use visual cues to indicate that your office is a safe and welcoming space for LGBT people. Put up posters or stickers that have positive messages about LGBT people and make sure your resource display includes materials specifically for LGBT people. When possible, hire LGBT people as staff members in your organization.

3. With all clients, use language that does not implicitly assume the client's sexual orientation or gender. Using inclusive language that does not assume the gender of your client or your client's significant other sends a message that it is safe for your client to talk to you about his or her sexual orientation or gender identity. It is important to use this inclusive language with all clients, not just the ones who you think may be LGBT. For example, ask "are you in a relationship?" instead of "do you have a boyfriend?"

4. Be aware of assumptions you may have based on a client's sexual orientation or gender identity. We all make assumptions about others based on our own background and experience. The important thing is to be aware so that you do not unconsciously make decisions based on your assumptions about people who are LGBT rather than on your client's unique situation. For example, a gay male client does not necessarily appreciate sexual advances from other male coworkers, and he may have a sexual harassment claim.

5. Use the name and pronoun that conforms to the client's gender identity consistently in all your interactions with the client, as well as in all correspondence and court documents. It is important to be respectful of your client's gender identity by using the name and pronoun that he or she prefers and by asking co-workers, opposing counsel, judges, and court staff to do so. If you are unsure what name or pronoun to use, ask. Court documents may need a footnote explaining that you will use to the client's current name and gender.

6. An LGBT client's legal problems may not be directly related to his or her sexual orientation or gender identity. LGBT clients face the same types of legal identity problems that non-LGBT clients face. An LGBT client's legal problems will not inevitably involve sexual orientation or gender identity discrimination. For example, an LGBT client may come to the legal aid office because his or her landlord has failed to fix an unsafe condition, and that failure may be unrelated to the client's sexual orientation or gender identity.

7. Be prepared to address hostile attitudes and irrelevant arguments. An LGBT client may face hostility from the legal system, even if the case does not relate directly to his or her sexual orientation or gender identity. For example, in a custody case between different-sex parents where one parent is LGBT, the other parent may argue that the LGBT parent shouldn't have custody because of his or her sexual orientation or gender identity.

8. Reach out to LGBT organizations and attorneys who have experience working with LGBT legal issues. The laws affecting LGBT people are complicated and constantly changing. Organizations and attorneys experienced with LGBT legal issues can help you identify the most effective strategies and may be able to provide legal research and information on these issues.

Jatrine Bentsi-Enchill, *Client Communication: Measuring Your Cross-Cultural Competence*

The Canadian Bar Association (September 29, 2014).

Cross-Cultural Communication and Cultural Competence

So what is cultural competence? For individuals, cultural competence is the ability to function effectively in the context of cultural difference and the capacity to effectively adapt, accept and interpret culturally relevant behavior. . . .

The most effective way to determine your level of cultural competence is to take an assessment. Dr. Milton Bennett, developer of the Developmental Model of Intercultural Sensitivity, provides a good starting point to review current perspectives around culture and difference.

His model outlines [several] stages that provide insight into an individual's level of intercultural sensitivity and cultural competence:

Denial

In this stage, lawyers are unaware of cultural difference.

The prevailing attitude is likely to be: "Business is business the world over" or "Everyone would respond this way." Lawyers in this stage of development might be so intent on the tasks at hand that they fail to notice the cultural aspects of business relationships with clients and colleagues. In this stage, there is a general lack of awareness about difference.

However, awareness is a key element in cross-cultural communication. Effective cross-cultural communication requires that individuals have some awareness and appreciation of difference. A lawyer in denial would be completely insensitive to their client's cultural taboos, expectations, family norms, communication, and conflict styles.

While in the denial stage, lawyers will be ineffective in establishing trust and good client relations with clients from a different culture. The failure to understand the significance of cultural differences may lead lawyers to implement ineffective case strategies due to the misinterpretation of client behavior.

For lawyers in this stage, unnecessary conflicts and misunderstandings, along with an overall lack of understanding of the importance of cross-cultural communication, are common.

Defense

Lawyers in this stage will recognize some cultural differences and view such differences negatively.

Instead of striving to understand or interpret the patterns of conduct or communication that differ from their own culture, lawyers in defense are likely to mislabel such conduct as "wrong", "unintelligent", "dishonest", etc. In this stage, the greater the difference, the more negatively it is perceived.

A criminal defense lawyer in the denial stage will most likely be frustrated by a female murder defendant from China, who is more committed to preserving family honor than asserting a claim of self defense in the murder of her husband. (For many in China, issues of honor, shame and commitment to family take precedence over individual goals and objectives.) How effectively could a lawyer in the denial stage represent this client? How might the difference in cultural worldviews and behaviors affect the lawyer's relationship with her client?

Clearly, lawyers in this stage will struggle to communicate and work effectively with clients they perceive as different. This perception may cause otherwise well-meaning lawyers to misjudge or stereotype a client. Negative attitudes and perceptions held about people from other cultures serve to diminish cross-cultural understanding and communication, ultimately undermining a lawyer's ability to establish a healthy and respectful relationship with his or her client.

Minimization of Difference

It is common for lawyers in this stage to avoid stereotypes and appreciate differences in language and culture. However, many will still view their own values as universal and superior, rather than viewing them simply as part of their own ethnicity and culture.

As a result, it is common for lawyers in minimization to believe that everyone else shares their ideals, goals, and values with regard to family, work, professionalism, humor, communication, etc. In dealing with clients, the lawyer is

likely to misinterpret the client's behavior, opinions, and reactions because the lawyer will misperceive that the client shares his or her cultural values.

For example, in American culture when assessing credibility, lawyers may read a client's or a witnesses' failure to maintain eye contact as a sign of dishonesty. However, in many cultures, averting the eyes is a sign of respect to someone in authority. How will an inaccurate read on behavior impact the lawyer's ability to make an accurate assessment of the credibility of a client or witness?

Lawyers in this stage focus on minimizing difference and in so doing they misread relevant behavioral and communication cues that are based on culture. Assuming similarity when none exists serves as a barrier to successful cross-cultural communication.

Acceptance of Difference

It is important for lawyers to have the ability to properly analyze and respond to clients as a basis for establishing effective lawyer-client relations.

The following is a real situation described by an immigration lawyer. It provides a great example of effective cross-cultural communication and lawyering:

> The lawyer was representing a client eager to obtain his permanent resident status, so he could take a long-awaited trip home to visit family and friends.
>
> During a discussion about timeframes for the permanent resident process, the lawyer gently explained to the client that his expectations regarding processing timelines were unreasonable and simply impossible to meet. In an attempt to "expedite" the process, the client responded by offering the lawyer a bribe.
>
> In this situation, the lawyer was aware of his client's cultural background, and as such, was aware that in his client's culture, it is customary to pay officials bribes in order to expedite certain processes; in fact, such bribes were often expected.
>
> The immigration lawyer's awareness of his client's background allowed him to respond in an appropriately sensitive and informative manner. Additionally, since the lawyer approached the

situation with understanding instead of judgment, the lawyer-client relationship was preserved.

This example speaks to the heart of the significance of cultural awareness and competence required to develop and sustain successful attorney-client relationships. . . .

Tips for Improving Cross-Cultural Communication

Although training and coaching interventions are the most effective methods of improving cross-cultural communication skills and cultural competence, the following are some things that lawyers can begin doing to improve cross-cultural communication skills:

1. *Gain awareness.* Become aware that although a gesture, word or response may mean something in your culture; it may mean something totally different to someone from another culture.

2. *Take a look at your own culture.* Understanding how your worldview and culture impacts your perception of others will help you identify instances where you may tend to use biases or stereotypes when interacting with those whom you may perceive as different.

3. *Try a little understanding.* In trying to better understand your clients and their motivations, understand the impact that culture plays on their values, perspectives, and behavior.

4. *Listen closely and pay attention.* Try to focus on verbal as well as non-verbal cues and the behavior of your client. If the client seems distracted, confused, or ill at ease, ask questions.

5. *Suspend judgment as much as possible.* Approaching people from other cultures in a judgmental manner will hinder your ability to gain a clear understanding of the situation.

6. *Be flexible.* Flexibility, adaptability, and open-mindedness are critical to effective cross-cultural communication. Understanding, embracing, and addressing cultural differences will lead to better lines of communication, client-service, and lawyering.

Conclusion

This Lesson provided an overview of labor law and anti-discrimination law. You learned that unions are decreasing in importance due to a shift from communal interests to individual rights. You also studied some of the cutting edge issues in anti-discrimination law, as courts define the broad terms of the statute. Keep these areas of law in mind as the backdrop for our study of employment law.

2

The Parties

Key Concepts

- Employment law imposes obligations on, and provides protections to, "employees" and "employers." Unfortunately, these key definitions are indeterminate.
- The definition of "employee" is generally resolved through application of a multi-factor "control test," derived from agency law, that focuses on the employer's right to control the completion of the work involved. However, an older approach is still used to interpret the Fair Labor Standards Act and Family Medical Leave Act in light of the "economic realities" of the relationship and the remedial purpose of the statutes.
- Recently, courts have focused on the "entrepreneurial opportunities" afforded by the relationship, perhaps suggesting a revival of the "economic realities" approach.
- A new approach, "the ABC test" has just been endorsed by California for wage claims, suggesting that a presumption of "employee" status might be emerging.
- Defining "employer" is also difficult, especially with regard to the liability of individuals as the "employer" and the doctrine of joint employment.
- The definitions of "employee" and "employer" do not work well in today's dynamic platform economy.
- Particular complexities arise with immigrant workers, who may or may not have work authorization.

Lesson 3:
Who Is an Employee? The "Multi-Factor" Tests

Objectives and Expected Learning Outcomes

In this Lesson, you will learn the different principal tests for "employee" status, and you will apply these tests to different factual scenarios. The traditional distinction between an "employee" and an "independent contractor" is becoming more difficult in the modern economy, which has moved away from the traditional employment relationship.

1. The Multi-Factor "Right of Control" Test

The duties and benefits of employment law are imposed only when there is an employment relationship. Only those persons who have the status of an "employee" are able to utilize the protections of employment law. Unfortunately, employment statutes tend to be hopelessly circular in their definitions of employee. For example, the National Labor Relations Act (29 U.S.C. § 152(3)) provides that the term "employee . . . shall include any employee, and shall not be limited to the employees of a particular employer, . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." Similarly, the Fair Labor Standards Act (Sec. 29 U.S.C. § 203(e)(1)) and the Employee Retirement Income Security Act (29 U.S.C. § 1002(6)) both define the term employee as "any individual employed by an employer."

To add detail to these definitions, the Supreme Court has borrowed from the common law definitions of employee under agency law. In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) the Court explained the multi-factor control test that it derived from the Restatement of Agency 2d, § 220(1):

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the

> hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

490 U. S. at 751–752. The Court has since reaffirmed this approach in the context of defining "employee" for purposes of various statutory schemes. See, e.g., *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (Employment Retirement Income Security Act) and *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (Americans with Disabilities Act). Consequently, for purposes of defining "employee" under federal statutes and the common law, we turn to the definition of a master-servant relationship under the Restatement (Second) of Agency.

Restatement (Second) of Agency

§ 220(1). Definition of Servant

(1) A servant [employee] is a person employed to perform services in the affairs of another and who[,] with respect to the physical conduct in the performance of the services[,] is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are 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 places of work for the person doing 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;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Example 3-1

Shane Wilson has built a business cleaning homes in his neighborhood. He meets with the homeowner to determine what they want him to do and how often, and he schedules them accordingly. He currently cleans 14 homes on a weekly basis. Shane brings all the tools and supplies he requires to the job, and he cleans the home at times that the owners are away. He charges for the job according to an agreed upon price, and he files taxes as a sole proprietor. Shane is not an employee of any of the homeowners.

Example 3-2

Shane Wilson applied to Housecleaners, a franchise that provides cleaning services in town. Shane wears a Housecleaners uniform and is assigned houses to clean by the Housecleaners front office. He was required to take a four hour course on how to clean a house in the manner promised by Housecleaners, and his work is reviewed every quarter. Shane is not permitted to communicate directly with the homeowners regarding the work to be performed, and he is required to be on call during the week if new customers are signed by Housecleaners. Consequently, Shane depends on Housecleaners for his income, although he occasionally drives an hour or two for Uber when he is not cleaning houses. Shane is an employee of Housecleaners.

A recent district court opinion provides a good example of the multi-factor control test. In *Lawson v. Grubhub, Inc.,* 302 F. Supp. 3d 1071 (N.D. Cal. 2018), the Court determined that Grubhub had met its burden of showing that Lawson, one of their drivers, was properly classified as an independent contractor. Although some elements of the test pointed toward employee status, Grubhub's lack of all necessary control over his work, including whether he performed deliveries, how

long he was available to accept deliveries and how he performed the actual deliveries, established his status as an independent contractor.

Grubhub is an internet-based application that connects diners seeking food delivery to a variety of local restaurants. Customers order food and Grubhub transmits the order to the restaurant and arranges for a delivery driver if the restaurant does not have its own driver. Grubhub operates in 1,200 markets in the United States, with 250 in California alone. As of June, 2016, there were 4,000 Grubhub delivery drivers in California.

Once per week, Grubhub posted a schedule of available shifts, or "blocks," to its drivers, and drivers selected their blocks on a first-come-first-served basis. No drivers were assigned mandatory blocks, nor were they required to sign up for a minimal number of blocks. Nearly 40% of persons who sign up on the Grubhub app to be a delivery driver never follow through by signing up for a block and performing work. However, drivers who performed especially well were given "priority scheduling" rights, and so there were advantages to making oneself available. Drivers were paid a per-order-delivered payment plus any tips offered by customers, and a nominal amount for mileage. However, Grubhub ensured a minimum hourly compensation if the driver accepted at least 85% of the deliveries offered to him during a block.

When Lawson began a block he would move the Grubhub driver app to the "available" setting. Grubhub then used a computer algorithm to offer deliveries to the available drivers, and the driver would then accept or reject the delivery. If the delivery was rejected, the algorithm would move to the next available driver without removing the first driver from the block. In the event that customers outnumbered available drivers, Grubhub would send a market-wide message to all drivers asking them if they wished to be available for assignment.

The court analyzed Grubhub's right to control the manner and means of Lawson's performance of duties as follows:

> Grubhub exercised little control over the details of Mr. Lawson's work during the four months he performed delivery services for Grubhub. Grubhub did not control how he made the deliveries—whether by car, motorcycle, scooter or bicycle. Nor did it control the condition of the mode of transportation Mr. Lawson chose. Grubhub never inspected or even saw a photograph of Mr. Lawson's vehicle. Grubhub did ensure that Mr. Lawson's chosen vehicle was registered and insured, and that he had a valid driver's license. But given that he could not legally drive

the car without these conditions being satisfied, Grubhub's oversight in this respect does not weight in favor of employee status. *See Linton*, 15 Ca.App.5th at 1223 ("A putative employer does not exercise any degree of control merely by imposing requirements mandated by government regulation").

Grubhub also did not control Mr. Lawson's appearance while he was making Grubhub deliveries. While Mr. Lawson could wear a Grubhub shirt and hat, he was not required to do so and did not always do so. . . .

Grubhub did not require Mr. Lawson to undergo any particular training or orientation. He was not provided with a script for how to interact with restaurants or customers. He was not told what supplies, if any, he had to have with him, whether condiments, straws or extra napkins. No Grubhub employee ever performed a ride along with Mr. Lawson; indeed, no Grubhub employee ever met Mr. Lawson in person before this lawsuit.

Grubhub did not control who could be with Mr. Lawson in his vehicle, or even accompany him into a restaurant to pick up an order or to a customer's door to make a delivery. . . .

Mr. Lawson could decide not to work a block he signed up for right up to the time the block started. Mr. Lawson even had the right to reject any order offered during his scheduled block; in other words, he had no obligation to perform any delivery offered to him by Grubhub even though he had signed up to work a particular block. . . .

Thus, at bottom, Mr. Lawson had complete control of his work schedule: Grubhub could not make him work and could not count on him to work. . . . .

Grubhub also did not control how and when Mr. Lawson delivered the restaurant orders he chose to accept. The Agreement did not specify an amount of time in which a driver had to reach a restaurant to pick up an order; nor did it specify how quickly the driver had to complete the delivery. Mr. Lawson picked his own route; indeed, he could make as many stops as he desired and even make a delivery for another company while delivering for Grubhub, and on many occasions he made deliveries for Grubhub's restaurant delivery competitors while working a Grubhub scheduled block. . . .

> Grubhub also did not prepare performance evaluations of Mr. Lawson. While for a time drivers whom Grubhub in its sole discretion determined were its top performers were offered priority scheduling, failing to qualify as a top performer did not jeopardize Mr. Lawson's contract with Grubhub. No one at Grubhub was Mr. Lawson's boss or supervisor. . . .
>
> Grubhub did control some aspects of Mr. Lawson's work. Grubhub determined the rates Mr. Lawson would be paid and the fee customers would pay for delivery services. . . . The Court finds that Mr. Lawson could not negotiate his pay in any meaningful way and therefore this fact weighs in favor of an employment relationship.

Lawson, 302 F. Supp. 3d, at 1084–1086.

The court found that the fact that most suggested employment status was the ability to terminate the Agreement at-will. However, the at-will status was completely mutual: Lawson never was required to sign up for a block, or even to complete deliveries during a block for which he had signed up. Moreover, he was not in a vulnerable position because he did not have to invest in any special equipment or supplies. He merely had to use his existing vehicle and cell phone.

The court then assessed the secondary factors. First, it found that "Mr. Lawson was not engaged in a distinct occupation or business. He did not run a delivery business of which Grubhub was simply one client." *Id.* at 1089. Additionally, it found that the work required little skill, *id.*, was essentially compensated on an hourly basis, *id*. at 1090, and that the work performed was part of Grubhub's regular business, *id*. All these factors augured in favor of employee status. On the other hand, the work was not performed under Grubhub's supervision, *id.* at 1089, Mr. Lawson provided all necessary tools and equipment, *id.*, and the Agreement did not last for a stated period of time, *id.* at 1089–90. These factors augured in favor of independent contractor status.

The court concluded that the last factor, the parties' intent, was neutral. On one hand, the express Agreement provides that Mr. Lawson agreed to independent contractor status. On the other hand, it was a take-it-or-leave-it offer. *Id.* at 1091. On balance, the court concluded that Mr. Lawson was an independent contractor.

> The *Borello* [multi-factor control test] factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Alexander*, 765 F.3d at 989. Here, some secondary factors favor an employee/employer relationship: namely,

> Mr. Lawson's delivery work was part of Grubhub's regular business in Los Angeles; the work was low-skilled; Mr. Lawson was not engaged in a distinct delivery business of which Grubhub was just one client; and, slightly less, Grubhub's method of payment. The other factors, however, favor a finding that Mr. Lawson was an independent contractor. Of primary significance, Grubhub did not control the manner or means of Mr. Lawson's work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to delivery for Grubhub. Grubhub also did not provide Mr. Lawson with any of the tools for his work (other than a downloadable mobile app) and neither Grubhub nor Mr. Lawson con templated the work to be long term or regular, but rather episodic at Mr. Lawson's sole convenience. And while Grubhub had the right to terminate the Agreement at will upon 14 days' notice, under the specific circumstances of this case, this right did not allow Grubhub to exert control over Mr. Lawson's work. After considering all the facts, and the caselaw regarding the status of delivery drivers, the Court finds that all the factors weighed and considered as a whole establish that Mr. Lawson was an independent contractor and not an employee.
>
> . . . .
>
> Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If Mr. Lawson is an employee, he has rights to minimum wage, overtime, expense reimbursement and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy. In the meantime the Court must answer the question one way or the other. Based on what the Court observed at trial and the facts found, and after applying the *Borello* [multi-factor control] test, the Court finds that during the four months Mr. Lawson performed delivery services for Grubhub he was an independent contractor. Since he was not an employee, he cannot prevail on his . . . claims. Accordingly, judgment must be entered in favor of Grubhub and against Mr. Lawson.

Id. at 1091–1093.

QUESTIONS

1. Should the rights and benefits of employment law be an "all-or-nothing" proposition?
2. Does the judge explain how she balanced the conflicting evidence under the multi-factor test to come to her conclusion? Is it possible for a judge to provide an account of multi-factor decisionmaking?

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2. The Economic Realities Test: An Earlier Alternative to the Control Test

Early on, courts sometimes went beyond the strict common law test to ensure that the remedial employment law statutory schemes were applied broadly to fulfill their purpose of protecting workers. However, through statutory amendment Congress restricted the scope of employment in several major acts to the traditional common law "control" test. One exception is the expansive definition of employee under the Fair Labor Standards Act. Professor Matt Bodie explains this development of the (now limited) economic realities test.

Matt Bodie, *Participation as a Theory of Employment*

89 Notre Dame L. Rev. 661, 684–688 (2013).

The primary alternative to the control test, particularly in the realm of employment law, is the "economic realities" or "economic dependence" test. It is generally interpreted to provide a more expansive definition to the term "employee," one that covers more vulnerable workers who may have some aspects of separation from the firm but lack true economic independence. It has its roots in the interpretation of critical New Deal statutes soon after their passage. While clearly rejecting the common law control test, these cases did not craft a specific and readily cognizable alternative. Instead, they looked to the purpose of the statutes and attempted to glean an approach that harmonized with that purpose. Interpreting the NLRA, the Court noted that it was "not necessary in this case to make a completely definitive limitation around the term 'employee.' " But the Court did distinguish between the traditional common law definition and a broader perspective based on the ills at which the statute was directed. In other words, the

term "employee" was "to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." That reference to "economic facts" became "economic reality" in later cases defining the category of "employee" in the context of the Social Security Act and the Fair Labor Standards Act. This test—lacking any factors or even specific doctrinal definition—was something of a gestalt or eyeball standard, designed to look at the overall economic relationship and determine whether Congress intended such a relationship to come under the purview of the particular statutory scheme.

Although the Court's "economic reality" definition was overturned by statutory amendments to both the NLRA and the Social Security Act, it has remained in place with regard to the FLSA. That statute's definition of employee is the circular one found in many statutes: "the term 'employee' means any individual employed by an employer." However, the Act also defines "employ" to include "suffer or permit to work." Because employ is defined differently and more broadly, the Supreme Court has recognized that the FLSA may extend to cover workers beyond the reach of the common law agency test. The definition of "employee" under the FMLA incorporates the standard from the FLSA by reference, and thus courts have applied the same "economic realities" test. Outside of these contexts, however, the Supreme Court has made it clear that the "control" test is to apply as the default rule.

According to the "economic realities" test, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." Courts have generally looked to a number of factors in calculating coverage under the "economic realities" test. One popular test, developed in *Bonnette v. California Health & Welfare Agency*, asks whether the employer: "(1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." Other circuits have more closely mirrored the control test. But in recognition of the FLSA's broader coverage, courts have either implicitly or explicitly looked to the "reality" of the worker's dependence on the putative employer. Such dependence is often manifested through the economic weakness of the workers, and the focus on economic reality is meant to cut through formalistic trappings to get at the heart of the relationship. In *Secretary of Labor v. Lauritzen*, for example, the court held that migrant workers on a pickle farm were employees because they

"depend on the [employer's] land, crops, agricultural expertise, equipment, and marketing skills."

Some commentators have argued that the economic realities test should replace the control test, because its focus on economic dependence provides more protection to vulnerable workers. However, in the United States the test has thus far remained limited to the FLSA and FMLA. The concept of dependency has been more successful in foreign jurisdictions, which have adopted concepts such as "dependent contractors" and "employee-like" persons in certain worker-protection regimes. In the United Kingdom, for example, several employment law regimes have expanded to include those working relationships "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." At present, the extended protections include minimum wage requirements, overtime limitations, grievance processes, and restrictions on wage deductions. However, the definition of "worker" has only extended these protections to an additional set of laborers; it has not replaced the concept of "employee" in the law.

Example 3-3

In *Perez v. SuperMaid, LLC*, 55 F. Supp. 3d 1065 (N.D. Ill. 2014), the court determined that workers at SuperMaid were employees for FLSA purposes (minimum wage and overtime). The employees were substantially controlled by the business: they were provided with vehicles, uniforms, cleaning supplies and tools; they were trained how to clean houses, and their performance was monitored; and their work was scheduled by the office, and they did not manage their own workflow. However, the court also emphasized that the economic realities test under the broad definition of FLSA provided strong support for the holding:

> Opportunity for Profit and Loss. "An independent contractor risks loss of an investment and has the opportunity to increase profits through managerial discretion." *E.E.O.C. v. Century Broadcasting Corp.*, No. 89 C 5842, 1990 WL 43286, at *4 (N.D.Ill. Mar. 23, 1990) (citing *Lauritzen*, 835 F.2d at 1536).

> Strict prearranged pay scales and situations that do not afford workers "managerial discretion" to adjust their hours or work more efficiently eliminate the opportunity for those workers to realize increased profits by adjusting their own performance. *See Int'l Detective*, 819 F.Supp.2d at 748; *Skokie Maid*, 2013 WL 3506149 at *8. In *Skokie Maid*, compensating workers on a per-house basis and strict enforcement of permitted work hours weighed in favor of employee status. With Supermaid, workers are similarly not allowed to vary their start and end times, even if they are able to complete their work more efficiently than scheduled; their ability to perform more effectively does not increase their ability to increase their personal pay or profits. The defendants have made no showing, and the Court sees no basis in the record to find, that the maids in this case have any autonomy to increase their earning rate through managerial discretion, again weighing in favor of employee classification.

Perez, 55 F. Supp. at 1077.

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3. Contemporary Applications of the Multi-Factor Test: Emphasizing "Entrepreneurial Opportunity for Gain or Loss" Rather than "Control"

The first factor in the common law test, *the right of control*, is generally regarded as the central question to determine the scope of employment law statutes. In recent years, the element of the right to control has been criticized for being out of step with the evolving characteristics of the modern workplace. As an alternative, some courts have suggested that the more appropriate factor would be to focus on the "entrepreneurial opportunity for gain or loss." The test focuses on the economic reality of the relationship rather than formal characteristics of "control" over the work.

The struggle over defining employee status has been pronounced in certain industries where corporations seek to maintain a flexible workforce to adjust to rapidly changing circumstances and demands. For example, the shipping company, FedEx, began hiring drivers as independent contractors who were not subject to the full control of FedEx in carrying out their detailed obligations. On one hand, FedEx regarded them as contractors hired to assist with its variable delivery demands. On

the other hand, the independent drivers were dependent on FedEx in many ways and subject to detailed rules and regulations. The following opinion was notable for its effort to recast the test of employment status.

FedEx Home Delivery v. NLRB

563 F.3d 492 (D.C. Cir. 2009).

Brown, Circuit Judge:

FedEx Ground Package System, Inc. ("FedEx"), a company that provides small package delivery throughout the country, seeks review of the determination of the National Labor Relations Board ("Board") that FedEx committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining representative of its Wilmington, Massachusetts drivers. The Board cross-applies for enforcement of its order. Because the drivers are independent contractors and not employees, we grant FedEx's petition, vacate the order, and deny the cross-application for enforcement

I.

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In July 2006, the International Brotherhood of Teamsters, Local Union 25, filed two petitions with the NLRB seeking representation elections at the Jewel Drive and Ballardvale Street terminals in Wilmington, neither of which boasts many contractors. The Union won the elections, prevailing by a vote of 14 to 6 at Jewel Drive and 10 to 2 at Ballardvale Street, and was certified as the collective bargaining representative at both. FedEx refused to bargain with the Union. The company did not contest the vote count; instead, FedEx disputed the preliminary finding that its single-route drivers are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3).

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II.

To determine whether a worker should be classified as an employee or an independent contractor, the Board and this court apply the common-law agency test, a requirement that reflects clear congressional will. While this seems simple enough, the Restatement's non-exhaustive ten-factor test is

not especially amenable to any sort of bright-line rule, a long-recognized rub. Thus, "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," always bearing in mind the "legal distinction between 'employees' . . . and 'independent contractors' . . . is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute." *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C.Cir.1989) ("NAVL").

This potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors.

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For a time, when applying this common law test, we spoke in terms of an employer's right to exercise control, making the extent of actual supervision of the means and manner of the worker's performance a key consideration in the totality of the circumstances assessment. Though all the common law factors were considered, the meta-question, as it were, focused on the sorts of controls employers could use without transforming a contractor into an employee. . . .

Gradually, however, a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee . . . .

In any event, the process that seems implicit in those cases became explicit—indeed, as explicit as words can be—in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C.Cir. 2002). In that case, both this court and the Board, while retaining all of the common law factors, "shift[ed the] emphasis" away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.' " *Id.* at 780 (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. No. 144, at 6 (Dec. 19, 2000)). This subtle refinement was done at the Board's urging in light of a comment to the Restatement that explains a " 'full-time cook is regarded as a servant,' "—and not "an independent contractor"—" 'although it is understood that the employer will exercise no control over the cooking.' " *Id.* (quoting Restatement (Second) of Agency § 220(1) cmt. d). Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate

those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.

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This struggle to capture and articulate what is meant by abstractions like "independence" and "control" also seems to play a part in the Board's own cases, though we readily concede the Board's language has not been as unambiguous as this court's binding statement in *Corporate Express*. For instance, in the latest but far from only statement of the principle, the Board held that where carriers sign an independent contractor agreement; own, maintain, and control their own vehicles; hire full-time substitutes and control the substitutes' terms and conditions of employment; are permitted to hold contracts on multiple routes; select the delivery sequence; and are not subject to the employer's progressive discipline system, the evidence establishes that the carriers are independent contractors. Importantly, the Board, noting many drivers had "multiple routes" and could deliver newspapers for another publisher, also concluded significant entrepreneurial opportunity existed, even if most failed to make the extra effort. "[T]he fact that many carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so."

The record here shares many of the same characteristics of entrepreneurial potential. In the underlying representation decision, the Regional Director found the contractors sign a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx "for any purpose" and confirms the "manner and means of reaching mutual business objectives" is within the contractor's discretion, and FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance"; "contractors are not subject to reprimands or other discipline"; contractors must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety requirements; and "contractors are responsible for all the costs associated with operating and maintaining their vehicles." *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1–RC–22034, 22035, slip op. at 10–14 (First Region, Sept. 20, 2006) ("*Representation Decision*"). They may use the vehicles "for other commercial or personal purposes . . . so long as they remove or mask all FedEx Home logos and markings," and, even on this limited record, some do use them for personal uses like moving

family members, and in the past "Alan Douglas[ ] used his FedEx truck for his 'Douglas Delivery' delivery service, in which he delivered items such as lawn mowers for a repair company." *Id.* at 14, 15. Contractors can independently incorporate, and at least two in Wilmington have done so. At least one contractor has negotiated with FedEx for higher fees. *Id.* at 20.

Tellingly, contractors may contract to serve multiple routes or hire their own employees for their single routes; more than twenty-five percent of contractors have hired their own employees at some point. "The multiple route contractors have sole authority to hire and dismiss their drivers"; they are responsible for the "drivers' wages" and "all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance." *Representation Decision*, slip op. at 27. The drivers' pay and benefits, as well as responsibility for fuel costs and the like, are negotiated "between the contractors and their drivers." In addition, "both multiple and single route contractors may hire drivers" as "temporary" replacements on their own routes; though they can use FedEx's "Time Off Program" to find replacement drivers when they are ill or away, they need not use this program, and not all do. Thus, contrary to the dissent's depiction, contractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there. "FedEx [also] is not involved in a contractor's decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx [ ] they have hired a replacement driver, as long as the driver is `qualified.' " *Representation Decision*, slip op. at 29. "Contractors may also choose to hire helpers" without notifying FedEx at all; at least six contractors in Wilmington have done so. *Id.* at 29–30. This ability to hire "others to do the Company's work" is no small thing in evaluating "entrepreneurial opportunity." *Corp. Express*, 292 F.3d at 780–81; *see also St. Joseph News Press*, 345 N.L.R.B. at 479 ("Most importantly, the carriers can hire full-time substitutes. . . .").

Another aspect of the Operating Agreement is significant, and is novel under our precedent. Contractors can assign at law their contractual rights to their routes, without FedEx's permission. The logical result is they can sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship. In fact, the amount of consideration for the sale of a route is negotiated "strictly between the seller and the buyer," with no FedEx involvement at all other than the new route owner must also be "qualified" under the Operating Agreement, *Representation Decision*,

slip op. at 30, with "qualified" merely meaning the new owner of the route also satisfies Department of Transportation ("DOT") regulations, *see id.* at 8–10. Although FedEx assigns routes without nominal charge, the record contains evidence, as the Regional Director expressly found, that at least two contractors were able to sell routes for a profit ranging from $3,000 to nearly $16,000. *See id*. at 30–32, 38–39.

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The Regional Director . . . thought FedEx's business model distinguishable from those where the Board had concluded the drivers were independent contractors. For example, FedEx requires: contractors to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx's logo in a way larger than that required by DOT regulations. The company insists drivers complete a driving course (or have a year of commercial driving experience, which need not be with FedEx) and be insured, and it "conducts two customer service rides per year" to audit performance. FedEx provides incentive pay (as well as fuel reimbursements in limited instances) and vehicle availability allotments, and requires contractors have a vehicle and driver available for deliveries Tuesday through Saturday. *Id*. at 508–14. Moreover, FedEx can reconfigure routes if a contractor cannot provide adequate service, though the contractor has five days to prove otherwise, and is entitled to monetary compensation for the diminished value of the route. *Id*. at 512. These aspects of FedEx's operation are distinguishable from the business models in *Dial-A-Mattress*, 326 N.L.R.B. 884 (contractors arranged their own training, could decline work, did not wear uniforms, could use any vehicle, and were provided no subsidies or minimum compensation) and *Argix Direct, Inc.*, 343 N.L.R.B. 1017 (2004) (contractors could decline work, delivered to major retailers using any vehicle, and had no guaranteed income).

But those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship. In other words, the distinctions are significant but not sufficient. FedEx Home's business model is somewhat unique. The service is delivering small packages, mostly to residential customers. Unlike some trucking companies, its drivers are not delivering goods that FedEx sells or manufacturers, nor does FedEx move freight for a limited number of large clients. Instead, it is an intermediary between a diffuse group of