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The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee"

Russel A. Hollrah

Patrick A. Hollrah

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Russell A. Hollrah
*Patrick A. Hollrah**

The meaning of the term "employee" is critically important for the purposes of laws governing work relationships. This is because these laws, for the most part, cover only employees, and do not cover self-employed individuals, commonly referred to as independent contractors or independent entrepreneurs. Currently more than ten different tests are used to determine whether an individual qualifies as an "employee" for purposes of federal and state statutes.

This multiplicity of tests has frequently left independent entrepreneurs and their clients uncertain whether their contractual relationships will be respected for purposes of applicable statutes. This exposes companies doing business with independent contractors to the risk of having to litigate the classification of an individual multiple times.

Furthermore, many companies have become skeptical of doing business with independent contractors, and instead purchase services through other, less-efficient arrangements. This leads to fewer independent-contractor opportunities, which artificially depresses the earnings of legitimate independent contractors.

Moreover, the wide variety in definitions of the term "employee" inhibits the government's efforts to ensure proper worker classification.

The current patchwork of definitions could be eliminated at the federal level by harmonizing the definition of the term "employee" for purposes of federal statutes. Harmonization would establish one definition of "employee" that would apply for purposes of all federal statutes. Thus, once an individual's status relative to a company is determined for purposes of one federal statute, the individual's status would be known for purposes of all federal statutes.

While significant progress toward harmonization already has been made, it will remain elusive until Congress takes action to adopt a common-law test for the Fair Labor Standards Act, which is the only remaining New Deal statute that has not yet been amended to restore a judicially expanded definition for "employee" to its common-law meaning. The time for Congress to take this action is now.

I. THE NEED FOR HARMONIZATION

Imagine being the owner of a small company that litigates, and wins, a worker-classification dispute with the Internal Revenue Service ("IRS"), but is then visited by the U.S. Department of Labor ("DOL").[1] The DOL investigator explains that the DOL will be conducting its own investigation of whether those same individuals are classified correctly for purposes of the Fair Labor Standards Act ("FLSA")[2] and that any determination made for purposes of federal employment taxes would be largely irrelevant.

This scenario is not theoretical; it actually occurs. In one instance, the IRS audited a company and determined that the company had misclassified individuals as independent contractors. The company successfully litigated the issue in a federal district court, which held that the company was not liable for federal employment taxes with respect to those individuals.[3] The

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[*] The co-authors Russell A. Hollrah and Patrick A. Hollrah are attorneys with the law firm Hollrah LLC, in Washington, D.C., and serve as the Executive Director and General Counsel, respectively, of the Coalition to Promote Independent Entrepreneurs.

[1] The U.S. Department of Labor is the federal agency responsible for enforcing federal statutes pertaining to the workforce. Its mission is "[t]o foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." *Our Mission*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/aboutdol/mission (last visited May 1, 2018).

[2] "The Fair Labor Standards Act (FLSA) prescribes standards for wages and overtime pay, which affect most private and public employment. The act is administered by the Wage and Hour Division. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous." *Summary of the Major Laws of the Dep't of Labor*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/aboutdol/majorlaws (last visited May 1, 2018).

[3] One of the authors has represented the company in this example. Because certain aspects of the facts recounted here are not of public record, the case

government appealed that decision to a federal appeals court, and the company prevailed again.[4]

While the years of litigation were extraordinarily costly and stressful, the owner was nonetheless relieved that the company prevailed. This same company was subsequently visited by an investigator from the DOL, who explained that the DOL would be reviewing the company's independent-contractor relationships for purposes of the FLSA. Thinking that this issue had already been conclusively resolved, the owner provided the DOL investigator with a copy of the company's court decision.

The owner was stunned when the DOL investigator correctly responded that the court decision would have little, if any, relevance to the DOL's investigation. The investigator explained that the test used to determine "employee" status for purposes of federal employment taxes is very different from the test used to make that same determination for purposes of the FLSA. The owner was stung by the unfairness of how the federal government applied its statutes to the company's independent-contractor relationships. This experience illustrates how the inconsistent definitions of "employee" for purposes of different statutes unfairly punish companies that do business with legitimate self-employed individuals.

At this time, courts and government agencies apply more than ten different tests to determine whether an individual qualifies as an employee for purposes of different federal and state statutes.[5]

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citations are omitted to preserve the attorney-client privilege and protect the identity of the company and its owners.

[4] *Id.*

[5] For a list of the different tests applied to determine an individual's status, as an employee or independent contractor, for purposes of federal and state statues, see *Different Tests for Defining "Employee" for Different Purposes*, COALITION TO PROMOTE INDEPENDENT ENTREPRENEURS, https://iccoalition.org/wp-content/uploads/2018/03/Different-Tests-for-Defining-the-Term-Employee-Website.pdf (last visited May 1, 2018). For the most part, but not always, laws governing work relationships apply only to individuals who qualify as "employees." Some federal statutes governing the work relationship apply to independent contractors. *See, e.g.*, 42 U.S.C. § 1981 (1991) (prohibiting race-based discrimination); *see also* Wortham v. Am. Family Ins. Grp., 385 F.3d 1139, 1141 (8th Cir. 2004) ("'Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts

Different tests are applied for purposes of different statutes,[6] for purposes of the same statute in different jurisdictions,[7] and for purposes of different aspects of the same statute.[8] This has created an uncertain and unpredictable environment for independent entrepreneurs and their clients, and even for courts that struggle to determine the appropriate test for a specific statute.

The next two components of this Section identify the principal problems created by this patchwork of different tests and then offer a comprehensive solution, namely, harmonizing the definition of the term employee for purposes of federal statutes. In Section II, this Article proceeds with a history of how the term employee acquired different meanings. Section III discusses the different tests used to determine whether an individual is an employee for purposes of different statutes. The final Sections analyze how amending the Fair Labor Standards Act to adopt a common-law test for defining the term would not only achieve complete harmonization, but would conform the definition to more recent Supreme Court guidance.

A. Different Tests for the Term "Employee" Create Problems for Various Stakeholders

The principal problems created by the current patchwork of different tests for the term "employee" affect independent entrepreneurs, their clients, and the government. One such problem is that companies doing business with independent contractors can be required to litigate the same worker-classification issue multiple

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by which a[n] . . . independent contractor . . . provides service to another.'") (quoting Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 14 (1st Cir. 1999)).");
Hamdan v. Ind. Univ. Health N., LLC, 2014 U.S. Dist. LEXIS 157841, at *28 (S.D. Ind. Nov. 5, 2014) ("The Court agrees with Dr. Hamdan that the trend since 1991 has been to *expand* § 1981 to cover certain relationships, rather than limiting its scope"). For a discussion of the application of an anti-discrimination statute to independent contractors, see Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L. J. 170 (2006).

[6] *See infra* Section III.

[7] *See infra* Section III.

[8] *See infra* Sections III.A.3.b and III.B.5.

times, thus creating market distortions.[9] To make matters worse, these companies are exposed to staggering financial consequences if determined to have run afoul of any applicable test.[10]

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[9] For example, FedEx Ground Package System, Inc. ("FedEx") has been required to defend the independent-contractor status of delivery drivers with whom it does business multiple times, and under different tests. *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 504 (D.C. 2009) (holding delivery drivers to be independent contractors for purposes of the National Labor Relations Act); Tumulty v. FedEx Ground Package Sys., 2005 U.S. Dist. LEXIS 26215, at *2 (W.D. Wash. Mar. 4, 2005) (holding FedEx to be a joint-employer of certain drivers for purposes of the Fair Labor Standards Act and Washington Minimum Wage Act); Estrada v. FedEx Ground Package Sys., Inc., 154 Cal. Rptr. 3d 327, 335 (2007) (holding a class of drivers to be employees of FedEx for purposes of California labor law); Craig v. FedEx Ground Package Sys., 335 P. 3d 66, 92 (Kan. 2014) (holding delivery drivers to be employees for purposes of the Kansas Wage Payment Act); Anfinson v. FedEx Ground Package Sys., Inc., 281 P. 3d 289, 297 (Wash. 2012) (holding drivers to be independent contractors for purposes of the Washington Minimum Wage Act); *see also* Press Release, FedEx, FedEx Ground Contractor Ruling Statement (Nov. 10, 2009), https://about.van.fedex.com/news room/fedex-ground-contractor-ruling-statement/ (stating that the Internal Revenue Service determined drivers to be independent contractors relative to FedEx for federal tax purposes). In response to the litigation, FedEx reportedly ceased engaging individual independent-contractor drivers. After a transition period, FedEx only engaged larger independent-contractor drivers that were incorporated under state law, employed their own drivers, and operated multiple routes. Consequently, independent contractors were required to either significantly expand their business or cease operating. *See* Ian Taylor, *FedEx Ground Issues New Standards for Independent Contractors*, POST & PARCEL (May 24, 2010), https://postandparcel.info/33334/news/fedex-ground-issues-new-standards-for-independent-contractors/. A sample Independent Service Provider Transition Workbook identifying the updated independent-contractor prerequisites is available at http://www.deliveryroutesforsale.com/wp-content/uploads/FedEx-ISP-Workbook.pdf.

[10] *See e.g.*, Bartlow v. Costigan, 13 N.E. 3d 1216 (Ill. 2014) (finding that a company that allegedly misclassified ten individuals for between 8 and 160 days in 2008 received a notice of a "potential penalty" under various sections of the Illinois Employee Classification Act, 820 ILCS 185/1, of more than $1.6 million). *See also* Cal. Lab Code § 226.8(a) (2013) (making it unlawful for any person or employer to willfully misclassify an individual as an independent contractor or to charge such an individual a fee that could not have been lawfully charged to an employee and describing the penalty prescribed for a violation as not less than $5,000 and not more than $15,000 for each violation, in addition to any other penalties or fines permitted by law); Md. Code Ann., Lab. & Empl. § 3-909(a)

This adverse regulatory environment has led some companies to mitigate these risks by eschewing independent-contractor relationships entirely, regardless of the difficulty in obtaining the needed services through alternative means.[11] Examples of such alternative means include, among others, 1) reclassifying independent contractors as company employees, even though this option exposes the company to a new set of risks attributable to the ever-growing state-law requirements imposed on employers with respect to employees, which often are incompatible with how a company intended to do business with the affected individuals;[12] 2) modifying the terms and conditions of the company's independent-contractor relationships to make them more legally defensible but

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(2016) (providing that an employer found to have knowingly failed to properly classify an individual in violation of § 3-904 of this subtitle shall be assessed a civil penalty of up to $ 5,000 for each employee who was not properly classified).

[11] While published data on this phenomenon have not been found, the authors, whose law practice is devoted to representing companies that do business with independent contractors, have personally observed it in multiple industries.

[12] *See, e.g.*, Cal Lab Code § 2802(a) (2016) ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."). *See also* Cal Lab Code § 226.7(c) (2015) ("If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."); Cal Lab Code § 201(a) ("If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within a reasonable time as necessary for computation and payment thereof; provided, however, that the reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any employee who so requests and designates a mailing address therefor.").

less attractive or less viable to independent contractors;[13] 3) engaging the service providers through a third-party intermediary firm;[14] or 4) purchasing the services from a large incorporated vendor.[15] This is significant inasmuch as under all of these alternatives a company would operate less efficiently.[16]

Another stakeholder directly affected by the different tests for determining worker status is the legitimate independent contractor pursuing the American dream by offering his or her services as a self-employed entrepreneur. Self-employed individuals and their employees represent almost one-third of the American workforce.[17] This sector is estimated to add $1.4 trillion annually to the economy.[18] However, legitimate independent contractors increasingly find themselves discriminated against by potential client companies because they expose such companies to a worker-misclassification risk that a company can mitigate, and possibly

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[13] *See generally supra* note 9 (describing how FedEx restructured its independent-contractor relationships in order to preserve its business model, and how the restructuring had the unfortunate effect of restricting the opportunity to become a self-employed FedEx driver to those who possess the financial resources to purchase multiple routes).

[14] Third-party firms charge a fee for their services, which artificially increase the cost of the independent contractor's services to the client company, decreases the fees earned by the independent contractor, or both. The sole function of a third-party firm in this context is to mitigate the regulatory risks.

[15] This option deprives legitimate independent contractors of the opportunity to pursue these client projects.

[16] *See* STEVEN ALAN COHEN & WILLIAM B. EIMICKE, INDEPENDENT CONTRACTING POLICY AND MANAGEMENT ANALYSIS, in Columbia Univ. Academic Commons, at 84 (Aug. 2013), https://doi.org/10.7916/D8CR5SR9 [hereinafter Columbia Study]. The authors also observe that "[a] government that purports to have job creation as its number one priority should make it easier for companies to make their own strategic decisions about their employment models." *Id.* at 88.

[17] RAKESH KOCHHAR ET AL., THREE-IN-TEN U.S. JOBS ARE HELD BY THE SELF-EMPLOYED AND THE WORKERS THEY HIRE, HIRING MORE PREVALENT AMONG SELF-EMPLOYED ASIANS, WHITES AND MEN 5 (Oct. 2015), http://www.pewsocialtrends.org/files/2015/10/2015-10-22_self-employed_final.pdf.

[18] *Freelancing in America 2017*, EDELMAN INTELLIGENCE & UPWORK AND FREELANCERS UNION (Oct. 17, 2017), https://s3-us-west-1.amazonaws.com/adquiro-content-prod/documents/Infographic_UP-URL_2040x1180.pdf.

avoid, by eschewing independent contractors and doing business instead with a larger incorporated competitor.[19] Sadly, this leads to an artificial reduction in client opportunities available to independent contractors, thereby diminishing the earning potential of independent-contractors on the whole.[20] Ultimately, this impedes the ability of individuals to pursue self-employment as a viable alternative to traditional full-time employment. For centuries, dating back to English common-law, it has been recognized that individuals have a right to earn a living as they see fit, so long as they do not harm anyone in doing so. Impeding an individual's choice to pursue self-employment violates this longstanding right.[21] The risk of worker misclassification, created by a lack of harmony

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[19] As a consequence of a demanding version of an "ABC" test that applies in Massachusetts, a Massachusetts artists' coalition, Artists Under the Dome, described the impact on independent contractors as follows:

Many artists earn their income or a key part of their income from being an independent contractor. Many cultural organizations and arts related businesses hire independent contractors . . . In 2004 there was a change to the Massachusetts State law governing Independent Contractors. The change to the law was enacted as part of the Public Construction Reform Act . . . This law now makes it next to impossible to be an independent contractor or a freelancer in this state . . .The publishing industry, companies that are not based in Massachusetts, are no longer hiring Massachusetts-based freelance writers, copy editors, editors, etc. due to this 2004 Massachusetts law change. Massachusetts freelancers are losing needed clients and income due to this law change.

Information on Legislation Filed to Address the Independent Contractor Issue & What You Can do to Support It, ARTISTS UNDER THE DOME, http://www.artistsunderthedome.org/MAindependent_contractor.html (last visited May 1, 2018) [hereinafter ARTISTS UNDER THE DOME]. It is important to recognize that a company's risk of being deemed an employer of an individual is not necessarily avoided by the company doing business with incorporated entities, because of the concept of "joint employment," pursuant to which more than one entity can be deemed an employer of the same individual. *See, e.g.*, *Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act*, U.S. DEP'T OF LABOR: WAGE AND HOUR DIVISION (2016), https://www.dol.gov/whd/regs/compliance/whdfs35.pdf (describing joint-employment relationships under the Migrant and Seasonal Agricultural Worker Protection Act).

[20] For a discussion of the artificial reduction in client opportunities in Massachusetts, *see* ARTISTS UNDER THE DOME, *supra* note 19.

[21] *See* Mayor v. Winfield, 27 Tenn. 707, 709–10 (1848); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 1–2 (2010).

among statutes in the meaning of the term "employee," sows so much confusion and discord in business relationships that it arguably creates just such an impediment.

Another unfortunate economic impact of the unpredictability and uncertainty created by the different tests for the term "employee," and the corresponding business decisions companies make to mitigate these risks, is reduced economic growth. Businesses enter into less-efficient arrangements to mitigate their risk exposure, and this prevents legitimate independent contractors from maximizing their earnings.[22] Columbia University Professors Steven Cohen and William B. Eimicke observed that "the inconsistent application of control tests and definition of contractors across the U.S. puts American businesses that employ contractors at a concrete disadvantage."[23] A unified test and definition for the term "employee" would foster better economic opportunities for independent contractors, which would benefit economic growth on the whole.

A 2010 study on independent contractors warned that curtailing independent contracting would 1) reduce job creation and small business formation; 2) reduce competition and increase prices; 3) create sector specific disruptions; and 4) produce a less flexible and dynamic work force.[24] The study also reported that:

> [I]ndependent contractor arrangements serve several important economic functions. They provide a means of low-cost contracting as an alternative to the fixed

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[22] *See, e.g.*, JEFFREY A. EISENACH, THE ROLE OF INDEPENDENT CONTRACTORS IN THE U.S. ECONOMY 36 (2010), https://iccoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf [hereinafter Eisenach Study] (describing the economic costs of deterring independent-contractor relationships).

[23] Columbia Study, *supra* note 16, at 84.

[24] Eisenach Study, *supra* note 22, at 36–40. *Accord* Columbia Study, *supra* note 16, at 83–84 (concluding that "when executed correctly, independent contracting can be advantageous to businesses, workers and the broader economy"). Another consequence of the legal uncertainty concerning independent-contractor relationships and the financial consequences of being determined to have misclassified individuals is a growth of third-party firms that interpose themselves between client companies and independent contractors to mitigate the client companies' risks. The fees these firms charge result in independent contractors earning less, companies paying more, or both.

> costs of traditional employment relationships; facilitate efficient incentive arrangements and effective quality control, especially in the face of obstacles sometimes created by regulatory and legal aspects of traditional employment contracts; and, perhaps most importantly, respond to workers' desires to 'be their own boss' and, in many cases, take the first steps down the road of small business creation.[25]

The reported adverse economic impact of a government policy discouraging the creation of independent-contractor relationships also identifies a human cost: individuals are prevented from pursuing their entrepreneurial dreams. This cost, in turn, suppresses the growth of small businesses on the whole.[26]

A stakeholder adversely affected by the patchwork of different definitions for the term "employee" that might not be readily apparent is the government. Federal agencies have invested substantial time and effort in developing information-sharing and collaborative-enforcement arrangements to address worker misclassification, but the efficacy of these arrangements has been severely limited by these inconsistent definitions. For example, the DOL has entered into Memoranda of Understanding ("MOUs") with other federal agencies and thirty-eight states to jointly pursue worker misclassification.[27] However, the lack of a consistent definition of the term "employee" impedes the agencies' ability to derive much efficiency or value from these agreements.[28] A worker-

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[25] Eisenach Study, *supra* note 22, at 35.

[26] *See id.* at 36–37.

[27] For a current list of MOUs entered into by the U.S. Department of Labor, *see DOL MOU Initiative*, COALITION TO PROMOTE INDEPENDENT ENTREPRENEURS, https://iccoalition.org/dol-mou-initiative/ (last visited May 1, 2018); *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/workers/misclassification/ (last visited May 1, 2018).

[28] For a list of the different definitions given to the term employee for purposes of federal and state statutes, see *Different Tests for Defining "Employee" for Different Purposes*, COALITION TO PROMOTE INDEPENDENT ENTREPRENEURS, https://iccoalition.org/wp-content/uploads/2018/03/Different-Tests-for-Defining-the-Term-Employee-Website.pdf (last visited May 1, 2018).

status determination for purposes of one statute made by one government agency is often a poor status indicator for use by another government agency that administers a different statute, due to the different tests for "employee" that apply for the purposes of different statutes.[29] For example, if the DOL were to determine an individual to be an employee of a company for purposes of the FLSA, it would apply an "economic realities" test to make that determination.[30] The determination would have little, if any, value to the IRS in administering the Internal Revenue Code, because a common-law test is used to define "employee" for purposes of the Internal Revenue Code.[31] The same impediment frustrates the collaborative enforcements efforts pursued by any agencies that administer statutes that define the term "employee" differently.

B. Problems Caused by Different Tests Can be Eliminated by Harmonizing the Definition of "Employee" for Purposes of Federal Statutes

A solution to these problems is harmonization.[32] If the term "employee" were given the same meaning for purposes of federal

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[29] For example, the economic realities test that the DOL applies in determining an individual's status for purposes of the laws over which it has jurisdiction (*e.g.*, the FLSA, FMLA and MSPA) is materially different from the test used by the other federal agencies in determining an individual's status for purposes of the laws over which they have jurisdiction. Consequently, in cases where DOL finds an instance of worker misclassification, this finding offers little if any indication of whether the individual would be deemed an employee for purposes of the federal statutes over which the other agencies have jurisdiction. *See* Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995) (applying the economic realities test); Burrey v. Pacific Gas and Elec. Co., 159 F.3d 388 (9th Cir. 1998) (applying the common-law test).

[30] *Johns*, 57 F.3d at 1557 ("Because the definition of 'employee' under the FLSA is broad, but not precise, courts apply the Supreme Court's 'economic reality' test to determine the scope of the employee coverage under the FLSA in particular cases.").

[31] *Burrey*, 159 F.3d at 393 ("Neither version of § 414(n) nor the Internal Revenue Code defines 'employee,' and accordingly the common-law definition of 'employee' should be used in its place.").

[32] For an individual to be excluded from coverage under a statute that covers only employees, the individual would need to either qualify as a self-employed independent contractor for purposes of the statute or satisfy the criteria for a

statutes, an individual's status, once determined, would be known for purposes of all federal statutes. Both parties to an independent-contractor relationship would be insulated against having to relitigate their relationship status under a different test each time it is challenged for purposes of a different statute (or in a different jurisdiction). The resulting increased certainty would allow contracting parties to more freely choose the most appropriate type of relationship to construct. Once an independent-contractor relationship had been tested and validated, the parties could continue doing business together with greater certainty that the relationship would be respected for purposes of other federal statutes.

Furthermore, the government would be able to more efficiently ensure correct worker classification through its collaborative efforts, as federal agencies would apply the same test to determine worker status. Thus, one federal agency's determination of an individual's status relative to a company would be useful to other agencies, as they would all follow the same test for purposes of determining worker status. By standardizing this definition across federal statutes, Congress would take a significant step towards the creation of a more stable environment for independent contractors and small business owners—one with less litigation and confusion over the definition of the term "employee." It should take this step as soon as possible.

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statutory exclusion. A statutory exclusion defines a category of individuals who are explicitly excluded from coverage under the statute, regardless of whether they qualify as an employee or independent contractor. Similarly, for an individual to be covered under a specific statute, the individual will either qualify as an employee for purposes of the statute or satisfy the criteria for a statutory inclusion under the statute. A statutory inclusion defines a category of individuals who are explicitly covered by the statute, regardless of whether they qualify as an employee or independent contractor. The harmonization proposal discussed herein is directed solely at the criteria for determining whether an individual qualifies as an employee or an independent contractor for purposes of a statute, and would not affect the statutory exclusions or inclusions contained in any statute.

II. BRIEF HISTORY OF HOW THE TERM "EMPLOYEE" ACQUIRED DIFFERENT MEANINGS FOR DIFFERENT PURPOSES

The seeds of inconsistent definitions for the term "employee" were planted in the 1940s, when the Supreme Court decided several cases involving this definition for purposes of New Deal legislation,[33] namely, the National Labor Relations Act of 1935 ("NLRA"),[34] the Social Security Act of 1935 ("SSA"),[35] and the Fair Labor Standards Act of 1938 ("FLSA").[36] These New Deal statutes were some of the first laws governing work relationships and, importantly, cover only employees, but not independent contractors. Subsequent laws governing work relationships have adopted or follow the interpretation of the term "employee" developed for purposes of these statutes. A brief history of the evolution of the current patchwork of different definitions for the term employee follows.

A. Early Supreme Court Decisions Adopt an Economic Realities Test

The first Supreme Court decision to interpret the term "employee" for purposes of a New Deal statute was *NLRB v. Hearst Publications*.[37] At issue in *Hearst* was whether certain Los Angeles daily newspapers were required to bargain collectively with a union representing newsboys who distributed their papers.[38] A threshold question was whether the newsboys were "employees" of the newspapers for purposes of the NLRA.[39]

Affirming a National Labor Relations Board determination that the newsboys were employees of the newspapers, the Court applied

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[33] *See* United States v. Silk, 331 U.S. 704 (1947); Walling v. Portland Terminal Co., 330 U.S. 148 (1947); NLRB v. Hearst Publications, 322 U.S. 111 (1944).

[34] National Labor Relations Act, 29 U.S.C. §§ 151–169 (1984).

[35] Social Security Act, 42 U.S.C. §§ 301–1397mm (2015).

[36] Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2016).

[37] *See* NLRB v. Hearst Publications, 322 U.S. 111 (1944).

[38] *Id.* at 113.

[39] *See id.*

an "economic realities" test,[40] reasoning that the meaning of the term "employee" must be derived from the "history, terms, and purposes of" the NLRA.[41] It interpreted the term employee as "not treated by Congress as a word of art having a definite meaning . . . Rather it takes color from its surroundings . . . [in] the statute where it appears, and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained."[42]

Later that year, in *United States v. Vogue Inc*., the Court of Appeals for the Fourth Circuit, following the Supreme Court's rationale in *Hearst*, adopted an "economic realities" test for purposes of the SSA.[43] Other federal circuits followed a common-law test,[44] which was consistent with Treasury regulations in effect at that time.[45] For example, the Court of Appeals for the Ninth Circuit applied a common-law test in *United States v. Aberdeen Aerie No. 24 of Fraternal Order of Eagles*, reasoning that because the facts in *Hearst* were distinguishable, and the *Hearst* decision applied only for purposes of the NLRA, the *Hearst* decision did not bind the court for purposes of the SSA.[46] This created a circuit split between the Fourth and Ninth Circuits.

The Supreme Court settled this split in *United States v. Silk*, when it held that certain truck drivers were "employees" for

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[40] The economic realities test is a broad test that analyzes the service provider's economic dependence on the service recipient. *See infra* Section III.B.

[41] *Hearst Publications*, 322 U.S. at 124.

[42] *Id*. at 124 (citations omitted).

[43] *See* United States v. Vogue Inc., 145 F.2d 609, 612–13 (4th Cir. 1944).

[44] The common-law test considers the right of control the service recipient exercises over the service provider. *See infra* Section III.A.

[45] The Treasury regulations in effect at the time were published at 1 F.R. 1764 (1936). The court in *Ill. Tri-Seal Prods. v. United States*, observed that "[t]he Federal courts, however, applied varying standards in determining who were employees: A majority held that the term was to be given its common-law meaning; a few ignored the common-law test and looked instead to the purpose of the legislation for guidance; and still others looked to both the purpose of the legislation and the common-law rules for guidance." (citations omitted). Ill. Tri-Seal Prods. v. United States, 173 Ct. Cl. 499, 512 (1965).

[46] United States v. Aberdeen Aerie No. 24 of Fraternal Order of Eagles, 148 F.2d 655, 658 (9th Cir. 1945); *see generally Hearst Publications*, 322 U.S. 111 (applying an economic realities test for purposes of the NLRA).

purposes of the SSA.[47] In reaching this decision, the Court reasoned that for purposes of the SSA, "the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils on our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose."[48] To this end, the Court rejected the common-law test, and instead adopted an "economic realities" test, explaining that "[a]pplication of the social security legislation should follow the same rule that [the Court] applied to the National Labor Relations Act in the *Hearst* case."[49]

In the same year, the Supreme Court decided *Walling v. Portland Terminal Co*., in which the Court adopted an economic realities test to define the term "employee" for purposes of the FLSA.[50] The Court reasoned that, "in determining who are 'employees' under the [Fair Labor Standards] Act, common-law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[51]

Following these decisions, as discussed in more detail below, Congress intervened by amending the NLRA and SSA to define the term "employee" under a common-law test.[52] It did not amend the FLSA, however. This resulted in the term "employee" as used in two New Deal statutes being defined under a common-law test, while an economic realities test continued to be used for purposes

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[47] United States v. Silk, 331 U.S. 704, 716–18 (1947).

[48] *Id.* at 712.

[49] *Id.* at 713–14.

[50] *See* Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

[51] *Id*. at 15–51; *Hearst Publications*, 322 U.S. at 129 (In determining the definition of "employee" for purposes of the National Labor Relations Act, the Court held "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by *underlying economic facts* rather than technically and exclusively by previously established legal classifications.").

[52] *See infra* Section II.B.

of the third New Deal statute. This inconsistency laid the foundation for the current patchwork of tests used to define the term.

B. Congress Adopts the Common-Law Test for All But One of the New Deal Statutes

In June 1947, Congress enacted legislation to reverse the Court's judicially expanded scope of coverage under the NLRA. It did so by amending the definition of "employee" for purposes of the NLRA to exclude "any individual having the status of an independent contractor."[53] In *NLRB v. United Ins. Co*., the Supreme Court explained that the "obvious purpose of this amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors."[54] The Court concluded that it was bound to apply the common-law agency test to determine whether an individual is an employee or independent contractor for purposes of the NLRA.[55]

The following year, in June 1948, Congress similarly amended the definition of "employee" for purposes of the SSA, pursuant to a resolution known as the Gearhart Resolution,[56] to exclude "(1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."[57] In *Party Cab Co., v. United States*, the Court of Appeals for the Seventh Circuit recounted that Congress enacted the 1948 amendments to the SSA by overriding a presidential veto; it

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[53] *See* 29 U.S.C. § 152 (3) (1947).

[54] NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968).

[55] *Id.* ("[T]here is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.").

[56] *See* Ill. Tri-Seal Prods., Inc. v. United States, 353 F.2d 216, 225–26 (Ct. Cl. 1965). In *Ill. Tri-Seal Prods.*, the resolution was named after then-Representative Bertrand Wesley "Bud" Gearhart (R-Cal). The court also notes that the reaction by Congress was precipitated in part by the Treasury Department in November 1947 proposing a new regulation that would adopt an economic-realities test for the term "employee." *See id.*

[57] *See id.* (citing H.R.J. 296, 80th Cong. (1948), 62 Stat. 438, § 2 (a) (1948)).

characterized Congress as "highly resentful and critical of this attempt to broaden the coverage scope of the Act . . . ."[58] Thus, the appellate court determined that Congress intended that the common-law test be applied to determine worker status for purposes of the SSA.

As noted, the Congress did not take similar action with respect to the FLSA.

C. Landmark Supreme Court Decisions Adopt the Common-Law Test

Decades after the enactment of amendments to the NLRA and SSA to establish a common-law definition for the term "employee," the Supreme Court issued a trilogy of landmark decisions adopting a common-law definition for the term "employee" for purposes of statutes that either do not define the term "employee" or define it with a definition that is circular.[59]

The first such decision is *Cmty. for Creative Non-Violence v. Reid*.[60] At issue in *Reid* was whether an artist's work in creating a

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[58] Party Cab Co., v. United States, 127 F.2d 87, 91 (7th Cir. 1949). The court in *Party Cab Co*. describes how the term "employee" for purposes of the SSA evolved from a common-law test to an "economic realities" test, and then back to a common-law test. The decision explains that the initial regulations defining the term "employee" for purposes of the SSA "followed the accepted common law test." *Id.* at 89. But the Social Security Board (the "Board") subsequently urged Congress to broaden the definition. When Congress refused, the Board advocated a broadening of the definition in its arguments to the courts. *Id*. As noted, the Supreme Court ultimately adopted the expansive "economic realities test" for purposes of the SSA. The court in *Party Cab Co*., observed that Congress resented this development, and responded in 1948 by passing certain amendments to the SSA, reinstating the common-law test. *Id*. Following a veto by the President, Congress overrode the veto and the amendments were enacted as Public Law No. 642, 80th Congress, Second Session. The change was made retroactive to August 14, 1935, the date of the SSA's original enactment. *Id.* at 91. The fact that Congress overrode a Presidential veto to reinstate the common-law test for SSA purposes reveals the fervor with which Congress viewed an "economic realities" test as *not* representing its intent.

[59] *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003); Nationwide Mut. Ins. Co. v. Darden*,* 503 U.S. 318 (1992); Cmty. for Creative Non-Violence v. Reid*,* 490 U.S. 730 (1989).

[60] *Reid*, 490 U.S. 730.

sculpture constituted a "work made for hire" for purposes of the Copyright Act of 1976.[61] The case involved a provision that defines a "work made for hire" as a "work prepared by an employee within the scope of his or her employment."[62]

Noting that the Copyright Act of 1976 does not define the term "employee," the Court applied a common-law test, as articulated in the Restatement (Second) of Agency.[63] To arrive at this interpretation, the Court reasoned:

> The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co*., 453 U.S. 322, 329 (1981); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *See, e. g., Kelley v. Southern Pacific Co*., 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co*., 359 U.S. 227, 228 (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).[64]

The *Reid* decision, adopting a common-law meaning for the term "employee" for purposes of a statute that does not define the term, is consistent with a widely recognized canon of construction.[65]

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[61] *Id*. at 732. *See also* 17 U.S.C. §§ 101-1332 (2010).

[62] *Id.* at 733.

[63] *Id*. at 740. *See also* Restatement (Second) of Agency Section 228.

[64] *Id.* at 739–40.

[65] For example, a Congressional Research Service paper observes:

"Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise." Larry M. Eig, Congressional Research Service, *Statutory*

While the *Reid* decision interpreted the term "employee" for purposes of a statute that does not define it, several years later, in *Nationwide Mut. Ins. Co. v. Darden*, the Court interpreted the term for purposes of a statute that defines it, but with a definition that is circular.[66]

Darden concerned the definition of "employee" for purposes of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA").[67] ERISA Section 3(6), defines the term "employee" to mean "any individual employed by an employer."[68] The Supreme Court adopted the common-law test for the term, based on the following reasoning:

> ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U. S. C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA, a test we most recently summarized in *Reid* . . . .[69]

This decision established the rule of interpretation that the term "employee" is to be given its common-law meaning for purposes of a statute that defines the term with a definition that is circular.[70]

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*Interpretation: General Principles and Recent Trend*s (2011), https://fas.org/sgp/crs/misc/97-589.pdf.

[66] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[67] *Id*. at 319; 29 U.S.C. §§1001-1461 (2015).

[68] 29 U.S.C. § 1002(6) (2008).

[69] *Darden*, 503 U.S. at 323.

[70] *Id.* at 318; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Court's holding in *Darden* is slightly different from its decision in *Reid*, as the *Darden* decision adopts the common-law definition for the term "employee" for purposes of a statute the defines the term with a circular definition, whereas the *Reid* decision does so for purposes of a statute that contains no definition for the term.

The third decision in this trilogy is *Clackamas Gastroenterology Assocs., P.C. v. Wells*, which considered the definition of "employee" for purposes of the Americans with Disabilities Act of 1990 ("ADA").[71] The ADA defines the term to mean "an individual employed by an employer,"[72] which is identical to the statutory definition for the term contained in ERISA (and also the FLSA).[73] Relying primarily on its decision in *Darden* (which interpreted the term for purposes of ERISA), the Supreme Court adopted a common-law test to define employee for purposes of the ADA.[74]

The foregoing decisions establish the interpretative rule that when the term "employee" is used in a statute that contains no definition for the term, or a definition that is circular, the term is to

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[71] Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003); *see generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§12101-12213 (2008) (describing protections provided).

[72] 42 U.S.C. § 12111(4).

[73] 29 U.S.C. § 1002(6) (2008).

[74] *Clackamas Gastroenterology Assocs., P.C.*, 538 U.S. at 444–45. In adopting a common-law test to define the term "employee" for purposes of the ADA, the Court reasoned:

"We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992). The definition of the term in the ADA simply states that an "employee" is "an individual employed by an employer." 42 U.S.C. § 12111(4). That surely qualifies as a mere "nominal definition" that is "completely circular and explains nothing." *Darden*, 503 U.S. at 323. As we explained in *Darden*, our cases construing similar language give us guidance on how best to fill the gap in the statutory text.

In *Darden* we were faced with the question whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA). Because ERISA's definition of "employee" was "completely circular," 503 U.S. at 323, we followed the same general approach that we had previously used in deciding whether a sculptor was an "employee" within the meaning of the Copyright Act of 1976, see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989), and we adopted a common-law test for determining who qualifies as an "employee" under ERISA. Quoting *Reid*, 490 U.S., at 739-740, we explained that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322–23.

be given its meaning under the common law.[75] Notwithstanding these decisions, and their compelling rationale, some courts continue to apply different tests for purposes of statutes that satisfy these criteria.[76]

D. Precedent Established by Landmark Decisions Conflict with Earlier Decisions Interpreting FLSA

While earlier Supreme Court decisions adopted an "economic realities" test to define the term "employee" for purposes of the FLSA, the statutory definition given the term "employee" in the FLSA is identical to the definition given the term for purposes of ERISA and the ADA.[77] All three of these statutes define the term "employee" to mean "any individual employed by an employer."[78] As noted, the Supreme Court held more recently in *Darden* and *Clackamas* that the term "employee" for purposes of ERISA and the ADA is to be given its common-law meaning.[79] It follows that the continued use of the "economic realities" test to determine whether an individual constitutes an "employee" for purposes of the FLSA results in the term "employee" being given different meanings for purposes of federal statutes that contain the same statutory definition for the term. This inconsistency can only be resolved by the imposition of a common-law test by Congress for purposes of all federal statutes.

At least one federal court appears to have acknowledged this conflict and followed the more recent Supreme Court precedent by applying a common-law test to determine whether an individual was

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[75] *See Clackamas Gastroenterology Assocs., P.C.*, 538 U.S. 440; *Darden,* 503 U.S. 318; *Reid,* 490 U.S. 730.

[76] *See infra* Sections III.B and III.C for examples.

[77] The FLSA defines the term "employee," subject to certain exceptions, to mean "any individual employed by an employer." 29 U.S.C. § 203(e)(1). ERISA also defines the term "employee" to mean "any individual employed by an employer." § 3(6), 29 U.S.C. § 1002(6).

[78] ERISA defines the term employee to mean "any individual employed by an employer." 29 U. S. C. Section 1002(6). The ADA defines the term to mean "an individual employed by an employer." 42 U.S.C. § 12111(4).

[79] *Clackamas Gastroenternology Assocs., P.C.*, 538 U.S. 440; *Darden*, 503 U.S. at 323.

qualified as an employee for purposes of the FLSA. In *Tetzlaff v. United States*, the Court of Federal Claims provided the following rationale for its application of a common-law test for purposes of the FLSA:

> "The FLSA imposes minimum wage, overtime, and record-keeping requirements, but the requirements apply only to 'employees.'" *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007); see 29 U.S.C. § 206(a) (2000) (minimum wage); id. § 207 (overtime); id. § 211 (c) (record-keeping). The FLSA pertains to employees, but does not extend to independent contractors. *Steelman*, 473 F.3d at 129 (citing *Walling v. Portland Terminal Co*., 330 U.S. 148, 152, 67 S. Ct. 639, 91 L. Ed. 809 (1947)). With respect to who constitutes an employee, "[t]he [FLSA] itself provides little guidance on the term's meaning. It defines an employee as 'any individual employed by an employer . . . .'" Steelman, 473 F.3d at 128 (quoting 29 U.S.C. § 203). The Supreme Court explained in *Nationwide Mutual Insurance Co. v. Darden* that this definition is "completely circular and explains nothing." 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992).
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> Consequently, "the existence or absence of an employment relationship is to be ascertained . . . by applying the common-law rules realistically, [namely, by] looking to the substance of the arrangement and giving weight to all relevant factors." *Ill. Tri-Seal Prods., Inc. v. United States*, 353 F.2d 216, 173 Ct. Cl. 499, 518 (1965).[80]

The court's analysis in *Tetzlaff* acknowledges the decision in *Walling v. Portland Terminal Co.*, but appears to view that decision as having been superseded by *Darden*.[81] At this time, the *Tetzlaff* decision remains an outlier. Most courts continue to apply an

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[80] Tetzlaff v. United States, No. 15-161C, 2015 U.S. Claims LEXIS 1577, at *24–25 (Fed. Cl. Nov. 25, 2015).

[81] *Id.*; *see Darden,* 503 U.S. 318; Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

economic realities test for purposes of the FLSA, notwithstanding *Darden*.[82]

E. The Final Act for Restoring the Common-Law Test Can Only Be Accomplished by the Congress

The combined effect of Congress amending the NLRA and SSA to adopt a common-law test, and the Supreme Court decisions in *Reid*, *Darden* and *Clackamas*, has been to make the common-law test the predominant test for purposes of federal statutes, and the proper test for purposes of federal statutes that do not define the term "employee" or define it with a definition that is circular.[83] However, courts continue to apply tests other than the common-law test to define the term "employee" for purposes of federal statutes that satisfy these criteria. Because of this, it appears likely that harmonization of this term will not be accomplished by the judiciary, and must therefore be pursued though legislation.

As noted, the FLSA is the lone New Deal statute which Congress has yet to amend to statutorily adopt the common-law test for the term "employee." Therefore, the surest means for bringing the FLSA into conformity with the other federal statutes that follow a common-law test, and to otherwise harmonize the definition of the term "employee" for purposes of federal statutes, is for Congress to amend the FLSA to statutorily adopt the common-law test for defining the term "employee." This would have the effect of achieving the harmonization of this term that is so needed.

III. DIFFERENT TESTS FOR THE DEFINITION OF "EMPLOYEE" UNDER CURRENT LAW

An overview of the tests that federal courts currently use to define the term "employee" for purposes of a large sample of federal laws is provided below. The overview includes excerpts from significant decisions that highlight the decisive role of *Cmty. for Creative Non-Violence v. Reid* and *Nationwide Mut. Ins. Co. v. Darden* in establishing the common-law test as the predominant test

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[82] *See infra* Section III.B.1.

[83] *See supra* Sections II.B–C.

for purposes of federal statutes, and show how courts have struggled to ascertain the proper definition of the term "employee" for purposes of a specific statute, due to the absence of a harmonized definition.

A. Common-Law Test

The common-law test for the term "employee" provides generally that "an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the 'manner and means' by which the purported employee brings about the result."[84] This Article argues that the common-law test should be the prevailing standard test across all federal statutes, in order to achieve total harmonization in the definition of the term "employee." A sampling of specific statutes for which a common-law test is used to define the term "employee" is provided below. This sampling demonstrates the history and prevalence of the common-law test, which are factors Congress should consider if and when it acts to establish a universal definition of the term "employee."

1. Pre-1950s

a. National Labor Relations Act ("NLRA")

The NLRA "governs relations between private sector employers, labor unions, and employees," according to *Chamber of Commerce of the United States v. NLRB*.[85] As discussed in Section II, the NLRA is one of the statutes for which the Supreme Court initially adopted an "economic realities" test to define the term "employee."

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[84] NLRB v. H & H Pretzel Co., 831 F.2d 650, 653–54 (6th Cir. 1987). Other iterations of the common-law test are set forth in *Different Tests for Defining "Employee" for Different Purposes*, COALITION TO PROMOTE INDEPENDENT ENTREPRENEURS, https://iccoalition.org/wp-content/uploads/2018/03/Different-Tests-for-Defining-the-Term-Employee-Website.pdf (last visited May 1, 2018).

[85] National Labor Relations Act, 29 U.S.C. § 151 (2015); Chamber of Commerce of the United States v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013).

After Congress amended the NLRA to reject the economic realities test, the Supreme Court, in *NLRB v. United Ins. Co*., held that the common-law test is to be used to determine whether an individual is an "employee" for purposes of the NLRA.[86]

b. Social Security Act ("SSA")

The SSA is another federal statute for which the Supreme Court initially adopted an economic realities test for the term "employee" in *United States v. Silk*.[87] The Court in *Silk* rejected the common-law test, and instead adopted an "economic realities" test to define the term. Congress responded to the *Silk* decision by amending the statute.[88] The SSA, as amended, explicitly provides that "the term 'employee' means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."[89] This had the effect of reigning in the judicially expanded meaning of the term "employee" for purposes of the SSA and restoring the term's common-law definition.

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[86] NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968). The Court provided the following recounting of how this test evolved:

At the outset the critical issue is what standard or standards should be applied in differentiating "employee" from "independent contractor" as those terms are used in the Act. Initially this Court held in *NLRB v. Hearst Publications*, 322 U.S. 111, that "Whether . . . the term 'employee' included [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." 322 U.S. at 124. Thus, the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in § 2 (3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act . . . Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

[87] United States v. Silk, 331 U.S. 704, 713–14 (1947); *see supra* Section II.A.

[88] *Silk*, 331 U.S. at 713–14; *see supra* Section II.A.

[89] 42 U.S.C. § 410(j)(2) (2011).

c. FICA, FUTA and Federal Income Tax Withholding

Federal employment-tax provisions contained in the Internal Revenue Code include the Federal Insurance Contributions Act,[90] the Federal Unemployment Tax Act,[91] and the collection of income tax at the source on wages.[92] For all of these purposes, Rev. Rul. 87-41, 1987-1 C.B. 296, provides that "[a]n individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship."[93]

2. 1960s Through 1970s

a. Copyright Act of 1976

The tests used to determine the meaning of the term "employee" continued to evolve. As previously discussed,[94] the Supreme Court in *Cmty. for Creative Non-Violence v. Reid* interpreted the term "employee" for purposes of the Copyright Act of 1976 as being defined by a common-law test, as articulated in the Restatement (Second) of Agency § 228 (1958).[95] The *Reid* decision established the interpretative rule that the term "employee," when used in a statute that does not define the term, is to be given its common-law meaning. This had the effect of widening the application of the common-law test.

b. Employee Retirement Income Security Act of 1974

Title I of ERISA regulates certain employee benefit plans. For these purposes, the term "employee" is defined in ERISA § 3(6), to

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[90] Federal Insurance Contributions Act, 26 I.R.C. §§ 3101-3128 (2011).

[91] Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (2009).

[92] 26 U.S.C. §§ 3501-4000 (2015).

[93] *Accord* Treas. Reg. § 31.3121(d)-1, § 31.3306(i)-1, and § 31.3401(c)-1 (1979).

[94] *See supra* Section II.C.

[95] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740–41 (1989).

mean "any individual employed by an employer."[96] As noted,[97] in *Nationwide Mut. Ins. Co. v. Darden*, the Supreme Court characterized the test as circular, and adopted the common-law test for determining employee status for purposes of ERISA.[98]

The *Darden* decision established a corollary interpretative rule to the rule established in *Reid*, which is that the term "employee," when used in a statute that defines the term but with a definition that is circular, is to be given its common-law meaning.[99]

c. Title VII of the Civil Rights Act of 1964

According to *Gulino v. N.Y. State Edu. Dep't*, Title VII of the Civil Rights Act of 1964 ("Title VII"), "makes it 'an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[100] The court in *Gulino* also explained that "the existence of an employer-employee relationship is a primary element of Title VII claims."[101]

The Court of Appeals for the Second Circuit adopted a common-law test to determine "employee" status for purposes of Title VII in *O'Connor v. Davis*.[102] The court found that the definition of "employee" in Title VII was circular and, relying principally on *Darden* and *Reid*, determined that a common-law test should apply.[103]

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[96] Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(6) (2011).

[97] *See supra* Section II.C.

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

[99] *Id.*

[100] Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-2(a); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 370 (2d Cir. 2006).

[101] *Gulino*, 460 F.3d at 370.

[102] O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997).

[103] *Id.* In reaching its decision, the court offered the following rationale:

The definition of the term "employee" provided in Title VII is circular: the Act states only that an "employee" is an "individual employed by an employer." 42 U.S.C. § 2000e(f); *see also* EEOC v. Johnson & Higgins, 91 F.3d 1529, 1538 (2d

Title VII is another example of the term "employee" being given a common-law definition for purposes of a statute that contains a definition for the term that is circular. Many other federal circuits,[104] but not all,[105] have also adopted the common-law test for purposes of Title VII.

Cir. 1996). However, it is well established that when Congress uses the term "employee" without defining it with precision, courts should presume that Congress had in mind "the conventional master-servant relationship as understood by the common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)); *see also Walters v. Metropolitan Educ. Enters. Inc*., 136 L. Ed. 2d 644, 117 S. Ct. 660, 666 (1997); *Frankel v. Bally, Inc*., 987 F.2d 86, 90 (2d Cir. 1993). *Id.*

[104] *See, e.g.*, Faush v. Tuesday Morning, Inc., 808 F.3d 208, 213 (3d Cir. 2015) ("Because the definition of 'employee' in ERISA 'is completely circular and explains nothing,' *Darden*, 503 U.S. at 323, the Court concluded, as it had in similar situations, 'that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine,' *Id*. at 322–23 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)). Because Title VII's definition of 'employee' is similarly devoid of content, the common-law test outlined in *Darden* governs in the Title VII context as well."); Marie v. Am. Red Cross, 771 F.3d 344, 352 (6th Cir. 2014) ("For purposes of Title VII, an employee is 'an individual employed by an employer.' 42 U.S.C. § 2000e(f) (2012). The circularity of this definition renders it quite unhelpful in explaining whom Congress intended to include as an employee in the workplace. Therefore, we assume 'that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'"); Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 259 (4th Cir. 1997) ("It now appears to be settled that when Congress uses the term 'employee' in a statute without defining it, the courts will presume that Congress intended to describe 'the conventional master-servant relationship as understood by common-law agency doctrine.' Nationwide Mut. Ins. Co. v. Darden*,* 503 U.S. 318, 322–23, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739–740, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) . . . Following *Reid*, the Court in *Nationwide* adopted the 'common-law test for determining who qualifies as an 'employee' under ERISA.' 503 U.S. 318 at 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581. And again recently, the Court agreed that 'employee' under Title VII is defined by 'traditional principles of agency law.' Walters v. Metropolitan Educ. Enter. Inc., 136 L. Ed. 2d 644, 117 S. Ct. 660, 666 (1997).").

[105] *See infra* Section III.C.1.

d. Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 ("ADEA") "prohibits employers from discriminating against their employees because of age," according to *Legeno v. Douglas Elliman*.[106] The ADEA defines "employee" to mean "an individual employed by any employer . . . ."[107]

To determine whether an individual is an "employee" for purposes of the ADEA, some courts follow a common-law test. For example, in *Legeno v. Douglas Elliman, LLC*, the Second Circuit held "whether an individual is deemed an employee or an independent contractor is determine under common law agency principles"[108] Similarly, in *Speen v. Crown Clothing Corp*., the First Circuit relied on *Darden* in adopting the common-law test for making an employee determination under the ADEA.[109]

While the ADEA defines the term "employee" with a circular definition, which according to *Darden*, means that the term is to be given its common-law meaning, some courts nonetheless apply a different test for purposes of the ADEA.[110] These inconsistent interpretations make it necessary to examine which test has been applied in a specific jurisdiction, despite the ADEA's definition and relevant Supreme Court precedent. This illustrates how the imposition of a universal common-law test would help to resolve judicial differences.

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[106] Legeno v. Douglas Elliman, LLC, 311 F. App'x 403, 404 (2d Cir. 2009); *see also* Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1967).

[107] ADEA, 29 U.S.C. § 630(f).

[108] *Legeno*, 311 F. App'x at 404.

[109] Speen v. Crown Clothing Corp., 102 F.3d 625, 631 (1st Cir. 1996). In reaching its decision the court explained:

In view of the Supreme Court's unanimous decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992), we now adopt the common law test for determining who qualifies as an "employee" under the ADEA and expressly hold that covered employees under the ADEA are those who are employees under traditional agency law principles. *Id.*

[110] *See infra* Section III.C.3.

e. Equal Pay Act of 1963

The purpose of the Equal Pay Act of 1963 ("EPA") is "to ensure that 'employees doing equal work should be paid equal wages, regardless of sex.'"[111] Some courts follow a common-law test for the term "employee" for purposes of the EPA.[112] For example, in *Spann-Wilder v. City of N. Charleston*, a case involving both Title VII and the EPA, the court noted that the EPA defines the term "employee" with a circular definition, and therefore held that its meaning should be determined under a common-law test.[113]

3. 1980s Through Present

a. Americans with Disabilities Act of 1990

The test to define "employees" continues to evolve through the present day. The Supreme Court held in *Sutton v. United Airlines* that the purpose of the ADA is to prohibit "certain employers from discriminating against individuals on the basis of their disabilities."[114] The ADA defines the term "employee" to mean "an individual employed by an employer."[115]

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[111] Equal Pay Act of 1963, 29 USC § 206(d) (1963); Ford v. Travelers Real Estate Inv. Co., No. 89-2111-O, 1991 U.S. Dist. LEXIS 1343, at *8 (D. Kan. Jan. 10, 1991).

[112] Other courts apply an "economic realities" test. *See infra* Section III.B.4.

[113] *See* Spann-Wilder v. City of N. Charleston, No. 2:08-0156-MBS, 2010 U.S. Dist. LEXIS 85717, at *8 (D.S.C. Aug. 13, 2010). In reaching its decision the court explained:

For the purposes of both Title VII and the EPA, an employee is generally defined as an "individual employed by an employer" 42 U.S.C. § 2000e(f), 29 U.S.C. § 203(e). In adopting this definition, Congress essentially left the term "employee" undefined. See *Cilecek v. Inova Health Sys. Servs*., 115 F.3d 256, 259 (4th Cir. 1997). The Fourth Circuit has found that when Congress uses the term "employee" in a statute without defining it, the courts will presume that Congress intended to describe "the conventional master-servant relationship as understood by common-law agency doctrine." *Id*. (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)). *Id*.

[114] Sutton v. United Air Lines, 527 U.S. 471, 475 (1999).

[115] Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2008).

As noted, in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, the Supreme Court adopted a common-law test to determine an individual's status for purposes of the ADA.[116]

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[116] Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444–45 (2003). The court in Doud v. Yellow Cab of Reno, 96 F. Supp. 3d 1076, 1087 (D. Nev. 2015) recounted the history of the developments leading to the adoption of the common-law test for purposes of the ADA:

Here, as in *Reid*, it seems apparent that with Congress's express objective of providing a "national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), (2), that the court should apply the federal common law of agency in determining whether Mr. Doud is an employee or independent contractor of Yellow Cab.

The Supreme Court confronted the issue of construing the term "employee" once again in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992), where it was tasked with determining the meaning of the term as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 319. The court concluded as it did in *Reid*, and is [*sic*] it would subsequently in the context of the ADA in *Clackamas Gastroenterology Associates, P.C. v. Wells*, that traditional common law principles of agency should be utilized. *Id.* ERISA contains the same "nominal" definition of "employee" as the ADA: "any individual employed by an employer." *Darden*, 503 U.S. at 323. As the Supreme Court put it, this definition "is completely circular and explains nothing." *Id.* ERISA, like the ADA, gives no "specific guidance on the term's meaning." *Id.* Nor did it suggest "that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.*

Darden adopted the common-law test for determining who qualifies as an employee under ERISA (which the Supreme Court had also utilized in *Reid* in the context of the Copyright Act of 1976) . . .

More recently, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003), the Supreme Court was asked to construe the meaning of the term "employee" as it appears in the ADA. . . .

Clackamas noted that the ADA, like ERISA, contains a circular definition of employee. *Id.* at 444. As such, the Supreme Court found in this context, as it had in *Reid* under the Copyright Act of 1976, and in *Darden* under ERISA, that the common law principles of agency provided helpful guidance for construing the term. *Id*. at 448.

Notwithstanding the Supreme Court decision in *Clackamas*, some courts still do not apply a common-law test to determine whether an individual is an "employee" for purposes of the ADA.[117]

b. Affordable Care Act Employer Mandate

One of the many elements of the Affordable Care Act ("ACA") is an employer mandate.[118] These provisions generally require certain employers to offer eligible employees the opportunity to enroll in specified employer-sponsored health plans, or be liable for an "assessable payment" (sometimes referred to as a penalty) for failing to offer such coverage.[119] For these purposes, Treasury regulations interpreting the ACA defines the term "employee" to mean "an individual who is an employee under the common-law standard."[120]

4. Common-Law Test When No Statute or Regulation Applies

In cases involving a cause of action to which no statute or regulation applies, courts have applied a common-law test to determine whether an individual is an employee or independent contractor. For example, in *Leach v. Kaykov*, the court considered whether a vehicle-for-hire dispatch service was vicariously liable for the negligence of a driver.[121] In determining that a common-law test is to be used to determine whether an employment relationship exists for purposes of determining whether one person is vicariously liable for the acts of another, the court explained that a court "must look at the level of control exercised or retained by the principal, as

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[117] *See infra* Section III.C.2 (explaining that courts apply a hybrid test).

[118] *See* Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H (2012).

[119] *Id.* at § 4980H(a).

[120] 26 C.F.R. § 54.4980H-1(a)(15) (2014).

[121] *See generally* Leach v. Kaykov, No. 07-CV-4060, 2011 U.S. Dist. LEXIS 34235 (E.D.N.Y. Mar. 30, 2011) (granting summary judgment for the employer on the negligence claim).

well as 'the totality of the facts surrounding the relationship.'"[122] The court recognized that "[a]lthough personal fault is generally required for tort liability 'the doctrine of respondent superior recognizes a vicarious liability principle pursuant to which a master will be held liable in certain cases for the wrongful acts of his servants or employees.' . . . The imposition of vicarious liability is determined by evaluating the relationship between the tortfeasor and the principal."[123]

B. Economic Realities Test

This section discusses the statutes for which at least some courts apply an economic realities test to determine whether an individual is an employee or independent contractor. The court in *EEOC v. Zippo Mfg. Co*., describes the origin of the "economic realities" test[124] as follows:

> Prior to 1947, courts distinguished an employee from an independent contractor by using a common law test of the degree of control over the individual's work performance exercised by the alleged employer over the individual whose status was in dispute. If the alleged employer had the right to determine not only what work should be done but also how it should be

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[122] *Id.* at * 32 (quoting Andryishyn v. Ballinger, 50 A.2d 867 (N.J. Super. Cr. App. Div. 1960)).

[123] *Id.* at *30 (quoting Carter v. Reynold*s*, 815 A.2d 460 (2003)).

[124] The DOL's iteration of the economic test consists of the following factors:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

See Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), U.S. DEP'T OF LABOR (July 2008), https://www.dol.gov/whd/regs/compliance/whdfs13.htm.

> done, then the worker was deemed to be an employee. See *United States v. Silk*, 331 U.S. 704, 714 n.8, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947).In 1947, however, the United States Supreme Court held that the common law "right to control" test was too narrow for use in deciding employee status for the purposes of far reaching social legislation such as the Social Security Act. *Bartels v. Birmingham*, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947). Accordingly, the court enunciated what has come to be known as the "economic realities" test.[125]

The history the court recounted in *EEOC v. Zippo Mfg. Co*., identifies the common-law test as the traditional test that courts initially used to distinguish between employees and independent contractors, and characterizes the "economic realities" test as a departure from that norm.[126] While the common-law test remains the predominant test for determining an individual's status for purposes of federal statutes, courts continue to apply the "economic realities" test for purposes of certain statutes. The following discusses those statutes.

1. Fair Labor Standards Act of 1938 ("FLSA")

The FLSA imposes minimum-wage, overtime, and record-keeping requirements on an employer relative to its employees.[127] As noted, the FLSA is the lone remaining New Deal statute for which the Supreme Court adopted the "economic realities" test that Congress has not yet rectified.

The Supreme Court decisions commonly cited for adopting this test for purposes of the FLSA are *United States v. Rosenwasser*,[128] *Walling v. Portland Terminal Co*.,[129] and R*utherford Food Corp. v. McComb*.[130] In *Shultz v. Mistletoe Express Serv., Inc*., the court

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[125] EEOC v. Zippo Mfg. Co., 713 F.2d 32, 36 (3d Cir. 1983).

[126] *See id.*

[127] *See* Fair Labor Standards Act, 29 U.S.C. §§ 206-207, 211 (2012).

[128] United States v. Rosenwasser, 323 U.S. 360 (1945).

[129] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

[130] Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

explained that, in reference to FLSA's wide scope, "'coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand and employer and independent contractor on the other.'"[131]

While courts almost uniformly apply the "economic realities" test for purposes of the FLSA, there have been exceptions. As noted, the Supreme Court held in *Darden* that the term "employee," as defined under ERISA, is to be given a common-law definition. The term "employee" is defined the same under the FLSA as under ERISA.[132] Therefore, the *Darden* decision arguably suggests that courts should apply a common-law test for purposes of the FLSA. This was recognized in a recent decision by the U.S. Court of Federal Claims in *Tetzlaff v. United State*s.[133] In that case, the court applied a common-law test to define "employee" for purposes of the FLSA.[134]

2. Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 ("FMLA"), "guaranteed 12 weeks of unpaid leave each year . . . and encourages businesses to adopt more generous policies."[135]

For purposes of the FMLA, the terms "employ" and "employee" have the statutory definitions as contained in the FLSA.[136] Courts

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[131] Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267, 1270 (10th Cir. 1970).

[132] The FLSA, at 29 U.S.C. § 203(e)(1) (2014), defines the term "employee, subject to certain exceptions, to mean "any individual employed by an employer." ERISA, 29 U.S.C. § 1002(6) (2008), also defines the term "employee" to mean "any individual employed by an employer."

[133] *See* Tetzlaff v. United States, No. 15-161C, 2015 U.S. Claims LEXIS 1577 (Fed. Cl. Nov. 25, 2015).

[134] *See supra* Section II.D.

[135] Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2612(a)(1) (2009); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 84 (2002).

[136] *See* FMLA, 29 U.S.C. § 2611(3) (2009); *see also* FLSA, 28 U.S.C. § 203 (2014).

generally apply an "economic realities" test for purposes of the FMLA, because that is the test applied for purposes of the FLSA.[137]

3. Migrant and Seasonal Agricultural Worker Protection Act of 1983

The Migrant and Seasonal Agricultural Worker Protection Act of 1983 ("AWPA") "provides a variety of protections for migrant and seasonal workers."[138] The AWPA is another statute for which the "economic realities" test is applied because that is the test applied for purposes of the FLSA. The AWPA provides that "[t]he term 'employ' has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act [29 USCS §§ 201 et seq.]."[139]

In *Arredondo v. Delano Farms Co*., the Court offered the following rationale for its use of the "economic realities" test for purposes of the AWPA:

> Liability under the AWPA depends on whether a farmer or grower "employed" workers, as defined by the Fair Labor Standards Act ("FLSA"). See 29 U.S.C. § 1802(5). Under the FLSA, an entity "employ[s]" a person if it "suffer[s] or permit[s]" the individual to work. 29 U.S.C. § 203(g). This definition of "employment" rejects the common-law definition of employment, and applies "to many persons and working relationships which, prior to [the FLSA], were not deemed to fall within an

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[137] *See* Nichols v. All Points Transp. Corp. of Mich., Inc., 364 F. Supp. 2d 621, 630 (E.D. Mich. 2005) ("Because the statutory definition of FMLA, unlike the definition found in ERISA, incorporates the FLSA's broader definition of 'employee' and 'employ,' the court will continue to apply the 'economic realities' test . . . "); Bonnetts v. Arctic Express, 7 F. Supp. 2d 977, 981 (S.D. Ohio 1998) ("The FMLA incorporates, by reference, the definition of 'employee' found in the Fair Labor Standards Act ('FLSA'). 29 U.S.C. § 2611(3).").

[138] *See generally* Migrant and Seasonal Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2009) (describing protections provided); *see also* Cardenas v. Benter Farms, No. 98-1067-C, U.S. Dist. LEXIS 13670, at *11 (S.D. Ind. Sep. 19, 2000).

[139] 29 U.S.C. § 1802(5).

> employer-employee category." Walling v. Portland Terminal Co., 330 U.S. 148, 150-51, 67 S. Ct. 639, 91 L. Ed. 809 (1947). "In determining if the farm labor contractor . . . is an employee or an independent contractor, the ultimate question is the economic reality of the relationship.[140]

4. Equal Pay Act of 1963

Some courts, observing that the EPA was enacted as an amendment to the FLSA, have adopted the same definition of "employee" for purposes of the EPA that courts use for purposes of the FLSA, i.e., an "economic realities" test. For example, in *Strategic Mgmt. Harmony, LLC v. Enhanced Bus. Reporting Consortium, Inc*., the court reasoned that because the EPA is an amendment to the FLSA, the court must look to the "economic reality" behind the employment relationship to decide if the individual had control over the alleged violation of the FLSA.[141]

5. Affordable Care Act ("ACA") Notice Requirement

The ACA requires an employer to provide certain employees with a notice concerning specified health-insurance matters.[142] The ACA added this requirement by amending the FLSA, at 29 U.S.C. § 218b.[143] It requires an employer "to which [the FLSA] applies" to

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[140] Arredondo v. Delano Farms Co., No. 1:09-cv-01247-LJO-DLB, 2012 U.S. Dist. LEXIS 51786, at *25 (E.D. Cal. Apr. 11, 2012) (quoting 20 C.F.R. § 500.20(h)(4)). *Accord* Luna v. Del Monte Fresh Produce (Se.), Inc., No. 1:06-CV-2000-JEC, 2008 U.S. Dist. LEXIS 21636, at *9 (N.D. Ga. Mar. 18, 2008); Charles v. Burton, 857 F. Supp. 1574, 1578 (M.D. Ga. 1994).

[141] Strategic Mgmt. Harmony, LLC v. Enhanced Bus. Reporting Consortium, Inc., No. 4:05-cv-0180-JDT-WGH, 2007 U.S. Dist. LEXIS 59014, at *48 (S.D. Ind. Aug. 10, 2007). *Accord* Russell v. Belmont Coll., 554 F. Supp. 667, 674–75 (M.D. Tenn. 1982).

[142] Patient Protection and Affordable Care Act, 111 Pub. L. No. 111-148, 124 Stat. 119 (2010).

[143] *See id.*; 29 U.S.C. § 218b (2010).

provide its employees with a notice concerning specified information concerning health insurance.[144]

While this ACA notice requirement is contained in the FLSA, Treasury regulations governing the ACA's employer mandate explicitly adopt a common-law test for the term "employee."[145] Consequently, it is not clear how the term "employee" would be defined for purposes of this specific aspect of the ACA. If courts were to adopt the same definition as otherwise applies for purposes of the FLSA,[146] an "economic realities" test likely would apply. But courts will not necessarily do so. For example, the EPA, discussed above, also was enacted as part of the FLSA; yet some courts nonetheless have applied a common-law test in defining the term "employee" for purposes of the EPA.[147] Until courts decide this issue, it will remain uncertain. This is yet another illustration of the need for a harmonized definition of "employee."

C. Hybrid Test

A third test that some courts apply to determine an individual's status is commonly referred to as the "hybrid" test. This test represents a hybrid of the "economic realities" test and the common-law test.[148] Its application is limited to only a few statutes. The

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[144] *See* 29 U.S.C. § 218b (a).

[145] *See supra* Section III.A.3.b.

[146] Our research has not revealed any reported court decision interpreting the term "employee" for purpose of this ACA notice requirement.

[147] *See supra* Section III.A.2.e.

[148] A more extensive description of the hybrid test is contained in EEOC v. Zippo Mfg. Co., 713 F.2d 32, 36–37 (3d Cir. 1983).

Prior to 1947, courts distinguished an employee from an independent contractor by using a common law test of the degree of control over the individual's work performance exercised by the alleged employer over the individual whose status was in dispute . . . . *See* United States v. Silk, 331 U.S. 704, 714 n.8, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947).

In 1947, however, the United States Supreme Court held that the common law 'right to control' test was too narrow for use in deciding employee status for the purposes of far reaching social legislation such as the Social Security Act. Bartels v. Birmingham, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947) . . . .

In the wake of these [] decisions courts evolved two different standards to determine employee status for purposes of social legislation. The standard used

following discusses statutes for which courts have applied this test to determine whether an individual qualifies as an "employee" for purposes of the statute. Arguably, the introduction of a hybrid test has only contributed to the term "employee" being given different meanings in different contexts, and should be phased out in favor of a broad common-law test.

1. Title VII of the Civil Rights Act of 1964

Courts often cite *Spirides v. Reinhardt*, which interpreted the term "employee" for purposes of Title VII, as the decision that established the "hybrid" test.[149] In *Spirides*, the court considered whether an individual was an employee or independent contractor for purposes of Title VII. The court explains what has become known as the "hybrid" test as follows:

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depends upon the legislation involved. The 'economic realities' standard is generally used in cases involving the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Usery v. Pilgrim Equipment Company, Inc., 527 F.2d 1308, 1311 (5th Cir. 1976), cert. denied, 429 U.S. 826, 50 L. Ed. 2d 89, 97 S. Ct. 82 (1976) . . . .

Other courts have applied a hybrid of the common law 'right to control' standard and the 'economic realities' standard to determine employee status for purposes of Title VII, 42 U.S.C. §2000e et seq. Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982); Unger v. Consolidated Foods Corporation, 657 F.2d 909, 915 n.8 (7th Cir. 1981); Spirides v. Reinhardt, 198 U.S. App. D.C. 93, 613 F.2d 826, 831-32 (D.C. Cir. 1979).

These cases hold that 'it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative.' Cobb v. Sun Papers, Inc., 673 F.2d at 341. Thus, these courts applied 'a hybrid approach which looks at the economic realities of the situation but focuses on the employer's right to control the employee as the most important factor in determining employee status.' Hickey v. Arkla Industries, Inc., 699 F.2d 748, 751 (5th Cir. 1983). Therefore, 'the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor' among the various factors that a court must consider under this hybrid standard.

[149] *See* Williams v. Grimes Aero. Co., 988 F. Supp. 925, 935 (D.S.C. 1997) ("The United States Court of Appeals for the Fourth Circuit follows the hybrid, or Spirides, test for Title VII cases."); Vakharia v. Swedish Covenant Hosp., 765 F. Supp. 461, 466 (N.D. Ill. 1991) ("[T]he hybrid economic realities-common law control test championed by *Spirides v. Reinhardt*.").

> [a] determination of whether an individual is an employee or an independent contractor for purposes of [Title VII] involves, as appellant suggests, analysis of the "economic realities" of the work relationship. This test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.[150]

2. Americans with Disabilities Act of 1990

Some courts, such as those in the Fifth and Tenth Circuits,[151] continue to apply a hybrid test to determine an individual's status for purposes of the ADA, despite the Supreme Court's holding that courts should apply a common-law test.[152] This is another example of judicial confusion that would be resolved by a universal common-

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[150] Spirides v. Reinhardt, 613 F.2d 826, 831–32 (1979). *Accord* Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 434 (5th Cir. 2013) ("We apply the 'economic realities/common law control test,' a variation of the common law agency test, in determining whether a party is an employee or an independent contractor [for purposes of Title VII].").

[151] *See, e.g.*, Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 980 (10th Cir. 2002) (In determining the plaintiff's status, as an employee or independent contractor, for ADA purposes the court recognized that "in this circuit a person's status as either an employee or an independent contractor is determined using a hybrid test.").

[152] *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 451 (2003) (applying a common-law test to determine whether four physicians were employees or independent contractors for ADA purposes); *see also supra* Section III.A.3.a.

law test imposed by Congress. For example, in *Russell v. Degussa Engineered Carbons*, the U.S. District Court for the Southern District of Texas explained that "[i]n the Fifth Circuit, when determining whether an employment relationship exists within the meaning of the ADEA or the ADA, a court should apply a hybrid economic realities/common-law control test . . . ."[153] These decisions, by disregarding Supreme Court precedent and applying a hybrid test for purposes of the ADA, contribute to the patchwork of different tests for defining the term employee and suggest that harmonization can only be accomplished by an act of Congress. Clearly, if left to their own devices, it appears that courts will continue to apply a variety of tests to determine the meaning of "employee," creating a confusing and inconsistent landscape for litigation involving an individual's status for purposes of a specific statute in a specific jurisdiction.

3. Age Discrimination in Employment Act of 1967

A few years after the *Spirides* decision, the Court of Appeals for the Third Circuit in 1983 decided *EEOC v. Zippo Mfg. Co*., which held that "the hybrid standard that combines the common law 'right to control' with the 'economic realities' as applied in Title VII cases is the correct standard for determining employee status under ADEA."[154] The court observed that both Title VII and the ADEA define "employee" to mean "an individual employed by an employer."[155]

The court in *Oestman v. Nat'l Farmers Union Ins. Co.*., 958 F.2d 303, 305 (10th Cir. 1992), adopting a hybrid test for purposes of the ADEA, explained the test as follows:

> The hybrid test . . . is a combination of the economic realities test and the common law right to control test.

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[153] Russell v. Degussa Engineered Carbons, No. C-06-93, 2007 U.S. Dist. LEXIS 8303 *17 (S.D. Tex. Feb. 6, 2007) (citing Deal v. State Farm Mut. Ins. Co. of Tex., 5 F.3d 117, 118–19 (5th Cir. 1993)).

[154] *Zippo Mfg. Co.*, 713 F.2d at 38.

[155] The provision is contained in 42 U.S.C. § 2000e(f) (1991) for purposes of Title VII, and 29 U.S.C. 630(f) (1990) for purposes of ADEA. The ADA also defines "employee" to mean "an individual employed by an employer." American with Disabilities Act, 42 U.S.C. § 12111(4) (2008).

> Id. at 37. Although the hybrid test looks at the economic realities of the situation, the focus of the inquiry is the employer's right to control the "means and manner" of the worker's performance. *Spirides v. Reinhardt*, 198 App. D.C. 93, 613 F.2d 826, 831 (D.C. Cir.).[156]

4. Family and Medical Leave Act of 1993

Some courts apply a hybrid test to determine if an individual qualifies as an "employee" for purposes of the FMLA. For example, in *Alexander v. Avera St. Luke's Hosp*., the court applied the hybrid test as a compromise between the broader economic realities test and more narrow common law test.[157]

IV. HARMONIZING THE FLSA WOULD ACHIEVE COMPLETE HARMONIZATION

The common-law test is the predominant test for determining whether an individual is an employee or independent contractor for purposes of federal law. This test is used for purposes of a cause of action for which no statute applies, for purposes of a statute that explicitly adopts the "common-law" test, and for purposes of a statute that either does not define the term "employee" or defines the term with a circular definition. Furthermore, the precedent for such applications is well established. The other tests courts use to determine an individual's worker-status, namely, the economic realities test and hybrid test, apply for purposes of only a few statutes and the legal justification for their continued use is less certain. It follows that the common-law test is the only test through which complete harmonization can be achieved.

The most effective means for harmonizing the definition of "employee" for purposes of federal statutes would be for Congress to amend the FLSA and conform it to the other New Deal statutes

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[156] Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992).

[157] Alexander v. Avera St. Luke's Hosp., 768 F.3d 756, 763–64 (8th Cir. 2014).

by statutorily defining the term "employee" under the common-law test.[158] The FLSA is the only remaining New Deal statute for which the "economic realities" test was judicially adopted, and which Congress has not yet amended to adopt a common-law test. The other statutes for which courts continue to apply this test, *e.g*., the FMLA, AWPA, EPA and possibly the ACA notice requirement, all define the term consistent with the definition given the term by the FLSA. It follows that once Congress amends the FLSA to adopt a common-law test, the common-law test should automatically apply for purposes of these other statutes as well.

Furthermore, once the FLSA is harmonized to follow a common-law test, the "hybrid" test would be expected to gradually fall into disuse, inasmuch as that test is a combination of a common-law test and an economic realities test. Once the economic realities test is no longer applied for purposes of any statute, its use in constructing a hybrid would likely diminish.

V. HARMONIZING THE FLSA WOULD BETTER REFLECT CONGRESSIONAL INTENT AND WOULD RESOLVE A CONFLICT IN U.S. SUPREME COURT DECISIONS INTERPRETING THE TERM "EMPLOYEE"

A primary impediment to harmonization is the continued application of the economic realities test for purposes of the FLSA, and the statutes that follow the definition of "employee" as contained in the FLSA, despite more recent Supreme Court decisions holding that the common-law test should be applied.

The principal rationale courts have offered to justify a departure from the common-law test in defining the term "employee" is that "the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation . . . ", and that the "term ["employee"] . . . must be understood with reference to the purpose of the Act . . . ."[159]

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[158] For example, Congress could amend Section 3(e)(1) of the FLSA, 29 U.S.C. § 203(e)(1), to specify that the term "employee" is determined under the usual common law rules.

[159] United States v. Silk, 331 U.S. 704, 712 (1947); NLRB v. Hearst Publ'ns., 322 U.S. 111, 129 (1944).

But if Congress actually intended for a statute to cover those individuals whose coverage would accomplish the purposes of the statute, it could have stated that intention in the statutory language. Congress could have defined the scope of coverage under a statute as including "any individual whose coverage would accomplish the purposes of this Act." But it did not; instead, Congress limited the scope of coverage under these statutes to "employees."

The mere fact that a statute has a "sweeping purpose," or is enacted to address a "widespread" problem, does not mean that the statute is intended to apply to individuals other than the specified class of individuals to which the statute explicitly limits its application.[160] The fact that Congress chose to limit the class of covered individuals to "employees" should operate as a limiting principle that does not permit courts to expand coverage beyond that defined class.

More recent Supreme Court decisions[161] have consistently interpreted the term "employee" as having its meaning under the common law, when used in a statute that does not define the term, or defines it with a definition that is circular. The statutory definition of "employee" in the FLSA is identical to the circular definition at issue in two of those Supreme Court decisions.

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[160] For example, in Doud v. Yellow Cab of Reno, the court applied a common-law test to determine whether an individual is an employee for purposes of the ADA, notwithstanding the court's findings that:

'Congress enacted the ADA in 1990 *to remedy widespread discrimination* against disabled individuals.' 'The Act responds to what Congress described as a 'compelling need' for a 'clear and comprehensive *national mandate to eliminate discrimination* against disabled individuals.' 'To effectuate its *sweeping purpose*, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III).' (citations omitted) (emphasis added). Doud v. Yellow Cab of Reno, 96 F. Supp. 3d 1076, 1083–84 (D. Nev. 2015).

Accord United States v. City of N.Y., 359 F.3d 83, 95 (2d Cir. 2004) (acknowledging that "Title VII . . . accords the basic civil right of freedom from discrimination to all employees employed by covered employers," the court nonetheless determined that a common-law test was an appropriate test to determine whether an individual qualifies as an "employee" for purposes of Title VII).

[161] *See supra* Section II.C.

The continued use of the "economic realities" test for purposes of the FLSA creates a conflict with more recent decisions by the Supreme Court.[162] Furthermore, it creates the anomalous outcome of courts applying two very different tests for the term "employee" as used in two statutes that contain the same statutory definition of the term. To be sure, this appears to be what the U.S. Court of Claims recognized in *Tetzlaff v. United States*, when it applied the common-law test to define the term "employee" for purposes of the FLSA.[163] Amending the FLSA to statutorily adopt the common-law test for the term "employee" would resolve this conflict and create the salutary result of a term that is statutorily defined the same in multiple statutes having the same meaning for purposes of each of those statutes.

VI. CONCLUSION: THE TIME FOR CONGRESSIONAL ACTION IS NOW

The many different tests used to define "employee" for purposes of state and federal laws governing work relationships create uncertainties and risks that produce an unlevel playing field in which legitimate independent contractors suffer discrimination. In addition, companies are compelled to make decisions concerning whether to engage an independent contractor based on regulatory risk concerns rather than business judgment. This hinders economic growth.

A harmonized definition of "employee" would bring efficiencies and basic fairness to all stakeholders. Companies would be more willing to do business with legitimate independent contractors. Independent contractors would enjoy a more level playing field to compete against larger organizations that do not pose a worker-misclassification risk. And, not least, a harmonized definition would permit government agencies to more efficiently enforce proper worker classification.

The time for Congress to act is now. While it took decisive action during the 1940s to restore the common-law test for purposes of two of the three New Deal statutes, it neglected to finish its work

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[162] *See supra* Section II.D.

[163] Tetzlaff v. United States, No. 15-161C, 2015 U.S. Claims LEXIS 1577, at *25 (Fed. Cl. Nov. 25, 2015).

by harmonizing the FLSA. And although the Supreme Court adopted the common-law test in its decisions in *Reid*, *Darden* and *Clackamas*, the current patchwork of different tests that courts continue to apply for purposes of federal statutes, contrary to Supreme Court precedent, confirms that harmonization cannot be achieved by court decisions alone. The final act can only be accomplished by Congress.

The last step for achieving harmonization of federal laws is for Congress to amend the FLSA to adopt a common-law test. The lost entrepreneurship, and artificially depressed economic growth, under the patchwork of different tests courts currently use to define the term "employee" cannot be recovered. But the sooner action is taken to harmonize this definition, the sooner these unfair burdens can be lifted from our nation's independent entrepreneurs, and the sooner companies can structure their work relationships in the most efficient manner. Both of these outcomes can contribute to higher levels of economic growth and basic fairness to the nation's self-employed.