DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

FLEXIBLE AND CONTINGENT: WATCHWORDS FOR A CHANGING LEGAL WORKPLACE

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The threshold question in an employment relationship, namely, the status of an employee, appears at first blush to be relatively simple. However, the determination of an employee's status is both highly complex and crucial to an employer's potential liability under various federal laws including those prohibiting discrimination. The issue is particularly difficult in the context of contingent work relationships, which have dramatically increased for most businesses and professional enterprises. This article describes various contingent work relationships, tests used to determine employee status, and suggestions for avoiding the risk of liability under employment laws.

Outside the legal field, contingent workers have been part of the workforce for many years. Recently, the business environment of law firms and corporate legal departments has changed dramatically. As a result, legal employers are also increasingly turning to contingent and alternative work relationships to satisfy their staffing needs.

In 1994, a survey by the *National Law Journal* revealed that the top 250 law firms in the country employed a total of 345 attorneys on a contract basis. In 1995, 54 of the top 250 law firms employed a total of 425 attorneys on a contract basis. In 1996, the number had increased to 547 contract attorneys employed by 64 of the country's top 250 law firms. All indications are that the number of attorneys employed in contingent work relationships will continue to increase. The use of contingent workers in the legal field allows law firm managers and in-house counsel to rapidly, and temporarily, expand their staff to accommodate a short-term increase in work.

Although the benefits to law firms and corporate legal departments of utilizing flexible and contingent work arrangements, for both professional and nonprofessional staff, are well understood, the potential legal pitfalls are numerous. In order to successfully avoid a courtroom battle over the seemingly simple issue of an employee's status, it is advisable for prudent law firm managers and in-house counsel to be aware of the complexities regarding this area of law so that they can better serve their clients as well as make informed decisions about their own hiring needs. Described below are the different types of contingent work relationships that are emerging in the legal employment environment and their potential consequences.

CONTINGENT WORK RELATIONSHIPS

Businesses in all sectors, including law firms, have discovered the many benefits of using a variety of contingent work relationships. Legal employers should be cognizant of the advantages and the disadvantages of each contingent relationship prior to deciding whether to use such an arrangement. Contingent relationships that are most frequently used within law firms and corporate legal departments are independent contractors or temporary of contract workers supplied by outside companies.

INDEPENDENT CONTRACTORS

An independent contractor is a worker whose work performance is not dependent on the supervisory control of the person for whom the service is being performed. An independent contractor does not act as an agent of the employer, but instead contracts to perform specified work or produce a specified result, as outlined under a contract; the way in which the independent contractor achieves the specified result is left to his or her discretion.

Independent contractors, sometimes referred to as independent consultants or freelance workers, typically work for themselves. Common examples of these workers include writers and artists, insurance and real estate agents, training consultants and, increasingly, attorneys. Independent contractors make up the largest group of "alternative" workers. About 8.3 million, or 7 percent of all workers, are considered independent contractors. Coverage under state and federal workplace laws will hinge on whether a worker is an employee or an independent contractor.

Employers often hire independent contractors rather than full-time employees to avoid paying for additional health insurance, pension benefits, unemployment insurance, and workers' compensation insurance.

In addition, employers can minimize employment liability risks because independent contractors are generally not protected by the various labor and employment laws that provide protection to traditional employees. For example, independent contractors are generally not protected by federal and state civil rights laws. In Pennsylvania, however, the state human relations law was amended in 1992 to make it unlawful for an employer to refuse to "contract with" an "independent contractor" for prohibited reasons. Further, the use of temporary employees may allow small companies to keep their employee rolls under the numerical limits to avoid the reach of coverage of federal antidiscrimination laws such as the Americans with Disabilities Act and the Civil Rights Act of 1964.

TEMPORARY WORKERS

In addition to independent contractors, temporary workers are being used by increasing numbers of employers, including law firms. Recent reports reveal that there are over 2.7 million temporary workers in the United States. This is approximately 4.9 percent of the labor force. That number skyrockets to six million workers once the numbers of contract and contingent workers are factored in. Many of these workers were formerly full-time employees of a downsized entity that have returned to work, but in a different capacity, after a period of layoff or severance. Although clerical work was once the quintessential temporary work assignment, "temps" increasingly include white-collar technical and professional workers, including attorneys. These are increasing number of firms that provide temporary attorneys to law firms and corporate law departments on an as-needed basis.

From an employer's perspective, there are several advantages to using temporary employees. Specifically, the use of temporary employees allows the employer to fill current needs without hiring regular employees in an uncertain economy. As is the case with independent workers, temporary employees allow employers to avoid the substantial payroll and administrative responsibilities and benefit costs typically involved in maintaining full-time personnel. Also, the use of temporary employee gives the employer the chance to assess the skills and abilities of the workers before hiring them as regular employees. The use of temporary employees also allows employers to avoid dealing with the question of whether a worker is considered an independent contractor or an employee; temporary workers are typically employees of a separate entity.

Although the advantages are numerous, there are several disadvantages that law firm managers and in-house counsel should give due consideration prior to engaging the services of temporary employees. Specifically, the presence of temporary employees may make managing the overall workforce more complicated; workers may need to be trained and may not be as productive as full-time staff, and this may ultimately increase costs.

Further, employee loyalty may decrease, and there may be hostility toward temporary employees by "traditional" employees who may not understand the role or pay of temporary workers.

CONTRACT WORKERS

Outsourcing to contract workers is another arrangement made between a company and a supplier of workers, called a managed staff service. This arrangement is very similar to employee leasing. The service resembles an independent contractor with its own workers. Typically, a company will opt to use contract employees to perform a particular task (e.g., payroll or benefits administration) in place of an entire department that the client company has decided to eliminate or never had in the first place. (A recent survey indicated that 48 percent of respondents are outsourcing more human resources functions today than three years ago, and 53 percent plan to outsource more functions over the next three years.) The service, rather than the client company, controls and manages the functions of the workers. Contract workers are generally "contracted" out to a customer employer for a longer period of time than leased workers. Increasingly, law firms and corporate legal departments are turning to contract attorneys and support staff. Outsourcing to contract workers provides many of the benefits of using temporary employees. For example, the employer outsources many company functions to the supplier, thus cutting back on paperwork, administrative tasks, and the costs of fringe benefits. Further, contract workers, like most temporary and leased workers, also decrease the size of "permanent" staff, reduce recruiting costs, provide access to special skills/knowledge, and provide a flexible staffing choice.

Some drawbacks to outsourcing are similar to those found with engaging temporary workers: productivity may be reduced depending on the amount of training needed by contract workers, animosity may exist between contract workers who were once employees of the company and those employees who remain "regular employees," and loyalty may be diminished.

TESTS USED TO DETERMINE "EMPLOYEE" STATUS

When a determination needs to be made about whether a worker is an employee or an independent contractor, courts and administrative agencies look to a variety of tests to determine the existence of an employment relationship. The three major tests that have emerged over the years are the common-law agency test, the economic-realities test, and the hybrid test. Each of these is briefly described below.

COMMON-LAW AGENCY TEST

Under this test, several factors are considered in determining whether an employer-employee relationship exists, including:

- extent of the hiring party’s control over the detail of the work (the most important factor);
- the worker’s occupation and skill;
- work’s revelation to the company’s business;
- worker’s investment, materials, and tools;
- the location of the work;
- duration of the relationship;
- control over working hours;
- method of payment;

- right to hire assistants;
- hiring party's business;
- taxes and employee benefits; and
- parties' intentions.

All of the circumstances of the relationship are relevant to the determination of whether an employer-employee relationship exists. These are essentially the factors that are used to determine independent contractor status, and together they are referred to as the "right to control" test.

ECONOMIC REALITIES TEST

Under the economic-realities test, employees are "those who as a matter of economic reality are dependent on the business to which they render service. A number of factors are considered to determine whether the worker is economically dependent on the business to which he or she provides service. They include:

- nature and degree of control exercised by the alleged employer as to the manner in which work is to be performed;
- worker's opportunity for profit or loss;
- worker's investment in the business;
- degree of permanency and duration of the working relationship;
- degree of skill required to perform the work; and
- extent to which the service rendered is an integral part of the employer's business.

The economic-realities test also requires a court to look at the specific purpose of the statute in question in determining whether the worker is an employee. However, the significance and use of the pure form of this test has been greatly diminished by the two or more recent U.S. Supreme Court cases referenced in note 11, *(Nationwide Mutual Insurance Co. v. Darden* and *Community for Creative Non-Violence v. Reid*.)

HYBRID TEST

The hybrid test, as its name suggests, uses the elements of both the economic realities test and the company's right to control the manner in which a worker performs the work. The factors relevant to this test are:

1. degree of control the company exerts over the individual;
2. individual's opportunities for profit or loss;
3. individual's investment in facilities;
4. the permanence of the relationship; and
5. skill required.

RELEVANCE OF EMPLOYEE STATUS UNDER EMPLOYMENT LAWS

Title VII of Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. (Title VII), prohibits discrimination in

employment (from initial help-wanted advertising to termination of employment) on the basis of race, color, national origin, religion, sex, and pregnancy. Determination of employee status under Title VII and other employment statutes apply only to employers with fifteen or more employees; therefore, the classification is important for jurisdictional purposes. Second, only "employees" are statutorily protected.

GENERAL PRINCIPALS

The "payroll method" is used to determine whether an employer is covered by Title VII. Under the payroll method, *all* workers on the payroll are counted. Whether they are full or part-time workers is irrelevant. The crucial factors are the dates the individual started and ended employment. If an individual begins or ends work in the middle of a workweek, he or she is not counted for jurisdictional purposes. If, pursuant to the payroll method, it is determined that an employer has fifteen or more employees, that employer is subject to Title VII.

If an employer has the requisite number of workers, the question becomes the status of the workers. The majority of courts have applied the hybrid test to determine the employment status of contingent workers for purposes of Title VII. Some courts have, however, applied the "economic-realities" test. Generally, courts have found an employer-employee relationship to exist when a company has the right to control and direct both the results of a workers' performance and the details by which the worker achieves such results.

The test adopted by the EEOC is a combination of the economic-realities and right-to-control tests. The extent of the employer's right to control the manner and means of the worker's performance is the most important factor. The underlying issue is whose business interest is being served. The EEOC considers the following factors in determining whether an employer-employee relationship exists:

- extent of control that the respondent exercises or may exercise over the details of the work;
- whether the charging party is engaged in a distinct occupation or business;
- kind of occupation in which the charging party is engaged, considering whether that work is generally done under the direction of a supervisor or by a specialist without supervision;
- skill required in that occupation;
- whether the respondent or the charging party supplies the equipment, tools, and the place of work for the charging party;
- length of time for which the charging party was or would have been engaged to work;
- method of payment, whether by time or by the job;
- whether the respondent withholds Social Security or other taxes from the compensation paid;
- whether the respondent provides leave or benefits, including annual, sick, or disability leave; health, medical or life insurance and retirement benefits;
- whether the charging party is or would be covered by workers' compensation;
- manner in which the work relationship may be terminated: by one or both parties, with or without cause, with or without notice and/or explanation;
- whether the work is an integral part of the respondent's business;

- whether the charging party worked, or would have been required to work, exclusively for the respondent, or whether the charging party was or would have been permitted to perform the same type of work for an employer other than the respondent;
- whether the charging party could delegate the work;
- whether the charging party was, or would have been, required to make capital investment;
- whether the work affords the charging party an opportunity for profit or loss depending on his or her skills or management abilities; and
- intention of the parties in creating the work environment.

TITLE VII

In *EEOC v. Fawn Vendors Inc.*, the U.S. District Court for the Southern District of Texas held that a sales representative was not an independent contractor, but rather was an employee protected by Title VII. Plaintiff was a vending machine sales representative who alleged she had been subjected to a sexually harassing hostile environment. She sued under Title VII, claiming she had been constructively discharged. Defendant argued that the sales representative was an independent contractor and therefore exempt from Title VII's protections. The court disagreed with the defendant, and held that plaintiff may proceed with her suit. It applied a hybrid of the "economic/common-law control tests" and considered both the financial aspect of the work relationship and the degree of control exercised by defendant over the manner in which the work was accomplished.

The court held that, although plaintiff signed a contract with defendant at the inception of their relationship expressly describing her as an "independent sales representative," defendant extended sufficient control over her work to form an employment relationship with plaintiff. For instance, the court noted that she was heavily supervised, her schedule was set by defendant, she used defendant's branch office to make calls to customers, and she reported to management at the end of the day. The court did not find dispositive the fact that plaintiff's pay was based on commissions and that the defendant provided her with no benefits, as the defendant exercised sufficient control over plaintiff's work to outweigh these economic factors. The court also noted that plaintiff's job required little special knowledge or skills, and that her work was a crucial part of defendant's business.

Conversely, in *Hatcher v. Augustus, d/b/a 7-Eleven and Southland Corp.*, the U.S. District Court for the Eastern District of New York held that a franchisor was not the employer of its franchisee's store manager under Title VII. Plaintiff, manager of a convenience store, sued the franchisor and the franchisee claiming Title VII had been violated when he was fired for not working a Sunday morning. Plaintiff had wanted to take the morning off to attend religious services. Southland Corporation, the franchisor, moved for summary judgment, arguing that it was not plaintiff's employer. The court granted Southland's motion for summary judgment, holding that Southland was not an employer under either the right to control or the economic-realities test. The court noted that Southland did not pay or withhold plaintiff's wages, Social Security taxes, or benefits. Under the terms of the agreement, the franchisee, Augustus, was the sole operator of the convenience store.

In *Alexander v. Rush North Shore Medical Ctr.*, the Court of Appeals for the Seventh Circuit held that a doctor was an independent contractor and was, therefore, precluded from filing suit under Title VII. Plaintiff, and Egyptian Muslim, alleged that defendant discriminated against him based on this ethnicity and religion when it revoked his hospital staff privileges. He sued under Title VII. The Seventh Circuit Court of Appeals

found that as a doctor, plaintiff was an independent contractor and therefore not covered by Title VII. The court held that in order to sustain a Title VII claim, the plaintiff must demonstrate the existence of an employment relationship. The court also held that common-law principles should be used to determined employee status. The court stated that the right to control the employee is the most important factor in deciding if an employee relationship exists. Other important factors include who controls the costs of the operation in question, the method and form of payment, and the length of the job commitment.

In this case, the court found it significant that plaintiff had specialized skills, named his personal wholly owned professional corporation as his employer for income tax purposes, and paid his own malpractice insurance, employment benefits, and taxes. Further, he exercised discretion in providing patient care, he billed patients directly, and he did not receive a paid vacation from the defendant. The court rejected plaintiff's argument that he was an employee because defendant provided plaintiff with equipment and assistants, plaintiff was on-call to defendant, and that most of his patients were assigned to him by the defendant. *Alexander* is particularly interesting in that the situation presented is analogous to the situation confronted by legal employers who use firms that provide temporary or contract attorneys.

ADEA

The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age against those over forty years old. Courts have used a variety of tests to determine employee status under the ADEA. Some courts have used the economic-realities test, whereas other courts have used the common-law or hybrid tests.

In *Garcia v. Copenhaver, Bell & Assoc.*, the Court of Appeals for the Eleventh Circuit held that whether a doctor is an employee and, therefore, covered by the ADEA is a question of fact for the jury. Plaintiff, an emergency room doctor, alleged that he had been terminated because of his age. Defendant was the provider of emergency room doctors who had placed plaintiff in a hospital emergency room. Plaintiff signed a medical services subcontract, agreeing to maintain lis licenses and set his own schedule. One portion of the contract referred to plaintiff as an independent contractor. Plaintiff testified that medical doctors oversaw the care he gave to patients, scheduled his shifts, and paid him on an hourly basis.

The Court of Appeals for the Eleventh Circuit held that the question of whether one is an employee pursuant to the ADEA is a question of fact for the jury. The court held that under either of the two tests employed in the Eleventh Circuit, the Hybrid economic-realities/ common-law employee test or the straight common-law employee test, there are disputed facts concerning the amount of control retained by defendant, rendering it impossible for the court to dismiss the plaintiff's claim as a matter of law.

In *Simpson v. Ernst & Young*, the Court of Appeals for the Sixth Circuit held that, under the economic-realities test, an accounting form partner was an employee covered under the ADEA. Plaintiff was a managing partner in the Cincinnati accounting office of Arthur Young & Company, which subsequently merged with Ernst & Whitney to become Ernst & Young. At the time of the merger, defendant began terminating older partners whose pensions had not yet vested. The court found that defendant did so in order to save money. Over an eighteen-month period, 120 partners over the age of forty (including plaintiff) were terminated, while 162 new partners under the age of forty were admitted. Plaintiff sued, alleging a violation of the ADEA. Defendant argued, that as a partner, plaintiff was not an employee and was not, therefore, entitled to the protections afforded employees under the statute.

The lower court denied defendant's motion for summary judgment and a jury found in favor of plaintiff on all claims and awarded him almost $3.7 million in back pay, front pay, and benefits. The court applied the economic-realities test to find that plaintiff was an employee. On appeal, the defendant argued that this was the wrong test to apply, and that under the common-law test, plaintiff was not an employee. The Court of Appeals for the Sixth Circuit affirmed the lower court's holding, ruling that plaintiff was not a bona fide partner under either test, but rather an employee. The court held, therefore, that plaintiff was statutorily

protected.

The court also looked at factors incorporated by the Uniform Partnership Act in making its determination. Plaintiff and the other partners had been divested of "all indicia of meaningful partnership participation in the new firm." He had no right to participate in decisions to admit or terminate other partners or other personnel, his access to firm records and client accounts was limited, and he had no right to transfer his interest in the firm.

ADA AND FMLA

Both the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) define an "employee" as "an individual employed by an employer.

If a company uses a staffing firm it is unclear who provides the reasonable accommodation for the leased or contract employee pursuant to the ADA - the staffing firm or its client. In the absence of guidance from Congress or the courts, businesses and staffing agencies should expect to work together to provide reasonable accommodation in order to avoid ADA violations.

The FMLA requires that an employer provide a leave of absence to employees under certain circumstances. The FMLA further requires that an employer reinstate the employee to the same or similar position at the end of the leave. The question them becomes which entity, the agency or the business, must provide the leave. Typically, the staffing agency provides the leave, but the secondary employer is required to reinstate an employee returning from FMLA leave, even if it means bumping another temporary employee who filled in during the leave. This requirement applies as long as the secondary employer has continued to use the services of the temporary agency and the agency so chooses to place the returning employee. The staffing agency is also typically responsible for providing all notices to its employees and maintaining health benefits. The client employer is forbidden from discouraging any employee from taking FMLA leave.

OTHER STATUTES

The question of employee status also has consequences for employers in terms of eligibility for fringe benefits. For example, in *Vizcaino v. Microsoft Corp.*, the Court of Appeals for the Ninth Circuit held that freelance employees who had been "fully integrated" into Microsoft's workforce were eligible to participate in the company's stock option plan. Workers were retained as freelancers by Microsoft between 1987 and 1990 in the company's international division to work in specific projects. At the time of their hire, the workers were told that they would be ineligible for benefits provided to permanent employees and they signed company documents confirming that they would be working as independent contracts. Microsoft "fully integrated" the freelancers into the workforce. They worked on teams with regular employees, "sharing same supervisors, performing identical functions, and working the same core hours." The workers were not paid through Microsoft's payroll department, instead submitting invoices for their services and were paid through the accounts receivable department.

In 1989 and 1990, the IRS examined Microsoft's employment records and, applying common-law principles, concluded that the freelance workers were not independent contractors but employees for federal withholding and employment tax purposes. After learning of the IRS ruling, the freelance workers who were not given permanent positions asked Microsoft to provide them with various employee benefits, including the right to participate in the company's employee stock purchase plan and deferred savings plan. Their claims for benefits were rejected. The workers then brought a class action suit claiming that the company's refusal to allow them to participate in the deferred savings plan violated the Employee Retirement Income Security Act, and that the denial of stock-option benefits violated Washington state law.

The Court of Appeals for the Ninth Circuit found that the workers were eligible to participate under the terms

of both the deferred-savings and stock-purchase plans. Because Microsoft already conceded that the workers were common-law employees, the court found the only eligibility criteria of the deferred-savings plan to be decided was whether the workers were "on the United States payroll of the employer." The court found that Microsoft paid the workers from its U.S. accounts, as opposed to those paid from its foreign subsidiaries or out of its foreign accounts. The court concluded that the plan "reasonably can be read to extend eligibility to the plaintiffs." The court also held that the workers were entitled to stock-option benefits under the stock-purchase plan, finding that the plan "expressly extends eligibility for participation to the freelance workers and affords them the same options to acquire stock in the corporation as all other employees." The court also stated that "[i]t is immaterial that the workers previously signed instruments stating that they would receive no benefits because the label used to describe the workers' employment status in the documents was incorrect, and the company could not legally exclude common-law employees from the plan without sacrificing the plan's tax qualification."

On rehearing, the Court of Appeals for the Ninth Circuit sitting *en banc* upheld the ruling that may give employees who were misclassified as freelancers access to Microsoft's 401(k) employee stock purchase plans. The court *en banc* found that "Microsoft has already recognized that the workers were employees and that the 'no withholding' consequence of the independent contractor label has fallen; we now hold that the 'benefit' consequence has also fallen." Further, the Court remanded the case for determination of individual eligibility for benefits and for calculation of the damages or benefits due to the various class members.

WHO IS LIABLE FOR WHICH WORKER?

In addition to the tests described above to determine employee status, compliance with employment and labor laws is important, and liability under these statutes often hinges on who is the employer. Having a worker with temporary or leased status does not automatically eliminate liability. This is because the company may be found to be a "joint employer" of the temporary of leased workers. This is because the company may be found to be a "joint employer" of the temporary or leased workers. Such a finding can mean joint liability for actions over which the company has little control. The company found to be a joint employer may be liable for violations under wage and hour laws and federal and state fair employment practices act.

Courts and the National Labor Relations Board (NLRB) generally follow the same standards when defining "joint employer." The following definition was developed by a series of NLRB cases:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over ... employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. See *Karr v. strong Detective Agency*, 787 F.2d 1205 (7th Cir. 1986).

Once joint employer status is found, the client employer can be held liable not only for its own unlawful conduct, but also for the unlawful conduct perpetrated by the leasing or temporary agency. The Court of Appeals for the Fifth Circuit held that although Title VII protects *individuals* against unlawful discrimination by employment agencies, and *employee* of an employment agency could not bring a Title VII action against the temporary employment agency that employed her because it employed fewer than fifteen people. There is an important distinction between the referral and recruitment functions of an employment agency and its own employment practices. The joint employer tests also apply to cases arising under the ADA.

Under the FMLA, separate legal entities may be treated as one "integrated employer" or as "joint employers." The regulations expressly include leased or temporary employee arrangements in the examples of joint employment relationships. Of the joint employers, the "primary" employer is responsible for providing FMLA

leave and reinstatement.

Factors used to identify the primary employer include:

- authority to hire and fire;
- authority to assign/place; and
- which entity makes payroll and provides employment benefits.

CONCLUSION

As the preceding pages demonstrate, an employee's title or internal classification is not determinative of his or her status. Courts will conduct a fact-intensive inquiry, and examine a plethora of factors. Even if a court determines that a worker does not fall within the status of an "employee," the court may, nonetheless, determine that a law firm or corporation is a "joint employer." Law firm managers and in-house counsel should be familiar with implications of employer and employee status in order to ensure that their (or their client's) use of temporary or contingent work relationships does not lead to unexpected legal problems.

NOTES

1. Sharon R. Cohany, "Workers in Alternative Employment Relations," *Daily Labor Report* (BNA) (Dec. 11, 1996): E-4, E-5.

2. See Lisa Stansky, "Changing Shifts," *ABA Journal* (June 1997): 56.

3. Julie Amparano, "Temps Tackle Bigger Load as Experts Worry," *Arizona Republic* (Dec. 22, 1996): A1.

4. Richard R. Carlson, "Selected Topics on Employment and Labor Law ; Variations on a Theme on Employment; Labor Law Regulation of Alternative Worker Relations," 37 *S. Tex. L. Rev.* 661, 663 (1996).

5. Amparano, *supra*, note 3, at A1.

6. 19.4% of all on-call workers, 9.3% of all temporary agency workers, 11.7% of all workers provided by contract firms, and 22.3% of independent contractors previously worked for their current "employer" in a different capacity. *See* Louis Uchitelle, "More Downsized Workers Are Returning as Rentals," *New York Times* (Dec. 8, 1996): at 1.

7. *See* Eileen Silverstein and Peter Goselin, "Intentionally Impermanent Employment and the Paradox of Productivity," 26 *Stetson L. Rev.* 1, 12 (1996) and Hal Lancaster, "The Expanding Told of Temps Offers Avenues to Good Jobs," *Wall St. J.* (Feb. 18, 1997): B1.

8. *See* Silverstein, *supra*, note 7, at 17, and Amparano, *supra*, note 3, at A1.

9. "Skill Shortfalls Are Widespread, SHRM Survey of HR Managers Finds," *Daily Labor Report (BNA)* June 24, 1997): A-10.

10. Karen Schmidt, "Personnel Moves: Many Companies Are Getting Out of the Human Resource Business," *Hartford Business Journal* (Mar. 3-9, 1997); at 1.

11. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992); *Community*

for Creative NonViolence v. Reid, 490 U.S. 730 (1989); *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

12. Carlson, *supra*, note 4, at 665. The author also points out that if a statute is unclear in its definition of "employee," the court will presume that Congress meant to apply the "common-law" concept of employees.

13. "Developments in the Law - Employment Discrimination," 109 *Harv. L. Rev.,* 1647, 1658 (1996), quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

14. See *United States v. Silk*, 331 U.S. 704, 716 (1947); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989).

15. See *Trustees of Sabine Area Carpenters' Health and Welfare Fund v. Don Lightfoot Home Builder*, 704 F.2d 822, 825 (5th Cir. 1983); *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 753 (5th Cir. 1983).

16. *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S.Ct. 660 (1997).

17. See *Wheeler v. Hurdman*, 825 F.2d 257, 268-73 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994).

18. See *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir, 1983).

19. EEOC Compl. Man. §605.12, Appendix H.

20. 965 F.Supp. 909 (S.D.Tec 1996).

21. 956 F.Supp. 387 (E.D.N.Y. 1997).

22. 101 F.3d 487, *cert. denied*, 118 S.Ct. 54 (7th Cir. 1996).

23. 104 F.3d 1256 (11th Cir. 1997).

24. 100 F.3d 436, *cert. denied*, 117 S.Ct. 1862 (6th Cir. 1997).

25. See 42 USC §12111(4), 29 USC §2611(3).

26. 97 F.3d 1187 (9th Cir. 1996), *on reh'g en banc*, 1997 WL 411663 (9th Cir. July 24, 1997).

27. *McKenzie v. Davenport-Harris Funeral Home* 834 F.2d 930 (11th Cir. 1987).

28. *Greenless v. Eidenmoller Ctrs., Inc.*, 32 F.3d 197 (5th Cir. 1994).

29. 29 CFR §825.104(c)(2), 29 CFR §825.106.

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