# Chapter 1

**The Regulation of Employment**

[*Note to users: Users can click on the case icon [](#CaseReturn)to access the case brief included at the end of the IM chapter.*]

**Chapter Objective**

The student is introduced to the regulatory environment of the employment relationship. The chapter examines whether regulation is actually necessary or beneficial or if, perhaps, the relationship would fare better with less governmental intervention. The concepts of “freedom” to contract in the regulatory employment environment and non-compete agreements have been discussed. Since the regulations and case law discussed in this text rely on an individual’s classification as an employer or an employee, those definitions are delineated and explored.

**Learning Objectives**

(*Click on the icon following the learning objective to be linked to the location in the outline where the chapter addresses that particular objective.*)

At the conclusion of this chapter, the students should be able to:

1. Describe the balance between the freedom to contract and the current regulatory environment for employment. *[Description: LO-Icon](#learningObj1)*
2. Identify who is subject to which employment laws and understand the implication of each of these laws for both the employer and employee. *[Description: LO-Icon](#learningObj2)*
3. Delineate the risks to the employer caused by employee misclassification. *[Description: LO-Icon](#learningObj3)*
4. Explain the difference between and employee and an independent contractor and the tests that help us in that determination. *[Description: LO-Icon](#learningObj4)*
5. Articulate the various ways in which the concept “employer” is defined by the various employment-related regulations. *[Description: LO-Icon](#learningObj5)*
6. Describe the permissible parameters of non-compete agreements. *[Description: LO-Icon](#learningObj6)*

**Detailed Chapter Outline**

**Scenarios—Points for Discussion**

***Scenario One*:** Students should discuss whether or not Nan’s non-compete agreement is likely to be found reasonable by a court, and elaborate the aspects of the agreement that Nan might contest as unreasonable (see section below, “Covenants Not to Compete”). Does Nan have a persuasive argument that the terms of her non-compete agreement are unreasonable in scope or duration? Might she have grounds to claim that the agreement prohibits her from making a living?

Given the diversity of state laws regulating non-compete agreements, discuss the range of legal restrictions that might apply to Nan’s particular agreement with her employer. As an employee who works across several states, Nan’s defense may depend upon the presence—and specific language—of a forum selection clause in her non-compete agreement. Consider what language would be more likely to provide Nan with a strong defense against the breach of contract claim.

Nan might also argue that the company’s client list is available through public means, and therefore, her access to this list should not be prohibited.

***Scenario Two:*** Serafine would not have a cause of action that would be recognized by the EEOC. Review the section “The Definition of ‘Employer’” with students, and discuss the rationale that determines the status of a supervisor vis-à-vis anti-discrimination legislation. Because Gustave is Serafine’s supervisor, not her employer, he cannot be the target of an EEOC claim of sexual harassment.

CCC, Serafine’s employer, would be vulnerable to an EEOC claim if the company lacked or failed to follow a system for employee redress of discrimination grievances. However, in this case, CCC appears to have a viable anti-discrimination policy that it adhered to diligently; consequently, Serafine would be unlikely to win a decision in her favor. The court in *Williams v. Banning* (1995) offered the following rationale for its decision in a similar case:

“She has an employer who was sensitive and responsive to her complaint. She can take comfort in the knowledge that she continues to work for this company, while her harasser does not and that the company's prompt action is likely to discourage other would be harassers. This is precisely the result Title VII was meant to achieve.”

***Scenario Three****:* This scenario offers an opportunity to review the distinctions between an employee and an independent contractor discussed in the chapter (see “The Definition of Employee,” particularly Exhibits 1.3–1.5). Discuss the IRS 20-factor analysis, as it applies to Ariana’s position. In light of the low level of control that Ariana had over her fees and her work process, and the limits upon her choice of clients, students should come to the conclusion that Ariana is an employee (therefore, eligible to file an unemployment claim), rather than an independent contractor.

**General Lecture Note for Employment Law Course**

In order to teach this course, instructors have found that students must be made to feel relatively comfortable with their peers. Instructors will be asking the students to be honest and to stay in their truth, even at times when they feel that their opinion on one of these matters will not be popular or accepted by the group. In order to encourage an open atmosphere, it is therefore necessary for the class to feel comfortable with and to be aware of itself as a group. Here are two exercises which have proven to be useful in reaching that goal in some classes:

***Cultural Introductions***

Have students sit in groups of four or five. Once they are in their groups (some instructors call them families, so as to prevent a feeling of competition), have students introduce themselves, as well as provide a bit of cultural introduction (where they or their parents are from, where they may have lived, or other “cultural” information, like they are from the suburbs, or they work for a certain industry, or they went to a catholic school, etc.). They should also discuss times when they may have been more aware of this cultural difference than others. This will only be shared with the families. In this way, each student is made aware of the fact that she or he belongs to a number of different cultures, their gender, race, and ethnicity, as well as geography, age, type of education, etc. Generally “white males” is used as the concept of majority, though many of the “white males” in the class may belong to a variety of cultural groups. Allow each of them to understand their own uniqueness.

Then ask group members to introduce other members to the class.

***Four Facts***

Ask the students to get into groups and list four statements about themselves, three of which should be true, and one of which should be false. Also ask them to list below those statements the names of the members of their family. (The instructor should do this too, up on the board, then disclose later to the whole class.)

Now, each individual should take turns reading her or his statements to their family. As each person reads their statement, the other people should jot down which numbered statement is false next to their name.

Then, take one person at a time, and all of the others should identify which statement they believe is false and why. After everyone has made their guess, the person who shared the statements can reveal which is actually false.

* Were the students surprised at some of the facts that people shared? Which? Why?
* How good were the students, individually and as a group, at picking the false statement?
* What does this tell one about making assumptions and judgments about people?
* Were some of the statements given by different people similar? Why?

Give the following instructions to students to find out how many they got right—“Everyone stand up. If you got at least one right, stay standing. Two right, stay standing. Three right? Four fight? Five right? etc.” Soon only one or two may remain standing.

**Opening Discussion Tip**

What is employment law?

How the law affects managers, management in general is what will be studied. This is important for one to know as employees and as potential employers. Now, one may not follow the law, but one should be aware of the ramifications of one’s management employment decisions. For instance, as an employee, one may know that one’s employer has no right to do something, but one submits to it anyway to avoid losing one’s job or having to go to court. As an employer, one may know that one’s actions are not legal according to the letter of the law, but one weighs the costs and benefits and decides to do it anyway. Simply, one must know the law in order to weigh the costs!

There is now a knowledge gap among professionals since most managers and personnel practitioners have not had formal training in the application of new employments laws to the workplace. In addition, most lawyers may understand the law as it is applied to a business relationship, but not to employment relationships.

*[](#lo1)Learning Objective One: Describe the balance between the freedom to contract and the current regulatory environment for employment.*

**I. Introduction to the Regulatory Environment**

Lecture Note: Just a tip to get the students to open their eyes a bit to the new ideas that may be presented in this course. Ask the students to clasp their hands (interlock the fingers). Then ask them to look down and see which thumb is on top. Tell them to unlock them and to do it again. Look down. How many students clasped their hands differently? Probably none or very few. Now ask them to try to clasp them with the other thumb on top. It feels different, doesn’t it? However, there is no reason in the world why it should feel any differently, except that one is used to doing it one way and not the other. Why do they think they clasp the one way in the first place? “Are you the type of person who goes right back to what is comfortable once you have changed for a moment, or are you the type of person who stays with a new idea to see if you like it, how it feels?” The purpose of this exercise is to show students that they should be open to new ways of looking at things, even if at first they feel a little uncomfortable.

If an employer wants to hire someone to work every other hour every other week, it should be allowed to do that, as long as it can locate an employee who wants that type of job. The freedom to contract is crucial to freedom of the market; an employee may choose to work or not to work for a given employer, and an employer may choose to hire or not to hire a given applicant.

It is unlikely that Congress would enact legislation that would require employers to hire certain individuals or groups of individuals (like a pure quota system) or that would prevent employers and employees from freely negotiating the responsibilities of a given job. (See Exhibit 1.1, “Realities about the Regulation of Employment.”)

Employers historically have had the right to discharge an employee whenever they wished to do so. However, Congress has passed employment-related laws when it believes that there is some imbalance of power between the employee and the employer. For example, Congress has passed laws that require employers to pay minimum wages and avoid using certain criteria such as race or gender in reaching specific employment decisions. These laws reflect the reality that employers stand in a position of power in the employment relationship. Legal protections granted to employees seek to make the “power relationship” between employer and employee one that is fair and equitable.

**A. Is Regulation Necessary?**

There are scholars who do not believe that regulation of discrimination and other areas of the employment relationship is necessary. Proponents of this view believe that the market will work to encourage employers’ rational, nonbiased behavior.

Some economists have argued that rational individuals interested in profit maximization will never hesitate to hire the most qualified applicants, regardless of their race. Decisions that are dependent on race or gender would be inefficient, they argue, since they are based on the (generally) incorrect belief that members of one class are less worthy of a job than those of another. Therefore, they will not let prejudices cause them to hire less qualified individuals and employ a less efficient workforce.

However, opponents of this position contend that discrimination continues because often employers are faced with the choice of two *equally* qualified applicants for a position. In that case, the prejudiced employer suffers no decrease in efficiency of her or his firm as a result of choosing the white or male applicant over the minority or female applicant. In addition, human beings do not always act rationally or in ways that society might deem to be in the best interests of society, as a whole. Finally, given the composition of the work force, if a biased firm chooses only from the stock of white males, it still might have a pretty qualified stock from which to choose; so it can remain awfully competitive. Therefore, economic forces do not afford absolute protection against employment discrimination where the discrimination is based on race, gender, national origin, or other protected categories.

Lecture Notes:

* One example that could be used by professors in class is to inform students that, generally, an employer may choose not to hire anyone who is blonde. Hair color is not a protected class and decisions on that basis are legal, as long as they do not have an adverse impact. (One may want to note that the opposite rule may have an adverse impact. If one was to hire *only* blondes, this rule may have a disparate impact on Blacks or Asians.)
* This might be a good place to stop and discuss Exhibit 1.1, *Realities about the Regulation of Employment*. How many students believe these “realities?” Why? Have they had any experience with any of these issues? Is there a difference in connection with these realities between what the law says and how it is implemented in the work place?
* After they have done the reading, it is helpful to ask several students to argue that regulation is absolutely necessary in order to bring about equality of opportunity, then pose them against several other students who argue the other side.

*[](#lo2)Learning Objective Two: Identify who is subject to which employment laws and understand the implication of each of these laws for both the employer and employee.*

**B. Who Is Subject to Regulation?**

The issue of whether someone is an employer or employee is a critical one when it comes to regulation, but like many areas of the law, it is not one with an easy answer. (See Exhibit 1.2, “Realities about Who Is an Employee and Who Is Not.”). Defining an individual as an employee allows that person to pursue a claim that an independent contractor might not have.

**C. Origins in Agency Law**

The law relating to the employment relationship is based on the traditional law called *master and servant,* which evolved into the law of agency. In an agency relationship, one person acts on behalf of another. The actor is called the *agent,* and the party for whom the agent acts and from whom that agent derives authority to act is called the *principal.* The agent is basically a substitute appointed by the principal with power to do certain things. In the employment context, an employee is the agent of the employer, the principal.

In an employment-agency relationship, the employee-agent is under a specific duty to the principal to act only as *authorized.* As a rule, if an agent goes beyond her authority or places the property of the principal at risk without authority, the principal is now responsible to the third party for all loss or damage naturally resulting from the agent’s unauthorized acts (while the agent remains liable to the principal for the same amount).

Throughout the entire relationship, the principal/employer has the obligation toward the agent to exercise good faith in their relationship, and the principal has to use care to prevent the agent from coming to any harm during the agency relationship. This requirement translates into the employer’s responsibility to provide a safe and healthy working environment for the workers.

**D. Why Is It Important to Determine Whether a Worker Is an Employee?**

How does one know if one is being hired as an employee or as an **independent contractor**? While some workers may have no doubt about their classification, the actual answer may vary, depending on the statute, case law, or other analysis to be applied. The courts, employers, and the government are unable to agree on one definition of “employee” and “employer,” so it varies, depending on the situation and the law being used. In addition, some statutes do not give effective guidance.

The definition of employee is all the more important as companies hire supplemental or contingent workers on an independent-contractor basis to cut costs. Generally, an employer’s responsibilities increase when someone is an employee.

**Employer Payroll Deductions**

An employer paying an employee is subject to requirements different from those for paying an independent contractor. An employer who maintains employees has the responsibility to pay Social Security (FICA), the FICA excise tax, Railroad Retirement Tax Act (RRTA) withholding amounts, federal unemployment compensation (FUTA), IRS federal income tax withholdings, Medicare, and state taxes. In addition, it is the employer’s responsibility to withhold a certain percentage of the employee’s wages for federal income tax purposes.

On the other hand, an independent contractor has to pay all of these taxes on his or her own. This is usually considered to be a benefit for the employer because it is able to avoid the tax expenses and bookkeeping costs associated with such withholdings.

**Benefits**

*Benefits* cost the employer money outside of the wages that the employer must pay the employee. In an effort to attract and retain superior personnel, employers offer employees a range of benefits that generally are not required to be offered such as dental, medical, pension, and profit-sharing plans. Independent contractors have no access to these benefits.

The Fair Labor Standards Act of 1938 was enacted to establish standards for minimum wages, overtime pay, employer record keeping, and child labor. Where a worker is considered an employee, the FLSA regulates the amount of money an employee must be paid per hour and overtime compensation. Employers may intentionally misclassify employees in order to avoid these and other costs and liabilities. A willful misclassification under FLSA may result in imprisonment and up to a $10,000 fine, imposed by the Department of Labor.

**Discrimination and Affirmative Action**

Title VII and other related antidiscrimination statutes only protect *employees* from discrimination by employers; therefore, an independent contractor cannot hold an employer liable for discrimination on this basis and employers are protected from some forms of discrimination and wrongful discharge claims where the worker is an independent contractor.

Merely labeling a worker as an “independent contractor” does not protect against liability under federal antidiscrimination statutes such as Title VII. Courts and the EEOC will examine a variety of factors to determine the true meaning of the relationship between the worker and the organization. If the worker is more appropriately classified as an employee, then the label will be peeled off, allowing for antidiscrimination statutes to apply.

Additionally, the National Labor Relations Act of 1935 (NLRA) protects only employees and not independent contractors from unfair labor practices. Independent contractors may be considered to be *employers;* so they may be subject to these regulations from the other side of the fence.

**Cost Reductions**

It would seem to be a safe statement that an objective of some, if not most, employers is to reduce cost and to increase profit. Hiring independent contractors avoids the cost of overtime (the federal wage and hour laws do not apply to independent contractors) and the employer is able to avoid any work-related expenses such as tools, training, or traveling. The employer is also guaranteed satisfactory performance of the job for which the contractor was hired because it is the contractor’s contractual obligation to adequately perform the contract with the employer, while the employee is generally able to quit without incurring liability (the at-will doctrine). If there is a breach of the agreement between the employer and the independent contractor, the independent contractor not only stands to lose the job but also may be liable for resulting damages. An employee is usually compensated for work completed with less liability for failure to perfectly perform.

The employee may actually cause the employer to have greater liability exposure. An employer has **vicarious liability** if the employee causes harm to a third party while the employee is in the course of employment. Questions might arise in connection with whether the worker is actually an employee of the employer and, therefore, whether the employer is liable at all. However, in certain situations, businesses will be liable for the acts of their independent contractors, including when those contractors are involved in “inherently dangerous activities.”

*[](#lo3)Learning Objective Three: Delineate the risks to the employer caused by employee misclassification.*

**The Cost of Mistakes**

Workers and employers alike make mistakes about whether a worker is an independent contractor or an employee. If a worker is classified as an independent contractor but later is found to be an employee, the punishment by the IRS is harsh. The employer is not only liable for its share of FICA and FUTA taxes but is also subject to an additional penalty equal to 20 percent of the FICA taxes that should have been withheld. In addition, the employer is liable for 1.5 percent of the wages received by the employee. These penalty charges apply if 1099 forms (records of payments to independent contractors) have been compiled for the worker. If, on the other hand, the forms have not been completed, the penalties increase to 40 percent of the FICA taxes and 3 percent of wages. Where the IRS determines that the worker was *deliberately* classified as an independent contractor to avoid paying taxes, the fines and penalties can easily run into six figures for even the smallest business.

In 2011, the U.S. Department of Labor launched a major Misclassification Initiative, in cooperation with the Internal Revenue Service, to reduce the incidence of employee misclassification and to improve compliance with federal labor laws. On the federal level, the Employee Misclassification Prevention Act has been introduced in Congress, although it has not yet been passed.

Misclassified workers are a significant portion of the employment tax gap, but just how big a portion is unknown, because the IRS’s last comprehensive misclassification estimate was in 1984. At that time, the IRS found that 15 percent of employers misclassified 3.4 million workers as independent contractors, causing an estimated loss of $1.6 billion in Social Security tax, unemployment tax, and income tax.

The IRS provides a small “safe harbor,” called the Classification Settlement Program, through the 1978 Revenue Act for employers who have always and consistently defined a class of workers as independent contractors. Section 530 cites four criteria required to claim a worker as an independent contractor. Where these conditions have been satisfied, the employer is not liable for misclassification:

* The business must have never treated the worker as an employee for the purposes of employment taxes for any period.
* All federal tax returns with respect to this worker were filed consistently with the worker being an independent contractor.
* The company has treated all those in positions substantially similar to that of this worker as independent contractors.
* The company has a reasonable basis, for treating the worker as an independent contractor, which may include a judicial precedent or published IRS ruling, a past IRS audit of the company, or long-standing industry practices.

In 2011, the IRS introduced the Voluntary Classification Settlement Program, which enables employers who are not currently subject to examination by the IRS, DOL, or a state agency to voluntarily reclassify their workers and to obtain substantial relief from federal payroll taxes, interest, and penalties. In both programs, the employer must agree to treat workers as employees prospectively.

Lecture Note: It should be emphasized that each students is a unique individual. Even in a class where these types of issues are “on the table,” students, of course, retain their biases from their culturalization process. In an effort to break these molds, instructors could play a game called Human Bingo. The purpose of this game is to make students aware that people are not always who one thinks they are, and that the one person in the class who appears to be the most reserved may also be the only person in the class who has jumped out of an airplane, or who speaks several languages, and so on.

Prepare a grid on a regular sheet of paper with twenty-five boxes. Fill in twenty of the boxes with qualities such as “speaks more than two languages,” “has skydived before,” “knows a good joke and can tell it,” “can name at least three Michael Jackson songs,” “grew up in the city/suburbs,” etc. Copy these sheets so that everyone has the same one and hand them out.

Tell students to write a quality that an individual may have in each of the empty squares. This can be: skis downhill, reads People, lives more than thirty miles from school, can name three Michael Jackson songs, etc. The trick to listing these is that the quality must be one that the instructor expects less than half of the class to satisfy.

The point of this exercise is to walk around the room and find people who satisfies that quality. The instructor may only ask, do you…, not whether they can sign any of the boxes. If they do, have them sign that square on the instructor’s sheet. The instructor should collect as many signatures as she/he can. At the end of the time limit, the person who has the most bingo lines on their paper wins. Ties will be broken by the total number of squares signed. And those ties will be broken by the students voting on which of them listed the harder qualities to find.

[The instructors could ask who signed certain boxes, and ask the person who knows the joke to tell it, the person who knows the songs to name them, etc.]

**II. The Definition of “Employee”**

Courts have offered various ways to determine whether a worker is an employee. Generally, the interpretation used depends on the factual circumstances presented by each case, as well as which law is at issue.

Several tests have been developed and are commonly used by courts to classify employees and independent contractors. These tests include the common-law test of agency, which considers several factors but focuses on who has the right to control the work; the Internal Revenue Service (IRS) 20-factor analysis; and the economic realities analysis. Several courts also use a hybrid approach, using one test that combines factors from other tests. As the court explains in *Murray v. Principal Financial Group, Inc., et al.,* the three tests are “functionally equivalent,” with the common-law test controlling.

*[](#Murray1)Murray v. Principal Financial Group, Inc.*

*[](#lo4)Learning Objective Four: Explain the difference between an employee and an independent contractor and the tests that help us in that determination.*

Under what is now considered to be the leading test to determine status, the **common-law agency test,** a persuasive indicator of independent-contractor status, is the ability to control how the work is performed. This test originated in the master and servant law. Using the language of those origins, since the master (employer) had control over the servant (worker), the servant was considered similar to common-law property of the master and, therefore, originally governed by property law rather than contract law.

Under the common-law agency approach applied by the courts, the employer need not actually control the work but must merely *have the right or ability* to control the work for a worker to be classified an employee. The common-law test is specifically and consistently used to determine employee status in connection with employment taxes, as well as in federal income tax withholding.

The IRS does have a secondary analysis, called the **IRS 20-factor analysis** however, even the IRS itself explains that “this Twenty Factor Test is an analytical tool and *not* the legal test used for determining worker status. The legal test is whether there is a right to direct and control the means and details of the work.”

The following 20 factors have been continually articulated by courts, regulatory agencies, commentators, and scholars as critical to the determination of the status of an individual worker. When these factors are satisfied, courts are more likely to find “employee” status. The twenty factors are as follows:

* *Instructions*
* *Training*
* *Integration*
* *Personal rendering of services*
* *Hiring, supervising, and paying of assistants*
* *Continuing relationships*
* *Set hours of work*
* *Full-time requirement*
* *Work performed on the employer*’*s premises*
* *Order or sequence set*
* *Oral or written reports*
* *Furnishing of tools and materials*
* *Payment by hour, week, or month*
* *Payment of business or traveling expenses*
* *Significant investment*
* *Realization of profit or loss*
* *Work performed for more than one firm at a time*
* *Service made available to the general public*
* *Right to discharge*
* *Right to terminate*

Finally, under the **economic realities test**, courts consider whether the worker is economically dependent on the business or, as a matter of economic fact, is in business for himself or herself. In applying the economic realities test, courts look to the degree of control exerted by the alleged employer over the worker, the worker’s opportunity for profit or loss, the worker’s investment in the business, the permanence of the working relationship, the degree of skill required by the worker, and the extent the work is an integral part of the alleged employer’s business. Typically, all of these factors are considered as a whole with none of the factors being determinative.

*[](#Juino1) Juino v. Livingston Parish Fire District No. 5*

In *Juino v. Livingston Parish Fire District No. 5*, a volunteer firefighter faced sexual harassment at her station. The court chose to consider whether she was paid as the threshold test in determining whether she was an employee. Though Juino received some indirect benefits from her volunteer work (e.g., life insurance), the court ruled that they were not significant enough to pass this first test of employment.

Lecture Notes:

* It may be beneficial to ask the class whether they understand why an employer might want to classify someone as an employee. (In one case cited in the text, *Lemmerman*, an employer sought that classification because the plaintiff would then be limited to collecting damages under Workers’ Compensation Act rather than under standard tort law.) Perhaps ask the class to list those reasons why some employers might classify someone as an employee or not.
* This would be a good time to review exhibit 1.3. A possible answer to question posed in the exhibit is that the programmer is not an employee, but an independent contractor. The 20-Factor IRS test supports this conclusion because this is a one-time project paid in one lump sum. There are no specific instructions or training for the project’s completion. She works primarily from home and not at the company’s premises, and there is no required reports or specific sequence of completion expected of the programmer. Plus, she is not being given any benefits and must pay her own taxes. There are some “employee” indicator but they seem to be a continuation of an employment relationship the programmer previously had with the company. For example, they furnished the expensive computer that she is using to complete the project. However, there are more factors in favor of independent contractor.

**A. Contingent or Temporary Workers**

As used by the EEOC, the term *contingent worker* includes those who are hired by an employer through a staffing firm, as well as temporary, seasonal, and part-time workers, and those considered to be independent contractors rather than employees.

Although contingent or temporary workers provide a cost savings as a short-term benefit, depending on their classification they could be entitled to protection under employment laws. It is important to be sure the classification given is the true classification.

**B. Joint Employers and Staffing Firms**

Title VII prohibits staffing firms from illegally discriminating against workers in assignments and opportunities for employment. Staffing firms can be considered to be employers, as well, such as when they pay the worker and provide training and workers’ compensation coverage.

If a client of a staffing firm supervises, trains, and otherwise directs the worker with whom it has a continuing relationship, then perhaps the client will become an employer of the worker. In this way, *both* the staffing firm *and* the client may share liability as employers of the worker. This is called *joint and several* liability, and the worker may collect compensatory damages from either one or both of the entities combined if a wrong is proven.

Whether a contingent worker who is placed by a staffing firm with the firm’s clients qualifies as an employee depends on a number of factors, including whether the staffing firm or the client retains the right to control when, where, and how the worker performs the job and whether there is a continuing relationship with the worker, among other factors. What is unique about the worker placed by a staffing firm is the potential for joint liability between the staffing firm and the client.

Further, employers may be held liable as “third-party interferers” under Title VII. For example, an employer using a staffing firm cannot avoid liability for discriminating against a temporary worker merely because it did not “employ” the worker.

**C. Defining “Applicant”**

Since federal regulations often require employers to track applicants on the basis of race, gender, and ethnicity, it is important to have a clear and consistent definition of who is an *applicant*. According to the EEOC’s Uniform Guidelines on Employee Selection Procedures (UGESP), while the precise definition depends upon the employer’s recruitment and selection procedures, in general it encompasses all individuals who indicate an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing a written application form, or by expressing interest orally, depending upon the employer’s practice.

Technology has changed the way people apply for jobs and also has raised questions about who is an applicant in the Internet age. According to the U.S. Department of Labor Office of Federal Contract Compliance Programs, there are four criteria that define an Internet applicant:

* The individual submits an *expression of interest* in *employment through the Internet or related electronic data technologies*.
* The employer *considers* the individual for employment in a particular position.
* The individual’s expression of interest indicates the individual possesses the *basic qualifications* for the position.
* The individual *does not remove* himself from the selection process at any time prior to receiving an offer or otherwise indicate that he is *no longer interested in the position*.

Thus an e-mail inquiry about a job does not qualify the sender as an applicant, nor does posting a resume on a third-party job board.

*[](#lo5)Learning Objective Five: Articulate the various ways in which the concept “employer” is defined by the various employment-related regulations.*

**III. The Definition of “Employer”**

Depending on the applicable statute or provision, an *employer* is simply one who employs or uses others to do his or her work, or to work on his or her behalf. Most statutes specifically include in this definition employment agencies, labor organizations, and joint labor-management committees.

Issues may arise where an entity claims to be a private membership club (exempt from Title VII prohibitions) or a multinational company that may or may not be subject to application of various U.S. laws. A determination also must be made whether the employer receives federal funds or maintains federal contracts for coverage under the Rehabilitation Act of 1973, among others.

Another question is whether an individual, such as a supervisor, is also considered an employer under employment-related statutes and, therefore, can be held personally liable for her or his actions. Though most statutes are silent on the issue, the majority of courts have concluded that federal antidiscrimination statutes do *not* permit the imposition of this liability.

The most exacting issue is usually how many employees an employer must have in order to be subject to a given statute. It is crucial for employers to be familiar with the statutes to which they are subject and those from which they are immune. (See Exhibit 1.6 for an overview of the various statutory definitions of employer.)

**IV. The “Freedom” to Contract in the Regulatory Employment Environment**

In the age of increasingly complex regulations governing the workplace, the relationship between employer and employee essentially is still based on an agreement. Terms and conditions of employment may be subject to regulation or open to contractual negotiation, and either expressed or implied. Though an employer is generally free to design contract terms of any kind, the terms and conditions set by an employer cannot violate the letter or the spirit of the applicable laws. Courts and legislatures sometimes determine that certain types of agreements between employer and employee are *unenforceable.*

*[](#lo6)Learning Objective Six: Describe the permissible parameters of non-compete agreements.*

**V. Covenants Not to Compete (Non-Compete Agreements)**

One employment constraint that has received varying degrees of acceptance by different states is the **covenant not to compete** or **non-compete agreement**. While individuals in positions of trust and confidence already owe a duty of loyalty to their employers during employment, even without a non-compete agreement, a non-compete agreement usually includes prohibitions against disclosure of trade secrets, soliciting the employer’s employees or customers, or entering into competition with the employer if the employee is terminated. All states allow employers *some* control over what information a former worker can use or disclose in a competing business and whether a former worker can encourage clients, customers, and former co-workers to leave the employer.

However, not all states allow employers to prevent former workers from competing with them. States vary widely, from explicitly permitting non-compete agreements, to permitting agreements under certain circumstances, to strictly prohibiting agreements that limit for whom a former employee can work and where he or she can work.

In some states, certain professions are exempted from these prohibitions. For example, in certain states, prior employers can enforce non-competes against “management personnel” while they may not enforce the agreements against other types of workers. In many states, an employer may restrict a past employee based on location, length of time, and the type of work she or he may conduct, as long as the restrictions are reasonable and necessary to protect a business interest. Because of these state-by-state differences, it is critical to have **forum selection clauses** in contracts that stipulate the state law that will apply to the contract in question.

The common law generally *prohibits* the restriction if it is more broad than necessary to protect the employer’s legitimate interests or if the employer’s need is outweighed by the hardship to the employee and likely injury to the public.

To determine reasonableness, courts look to the location and time limitations placed on the employee’s ability to compete. The definition of competition under the non-compete agreement is also relevant. Restrictions that are for an indefinite period of time, or that prohibit the employee from working “anywhere in the United States,” would likely be considered unreasonable. However, as an example, restricting an employee from engaging in direct competition with the employer for one year from the end of their employment relationship within the same county may be considered reasonable. Generally, in order to be considered reasonable, the restrictive covenant should not prevent the employee from earning a living of any sort under its terms.

It is generally accepted that a valid restrictive covenant will meet the following qualifications:

* It protects a legitimate business interest.
* It is ancillary to a legitimate business relationship.
* It provides a benefit to both the employee and employer.
* It is reasonable in scope and duration.
* It is not contrary to the public interest.

Covenants not to compete sometimes also include provisions with regard to trade secrets or confidentiality with regard to other elements of employer intellectual property. This property might also include, for instance, customer relations and goodwill, specialized training, or particular skills unique to the workplace. The agreement often depends on what an employer considers to be trade secrets versus information in the public domain or commonly known in an industry. Confidential customer lists or customer preferences are often the source of trouble since they are usually maintained by individual workers based on professional relationships; however, most courts deem them property of the employer. Pricing, revenue, and other projections and marketing strategies are also commonly considered to be trade secrets. On the other hand, processes that are known by many in a particular industry or other information that is otherwise available through external sources are not considered to be company property. Customer lists, if accessible through public means, would therefore no longer fall under the rubric of trade secrets.

Under the theory of **inevitable disclosure**, employers are protected against disclosure of trade secrets even if no non-compete applies. A court may prohibit a former employee from working for an employer’s competitor if the employer can show that there is imminent threat that a trade secret will be shared. The courts look to (1) whether the employee’s knowledge is exceptionally specialized and technical, (2) which would give either business (former or new) a significant advantage in the market, and (3) the employee could perform her or his work without it. It might be highly unlikely, if not impossible, in some instances for some of these workers to conduct their work without disclosing the trade secret.

The Uniform Trade Secrets Act (UTSA) is a model act that strives to provide guidance to states developing statutes in this and other related areas. The UTSA provides relief in the form of monetary damages, attorney’s fees, and injunctive relief for misappropriation of trade secrets and does include a provision for inevitable disclosure.

Once a non-compete agreement has been found to be valid, in order to be enforceable, it must also be supported by consideration offered in a bargained-for exchange. In other words, the agreement by the employee not to compete with the employer is *only* enforceable if the employee also receives something in exchange for this agreement. Often, non-competes are signed at the time an employee is first hired; so the offer of employment on its own is considered sufficient consideration. However, if an employee is asked to sign a non-compete agreement after being hired and is not offered any additional consideration, some states do not treat continued at-will employment as sufficient. It depends on the state in which the agreement is signed.

**VI. Management Tips**

* Always evaluate the status of the workers; do not assume employee or independent- contractor status for any worker.
* Employment status is relevant to employer payroll and other financial issues; therefore, misclassification may be costly to the employer.
* While an employer is not liable to independent contractors for discrimination based on Title VII, the independent contractor may have other causes of action. Therefore, hiring an independent contractor is not a safe harbor from liability.
* Monitor staffing firms with which one contracts for temporary or other contingent workers, are to ensure that the workers are being properly paid and that the firm provides workers’ compensation coverage.
* Since statements in an employment policy manual may be construed in some circumstances as contractual promises, review all documentation as if one will be bound to it as a contract.
* Draft non-compete agreements that strive toward reasonableness.

**Chapter-End Questions**

* + 1. Campion is a firm that provides psychological services to police departments. The City of Minneapolis terminated its contract with Campion and entered into a new contract with Detrick. Campion contends that it is because it is affiliated with the Illinois Family Institute, an organization that happens to have conservative perspectives on issues such as marriage, abortion, homosexuality, and stem cell research. Campion filed a claim against the City of Minneapolis (a public entity) claiming that the termination violated its First Amendment freedom of association. Is the firm’s contract protected under the First Amendment? What would the firm have to demonstrate in order to prove a *prima facie* case here? [*Campion, Barrow & Assocs. of Illinois, Inc. v. City of Minneapolis*, 652 F. Supp. 2d 986, 2009 U.S. Dist. LEXIS 70993 (D. Minn. 2009).]

The court found that that there was sufficient evidence for Campion’s First Amendment claim to move forward to a jury. However, the court determined that the Minneapolis Police Department’s (MPD’s) “balance of interest” claim had sufficient merit to progress to litigation.

Campion had ample evidence, in the court’s view, to establish a prima facie case:

* The MPD conceded that Campion’s association with IFI was protected activity
* The MPD’s suspension of Campion’s services and choice of another company constituted “adverse employment actions”
* The court was persuaded that Campion’s affiliation with IFI was the motivating factor for these actions.

However, “even if the plaintiff establishes a prima facie case and the defendant cannot demonstrate that the same adverse action would have been taken in the absence of the plaintiff’s protected activity, the defendant government entity may still avoid liability if the infringement on the plaintiff’s First Amendment rights is “reasonable,” given the balance of interests involved.” The “balance of interests” test, when a government entity is involved, allows the government employer to argue that its interest in effectively providing public services outweighs the employee’s interests in protected First Amendment activity.

In this case, the court denied summary judgment to Campion, finding sufficient merit for litigation in the MPD’s balance-of-interest claim that the public controversy caused by Campion’s affiliation with anti-homosexual group negatively impacted the provision of police services.

1. A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the clients’ premises. Client A reserves the right to direct the staffing-firm workers to perform particular tasks at particular times or in a specified manner, although it does not generally exercise that authority. Client A evaluates the quality of the workers’ performance and regularly reports its findings to the firm. It can require the firm to remove a worker from the job assignment it if is dissatisfied. Who is the employer of the workers?

Students’ answers would vary. Hence, the instructor should encourage students to have a class discussion.

1. US Airways hired independent contractor Aubry Company to maintain and repair a luggage conveyor system at San Francisco International Airport. The airline neither directed nor had its employees participate in Aubry’s work. The conveyor lacked certain guards required by regulations. An employee of Aubry Company, Anthony Lujan, was injured after his arm was caught in the moving parts. Is US Airways liable for injuries to Aubry’s employees allegedly resulting from its failure to comply with California’s Occupation Safety and Health Act and its regulations? Or is the duty to comply with the regulations for the benefit of an independent contractors’ employees delegable? [*Seabright Insurance Company v. US Airways Inc* , No. S182508 (Aug. 22, 2011)].

The Court held that an employee of an independent contractor is barred from bringing a negligent hiring action against the hirer of the contractor. The Courts reasoned that, as determined in prior cases, the hirer should not have to pay for injuries caused by the contractor’s negligent performance because the workers’ compensation system already covers those injuries.

1. Dr. Pooneh Hendi Glascock, a female physician of Iranian origin, entered an “Independent Contractor Physician Service Agreement” with Linn County Emergency Medicine (LCEM) in May 2007 to work as an emergency room physician at Mercy Medical Center in Iowa. The Agreement was for one year and could be renewed for an additional year unless terminated by either party with 90 days notice. LCEM provided professional liability insurance for Glascock, but no benefits or vacation pay. The agreement guaranteed Glascock 15 shifts per month at an hourly rate of $130.

Glascock submitted her monthly availability and scheduling preferences to LCEM, and LCEM assigned shifts. She also remained free to engage in other professional activities. Glascock filed her own self-employment tax returns. The Agreement gave LCEM no control or direction over the method or manner by which Glascock performed her professional services and duties. As the attending physician at Mercy Medical Center, she selected a patient’s chart and reviewed it, determined the appropriate course of action, and then met with the patient. She received no instruction on how to examine, treat, or diagnose patients.

At the end of Glascock’s first year under the Agreement, LCEM terminated her. Glascock brought suit, claiming violations of Title VII and the Iowa Civil Rights Act, due to discrimination based on sex, pregnancy, and national origin. Does Glascock have a claim under Title VII? [*Glascock v. Linn County Emergency Medicine, PC,* No.12-1311 (8th Cir. 2012).]

The Court determined that Glascock was an independent contractor and not an employee. Hence, Glascock was not eligible to bring suit under Title VII or the Iowa Civil Rights, both of which, prohibits discrimination based on race, color, religion, or national origin but independent contractors are not protected under either.

1. Wojewski was a heart surgeon with staff privileges at Rapid City Regional Hospital. He took a leave of absence based on his bipolar disorder and, upon his return, was subject to various restrictions in his work in order to ensure that he did not place patients at risk. These restrictions included meeting regularly with another physician to monitor his work, participating in therapy sessions, taking only prescribed medication, submitting to competency exams, submitting to random drug testing, taking mandatory vacations, and submitting to a review of all of his cases for the past six months. After he had an “acute episode” of his disorder during surgery, the hospital terminated his privileges and he sued based on disability discrimination under the Americans with Disabilities Act. The hospital claimed that he did not have a claim as he was not an employee. Is the hospital correct? What additional information might you wish to know to answer this question? [*Wojewski v. Rapid City Regional Hospital Inc. et al.,* 450 F.3d 338 (8th Cir. 2006).]

The court found that the conditions imposed did not create an employer-employee relationship. The doctor “performed highly skilled surgical work, leased his own office space, scheduled his own operating room time, employed and paid his own staff, billed his patients directly, did not receive any Social Security or other benefits from [the hospital], and did not receive a form W-2 or 1099 from [the hospital].” Instead, the court found that the conditions imposed were necessary to ensure patient safety and to avoid professional liability, without being controlling of the way in which he performed his operations.

1. A group of individuals began work for Microsoft as freelancers between 1987 and 1990 and were asked to sign agreements stating that they were independent contractors and were responsible for all their own benefits. Many of them had served continuously for more than two years, working at the Microsoft facility, engaging in the same functions as Microsoft employees, sharing supervisors, and working the same basic shifts. However, aside from those agreements, the only other difference was that these workers received their pay through accounts payable rather than through the payroll department and they were not eligible for benefits.

Notwithstanding the agreements, in 1989 and 1990, the IRS reclassified the workers as employees. Microsoft then offered the workers new positions as either regular employees or as employees of a new Microsoft-owned employment agency, but continued to pay the workers in the same manner. The workers then sought to claim benefits, but were denied Microsoft claimed it only offered benefits to an employee “who is on the United States payroll of the employer.” Since the workers were paid through the accounts payable department and not through the payroll department, it claimed that the workers were not “on the payroll of the employer.” Does Microsoft win? [*Vizcaino v. Microsoft Corporation*, 97 F.3d 1187 (9th Cir. 1996).]

No, Microsoft does not win. The Ninth Circuit concluded that “Microsoft, which created a benefit to which the plaintiffs were entitled, could not defend itself by arguing that the plaintiffs were unaware of the benefit, when its own false representations precluded them from gaining that knowledge.”

The court was particularly critical of Microsoft’s attempt to deny benefits on the basis of the manner of payment: “Microsoft's argument, drawing a distinction between common-law employees on the basis of the manner in which they were paid, is subject to the same vice as its more general argument. Microsoft regarded the plaintiffs as independent contractors during the relevant period and learned of their common-law-employee status only after the IRS examination. They were paid through the accounts receivable department rather than the payroll department because of Microsoft's mistaken view of their legal status. Accordingly, Microsoft cannot now contend that the fact that they were paid through the accounts receivable department demonstrates that the company intended to deny them the benefits received by all common-law employees regardless of their actual employment status.”

1. Consultants for Long View Systems signed agreements stating they were independent contractors, which also contained non-compete provisions. However, after one exclusive, three-month engagement for computer consulting, during which Long View paid Lucero personally, by the hour, Gino Lucero filed for unemployment benefits claiming that he was an employee.

Though Lucero had signed the agreement and was paid directly by Long View, he provided the services to a third party who oversaw his work, provided the tools he used, and established (with Lucero’s agreement) the schedule for the work. The Colorado statute that governed this relationship requires that, for Long View to show that Lucero was an independent contractor, Long View had to show that he was: (1) free from control and direction in the performance of the service, *and* (2) customarily engaged in an independent trade, occupation, profession, or business related to the service performed for Long View. Should Lucero be considered Long View’s employee? [*Long View Systems Corp v. Lucero*, No. 07CA2284 (2008).]

The court overturned the ruling of a hearing officer and administrative panel, each of which had determined that Lucero qualified as an employee under Colorado law, and remanded the case to the panel for further investigation.

The court disputed Long View’s claim that the consulting contract’s terms provided conclusive evidence of Lucero’s independent contractor status. The signed agreement failed to meet two of the nine factors required by Colorado statute for independent trade contracts:

* Long View contracted to pay Lucero by the hour, rather than by a “fixed or contract rate” and
* Long View paid Lucero personally, rather than making “checks payable to the trade or business name of the individual.” (Long View argued that such hourly, personal pay arrangements are “common practice” in the IT community, but as Long View did not make this argument in the initial hearing phases of the case, it was not recognized by the court.)

However, the court found that the hearing and panel reports provided inadequate evidence regarding the two key issues of “independent trade” and “direction and control.” To determine “independent trade” status, the hearing officer should have considered additional factors beyond Lucero’s lack of services for other companies during the short-term period of his contract with Long View. Did Lucero have a business card, business listing, business address, or business telephone number? Did he have “his own equipment needed to perform the service,” and/or determine “the price of the service to be performed”? The hearing officer erred in not presenting findings on these and other questions.

Finally, the court affirmed Long View’s contention that Lucero’s services were not under their direction or control. The third party, not Long View, provided tools to Lucero, oversaw his work, and negotiated hours or time frames with Lucero. Though the evidence was deemed insufficient to determine the “independent status” question, the court found that Long View did not have the right to control Lucero’s work, and therefore, remanded the case back to the panel for further investigation.

1. Arman was hired to drive an airport shuttle for a rental car company back and forth from the airport to the rental car company’s off-site parking lot. When Arman was hired, he signed a written contract that stated specifically that he was an independent contractor. He was paid every two weeks, based on a rate per mile plus an hourly rate for waiting time. He drove the shuttle at times and to locations directed by the rental car company and was on call twenty-four hours a day. Is Arman an employee or an independent contractor?

Despite the language of Arman’s contract, a court would likely find that he is an employee of the rental car company, rather than an independent contractor. The relevant factors suggesting employee status are the biweekly pay and hourly rate arrangement, Arman’s lack of control over his time and work process, and the presumption that the tools of his service (the airport shuttle) was provided by the rental car agency.

A signed contract that states that the agent is an independent contractor will not be recognized by the court as decisive evidence of that status; instead, the court will examine the specific contract provisions and the factual conditions in the particular case under review.

1. Eugene McCarthy began working for Nike in 1993 and was promoted to a footwear sales manager position in 1997. Following his promotion, McCarthy signed a covenant not to compete that stated, “during Employee’s employment by Nike …and for one (1) year thereafter, Employee will not directly or indirectly…be employed by, consult for, or be connected in any manner with, any business engaged anywhere in the world in the athletic footwear, athletic apparel or sports equipment and accessories business, or any other business which directly competes with Nike or any of its subsidiaries or affiliated corporations.” In 1999, McCarthy was promoted again, to director of sales for the Brand Jordan division, but he was not required to sign a new non-compete agreement. In the spring of 2003, McCarthy accepted a job at Reebok as vice president of U.S. footwear sales and merchandising, and he resigned from Nike. Once McCarthy began working at Reebok, Nike filed a suit against him, claiming breach of contract and that McCarthy’s employment with Reebok violated the covenant not to compete. Is Nike’s non-compete agreement “reasonable”? Why or why not? [*Nike v. McCarthy*, 379 F.3d 576 (9th Cir. 2004).]

The 9th Circuit affirmed the district court’s ruling that Nike’s non-compete agreement with McCarthy was reasonable. McCarthy argued that, in violation of Oregon’s statutory and common law requirements, 1) the non-compete agreement was signed after his promotion began; 2) Nike did not have a “legitimate interest” to protect, a necessary component of a ‘reasonable’ non-compete agreement; and 3) his interests were liable to greater harm if prevented from taking the job with Reebok for a year, than Nike’s interests were liable to harm by his holding the position with Reebok. The court found fault with each of McCarthy’s arguments.

The non-compete agreement, though signed shortly after McCarthy began to perform the duties of his new position—duties that provided access to confidential marketing and sales date—was reasonably timed with McCarthy’s advancement to the new position. The court determined that Nike’s interest in enforcing the non-compete agreement was legitimate; McCarthy had “obtained knowledge of Nike's product launch dates, product allocation strategies, new product development, product orders six months in advance and strategic sales plans up to three years in the future.”

As the court points out, “[t]his information was not general knowledge in the industry.” Nike need not prove that McCarthy had or would definitely share this information with Reebok, but only that there was “substantial risk” that its employee would divert significant portions of its business, if working for a competitor. The court deemed that this risk was in evidence. Finally, the court was obligated to consider the harm that its decision would likely cause to each party. By the terms of McCarthy’s non-compete agreement, Nike is obligated to pay his salary for during the year of non-competition. Reebok agreed to hold the position, and to cover McCarthy’s health care benefits, during the intervening year. The potential harm to McCarthy of sitting out of the “fast-moving industry” of athletic apparel and footwear for one year was judged to be less than the potential harm that Reebok’s employment of McCarthy could cause to Nike’s business.

Though the court was not convinced by McCarthy’s argument that “acquisition of confidential information alone is insufficient to justify enforcement of a non-compete agreement,” the issue is interesting for student discussion. Are students persuaded by McCarthy’s contention that the employer “must show actual use or potential disclosure of confidential information before a non-compete agreement can be enforced”?

10. Bimbo Bakeries USA, Inc., sought an injunction to prevent Chris Botticella, a senior executive, from working for one of Bimbo’s competitors, Hostess. Among other trade secrets at issue in the lawsuit is the recipe for Thomas’ English Muffins, which are estimated to account for approximately $500 million in Bimbo’s annual sales income. Botticella is alleged to be one of only seven people who possess all of the knowledge necessary to independently replicate the muffins. Should the court issue the injunction? If so, for how long? [Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102,110 (3d Cir. 2010).]

The Court granted a preliminary injunction preventing Botticella from moving to a rival firm finding that there was a “substantial threat.” The 3rd Circuit upheld the preliminary injunction.

Three flash drives were attached to Botticella’s computer, and the information accessed by him on the last few days with Bimbo Bakeries was “highly sensitive.” The district court concluded that Botticella’s testimony regarding his use of external storage devices was “confusing” and “simply not credible.” The 3rd Circuit affirmed the district court’s analysis. Permanent injunctive relief against Botticella was granted by the District Court.

[](#Case)

**Case Icons:**

***Murray v. Principal Financial Group, Inc.,* 613 F.3d 943 (9th Cir. 2010)**

**Issue:** Whether a financial agent pursuing a Title VII sex discrimination claim was an employee or an independent contractor. What factors should be considered in making this distinction, and which legal test best captures these factors?

**Facts:** Plaintiff Patricia Murray, is a “career agent,” selling defendant Principal Financial Group’s products, including a wide range of financial products and services, including annuities, disability income, 401(k) plans, and insurance. Murray sued Principal for sex discrimination in violation of Title VII and the court had to determine whether Murray was an employee or an independent contractor within the meaning of that statute since she would be entitled to the protections of Title VII only if she was an employee.

**Decision:** The 9th Circuit Court determined that Murray was not an employee; but, the case is important for its analysis of the type of test to be applied. The appellate court affirmed the district court’s finding that there is no significant difference between the three tests established in previous judicial decisions: the “common law agency” test (*Darden),* the “economic realities” test (*Adcock*), and the “common law hybrid” test (*Lutcher*). The “common law agency” test is characterized as “focus[ing] on the hiring party’s right to control the manner and means by which the product is accomplished.” In the same vein, the district court asserted that the “primary factor” of the “economic realities test” is “the extent of the employer’s right to control the means and manner of the worker’s performance.” The district court saw the “common law hybrid” test as combining the enumerated factors of the previous two tests. The Ninth Circuit found that *Darden* is the controlling case for the purposes of Title VII, and asserted that its “common law agency” test, with its primary focus upon who has control over the “manner and the means” of production, encompasses the others.

**Case Questions:**

1. Do you agree with the court that there is no “functional difference” between the three tests—the “common law agency” test, the “economic realities” test, and the “common law hybrid” test—for whether someone is an employee or an independent contractor?

Have students review the three test definitions (see Definition of “Employee” above). Though there are certainly strong overlaps between the three tests, the case examples cited in the chapter suggest that the mode of application of the tests varies. Consider why the three tests have tended to find success in different issue areas.

1. Even if it might not be vital in this situation, could you imagine a circumstance where the distinction could be great and a different decision would result under one or several of these tests?

This question is suitable for a student discussion.

The “economic realities” test, for example, points courts toward analysis of the specific factual trends within an economic sector. Consider how new digital technologies have enabled greater provision of services from home, complicating prior distinctions regarding the proper workplace of an “employee” vs. an “independent contractor.” Might agents or principals heavily engaged in IT work benefit from the use of this test, as distinct from the others?

1. What is the value in the court’s decision in reaching convergence among the three tests in *Murray*?

Setting a standard for employers reduces the risk of misclassification, and directs employers and courts to the primary issue of control as the governing principle for interpreting the factual conditions of the agent-principal relationship in a particular case. As one commentator writes, “the court's decision is important because it emphasizes that the key issue is control and that the “minutiae” of the relationship are not determinative” (Ford & Harrison LLP, “Ninth Circuit Finds Insurance Agent is Independent Contractor, Not Employee,”[www.martindale.com](http://www.martindale.com), accessed 8/18/10).

*[Click here to return to the reference to the above case in the chapter outline.](#Murray)*

***Juino v. Livingston Parish Fire District No. 5*, No. 12-30274 (5th Cir. 2013)**

**Issue:** Whether a volunteer can be considered to be an employee within Title VII of the Civil Rights Act of 1964.

**Facts:** Rachel Juino was a volunteer firefighter with the Livingston Parish Fire District No. 5 from November 2009 to April 2010. As she was a volunteer she did not receive a salary but received many benefits. Juino claims that during her tenure, fellow firefighter John Sullivan subjected her to sexual harassment on several occasions. She terminated her services with District 5 on April 2, 2010. After not receiving a right-to-sue letter from the Equal Employment Opportunity Commission (“EEOC”) within six months of filing her claim, Juino filed suit in the district court, alleging sexual harassment and retaliation under Title VII. District 5 moved for partial summary judgment, claiming that it was not an “employer” for purposes of Title VII. Juino opposed the motion, contending that District 5 was an “employer.” Juino appealed to the Fifth circuit.

**Decision:** The district court treated District 5’s motion for partial summary judgment as a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b) (1) by concluding that the minimum “employee” requirement was a jurisdictional issue and dismissing the case on this basis. It is undisputed that Juino did not receive a salary and that she responded to 39 calls, which resulted in compensation of $78.00. She also received a life insurance policy, a uniform and badge, and emergency/first responders’ training. Thus, it was concluded that as a matter of law that Juino was not an “employee” for purposes of Title VII because she failed to make a threshold showing of remuneration. Juino’s benefits were held to be purely incidental to her volunteer service with District 5. Therefore, in an issue of first impression by the U.S. Court of Appeals for the Fifth Circuit, the court held that Juino was not an “employee” within the meaning of Title VII.

**Case Questions:**

1. Though the court was quite clear that simply identifying workers as volunteers is insufficient to prevent Title VII application, does the name by which an employer calls its workers matter at all? In other words, does it matter at all whether the employer calls its workers volunteers or employees, or is it completely irrelevant?

Students’ answers will vary. However, the students could use some of the following points in their answers. In the Juino case, the court chose to consider whether she was paid as the threshold test in determining whether she was an employee. Though Juino received some indirect benefits from her volunteer work (e.g., life insurance), the court ruled that they were not significant enough to pass this first test of employment. Other courts have held that remuneration is not the threshold condition, but only one factor among others for classifying workers. The district court also prudently analyzed Juino’s claim under this circuit’s “economic realities/common law control test,” which is applied in resolving the employee independent contractor conundrum. Under both tests, the district court concluded that Juino was not an “employee” for purposes of Title VII.

1. Of the factors considered critical by the court in reaching its conclusion, which seem more critical to a determination of employment status? Do you agree with the court in its choice to apply the threshold-remuneration test, rather than to treat remuneration as only one factor in assessing whether a worker is an employee?

Students’ answers will vary. Some students may agree with the court’s decision to adopt the threshold-remuneration test according to which Juino’s benefits were held to be purely incidental to her volunteer service with District 5. They may use the following example to support their claim—the Bryson court considered remuneration as a factor, but followed the Darden Court’s instruction that “‘all of the incidents of the [putative employment] relationship must be assessed and weighed with no one factor being decisive.’”

1. Can you think of public policy reasons why Title VII *should* be interpreted or amended to require employers to consider some or all volunteer workers as employees?

Students’ answers will vary. Some students may put forth Juino’s argument that she is an “employee” under Title VII because she received the following benefits while working at District 5: $2.00 per fire/emergency call; a life insurance policy; a full firefighter’s uniform and badge; firefighting and emergency response gear; and firefighting and emergency first-response training. Students may suggest that volunteer workers who receive such benefits should be considered as employees.

*[Click here to return to the reference to the above case in the chapter outline.](#Juino)*