*26th Annual Labor & Employment Law Conference*
*May 9-10, 2019*
*AT&T Conference Center*
*Austin, Texas*

# Contingent Workers, Employment Status, and Joint Employer Responsibilities

Kathryn J. Youker
Labor & Employment Group Coordinator
TEXAS RIOGRANDE LEGAL AID, INC.
1206 E. Van Buren
Brownsville, Texas 78520
Telephone: (956) 982-5540
Facsimile: (956) 541-1410
kyouker@trla.org

## Table of Contents

## I. Introduction

This paper provides a guide to the current standards used in Texas courts, both state and federal, to determine employment status and the allocation of joint employer responsibilities under common employment laws with respect to contingent workers.

Contingent, or "non-standard," workers have jobs in work arrangements outside the traditional employment relationship – for example, subcontracting, temporary and staffing agencies, on-call arrangements, on-demand arrangements, franchisee models, or independent contractor arrangements. This segment of the workforce is exploding. Historically more prevalent in low-wage and blue-collar jobs, contingent work has now expanded to many more sectors of the economy. This increasingly popular business model results in many more workers being effectively excluded from the protections and benefits of the traditional employment arrangement.

Worker advocates are challenging contingent workers' exclusion from employment rights in the courts. The long-standing and broad tests used for determining employment status under remedial statutes such as the Fair Labor Standards Act, the National Labor Relations Act, and civil rights laws provide contingent workers with powerful protections. However, under the Trump administration, the federal agencies charged with enforcing these laws are seeking to radically curtail these judicially-developed standards through rulemaking. As a result, the issues of employee status, misclassification, and joint employment are highly dynamic, especially with respect to contingent workers.[1]

[1] This paper does not address the "single employer" or "integrated employer" test under any of the laws discussed. This test, which is similar under the federal statutes discussed herein, examines the economic relationships between multiple entities to determine whether they are sufficiently associated in order to be determined a "single employer." See e.g., *Wirtz v. Hebert*, 368 F.2d 139, 141 (5th Cir. 1966) and 29 C.F.R. 791.2 (FLSA); 29 C.F.R. § 825.104(c)(2) (FMLA); *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983) (civil rights); Dow Chemical Co., 326 NLRB No. 23 (1998) (NLRA).

As shown below, while the tests used to resolve these disputes share common principles, they vary in significant ways that will sometimes produce different results depending on the particular law the worker seeks to enforce. The reason why the tests are different lies in the differing public purposes of the laws and the particular ways in which employers historically attempted to avoid liability as employers under particular statutes. Thus, practitioners should take care to properly categorize the question presented and bear in mind the law's purpose when applying the proper standards for determinations about employment status.

## II. Common law control test

The precursor definition of the employment relationship was found in the common law, in its master and servant doctrine. The Restatement (Second) of Agency examines such factors as whether or not the hired party is engaged in a distinct occupation or business, and whether the work is a part of the regular business of the putative employer. Restatement (Second) of Agency § 220(2) (1958).

The doctrine of joint employment similarly has its origins in the common-law agency principles found in the Restatement (Second) of Agency. The Restatement states, "A person may be a servant of two masters, [who are not] joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency §226.

The U.S. Supreme Court has explained that in determining employee status under the common law of agency, the court considers "the hiring party's right to control the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992). The Court referenced a non-exhaustive list of factors:

> Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign

Also available as part of the eCourse
2019 Labor and Employment Law eConference

First appeared as part of the conference materials for the
26th Annual Labor and Employment Law Conference session
"Contingent Workers and Joint Employment"