



**DirectEmployers  
Association**

# Use of the Common Law Test to Define “Who is an Employee?”

# I. BACKGROUND

## A. **There Are 6 Creatures On This Planet From A Labor Lawyer's Perspective**

- 1) Sole Proprietor
- 2) Partnership
- 3) Corporation
- 4) Independent Kor
- 5) Employee
- 6) Volunteer

# I. BACKGROUND (Con't.)

## A. There Are 6 Creatures. . . (Con't.)

Most employment statutes/regulations provide “employees” with rights in the workplace, but not Independent Contractors.

- (This is very slowly changing, however)

# I. BACKGROUND (Con't.)

## B. Key Concepts

### **KEY CONCEPT 1: All Workers are 1 of 5 Legal Creatures:**

- 1) Sole Proprietor
- 2) Partner
- 3) Independent Contractor
- 4) Employee
- 5) Volunteer

“Temp,” “Casual,” “Seasonal,” “Co-op,” “Interns,” etc. are all HR terms which tell you NOTHING, without more info, re which of the 5 legal creatures the worker is. Rather, these HR terms are slang job description references local to each company.

# I. BACKGROUND (Con't.)

## B. Key Concepts (Con't.)

### KEY CONCEPT 2: Different Definitions:

There is a different legal definition of the term employee for every employment statute/regulation

- There is not one homogenous definition of the term “employee”
- Your challenge: What definition applies to the statute or regulation of concern to you?
  - Federal law not the same as state law
  - Not every federal law or every state law uses same definition
  - Federal law + 50 state laws + federal territories
  - See 41 CFR § 60-1.3 (United States)

# I. BACKGROUND (Con't.)

## B. Key Concepts (Con't.)

### KEY CONCEPT 2: Different Definitions (con't.)

- There are five major legal tests for employee status:
  - 1) The “Common Law test”
  - 2) The 20 factor “IRS test”
  - 3) The “Economic Realities” test [“Fair Labor Standards Act” (“FLSA”) test]
  - 4) The “Hybrid Test” (often used in discrimination cases)
  - 5) “Social remedial test” (for “safety-net” laws like workers compensation, unemployment insurance, etc.)

# I. BACKGROUND (Con't.)

## B. Key Concepts (Con't.)

### **KEY CONCEPT 2: Different Definitions (con't.)**

- A worker can be an “employee” for purposes of one statute even if not an “employee” under a different statute

# I. BACKGROUND (Con't.)

## B. Key Concepts (Con't.)

**KEY CONCEPT 3: An Ee may, simultaneously in time, serve more than one master and thus be an Ee of two employers... so-called “joint employment”**

- Classic contexts of concern = temporary staffing firm workers (i.e. “Temps”) and so-called “Leased employees”
  - NOTE: “Leased employees” are generally associated with the relatively recent arrival in the marketplace of PEOs (Professional Employer Organizations) which “loan” the worker to a host employer which directs the worker’s day-to-day work activities even while the PEO does all the “backroom” HR and ostensibly retains all employment liability



## II. OFCCP REGULATIONS OF INTEREST

- A. make discrimination against “applicants” and “employees” unlawful if based on race, sex, sexual orientation, gender identity, religion, national origin, color, disability, and/or protected veteran status;\* and
- B. require “affirmative action” on behalf of each applicant and each employee in the Kor’s workforce.

\*Note: Section 4212 (the statute) does not in fact make discrimination against Protected Veterans unlawful (although OFCCP believes to the contrary).

## II. OFCCP REGULATIONS OF INTEREST (Con't.)

### C. do not define the term “employee”

OFCCP has also in 2014 published FAQs addressing the definition of employee and titled: “Employer–Employee Relationship”:

[http://www.dol.gov/ofccp/regs/compliance/faqs/Employer-Employee\\_Relationship.html](http://www.dol.gov/ofccp/regs/compliance/faqs/Employer-Employee_Relationship.html)

What law applies when a federal agency like OFCCP, fails or refuses to define the term “employee”?

## II. OFCCP REGULATIONS OF INTEREST (Con't.)

### **T H E   C O M M O N   L A W**

Numerous U.S. Supreme Court decisions hold that The Common Law definition of the term employee applies to federal statutes and regulations which do not define the term “employee”

OFCCP agrees as to all three of the “statutes” OFCCP enforces:  
See OFCCP’s FAQs

### III. WHAT IS THE COMMON LAW DEFINITION OF THE TERM EMPLOYEE?



### III. WHAT IS THE COMMON LAW (Con't.)

- A. Here is the current Restatement (Third) of Agency (2006) definition of the term employee:

“§ 7.07 Employee Acting Within Scope Of Employment

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.”

“(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. (**emphasis added**) An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.”

### III. WHAT IS THE COMMON LAW (Con't.)

#### A. Restatement (Third) (Con't.)

“§ 7.07 Employee Acting Within Scope Of Employment (Con't.)

(3) For purposes of this section,

(a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work, (emphasis added) and

(b) the fact that work is performed gratuitously does not relieve a principal of liability.”

- NOTE: The Common Law test is not the FLSA test
  - So, you could prove the worker is not an “employee” within the meaning of the Common Law, but lose that same case under the FLSA

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Answers to Special Issues

##### 1) Interns Under The Common Law:

See, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. N.Y. 1997)

- Very rare case decision concerning whether an unpaid worker (an Intern in this case) was a “Common Law employee”
  - Sexual harassment case at major hospital filed pursuant to Title VII: Plaintiff claimed a doctor harassed her
  - Plaintiff was a student intern

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

See, *O'Connor v. Davis* (Con't.)

- Court applied Common Law test
- Held: she was not an employee of the hospital because it did not pay her
  - She did not receive direct or indirect remuneration from the hospital (instead received work study funds from federal government)
- Analysis: Court outlined a two-step analysis to determine whether an intern is an “employee” under common-law agency principals.



### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

See, *O'Connor v. Davis* (Con't.)

**Step 1:** Has a hire taken place such that there is a “plausible” employment relationship?

- An “essential condition” of a plausible employment relationship is “direct or indirect remuneration.”
- If the intern is not receiving any financial benefit from the alleged employer, the analysis stops. (i.e. no Step 2): i.e. no employment relationship!!

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

See, *O'Connor v. Davis* (Con't.)

#### **Step 2:**

- If, however, the intern is receiving a direct or indirect financial benefit from the alleged employer, the court will then undertake a Step 2, or traditional agency Common Law analysis, i.e.:
  - right to control manner and means of work
    - skill required
    - tools and instrumentalities
    - location of the work

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

See, *O'Connor v. Davis* (Con't.)

##### **Step 2 (Con't.):**

- duration of the relationship
- method of payment (hourly or by the piece/project), and
- whether the work is part of the regular business of the hiring party, etc.

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

**CONCLUSION 1** = INTERNS: The test would be the same for interns of federal contractors under THE COMMON LAW.

- a) If you are NOT paying your intern, you and OFCCP SHOULD find the intern is NOT an employee. “The analysis stops.”
  - The Intern is not within OFCCP’s jurisdiction for ANY purpose: not in the AAP, not in Disparity Analyses, not in recordkeeping; no job listing, etc.

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 1) Interns (Con't.):

**CONCLUSION** = INTERNS (Con't.):

##### b) But what if you pay the Intern?

- Then go to step 2 of Common Law test
  - Lifeline: See slides 17-19, above
    - If Intern is a Common Law Ee, s/he, goes in AAPs for all purposes as to Applicants, Organizational Profile, Job Groups, Availability, etc., Disparity Analyses, Recordkeeping, Job Listings, etc.

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

- NOTE: There would be a different result under the FLSA: Free work is NOT an escape from FLSA liability, even though it is the “winning card” in a Common Law analysis
  - So, you could win the OFCCP claim, but lose the Wage-Hour minimum wage and overtime case

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 2) Temporary Ees Under The Common Law Test

See, e.g., *Francis v. Town of Brookneal*, 2007 U.S. Dist. LEXIS 36608 (W.D. Va. May 18, 2007) (temporary maintenance workers hired through a staffing company were **NOT** common law employees of the defendant Town for purposes of Title VII because they failed the Step 2 Common Law “control” analysis):

1. Town managers did not have the right to control the workers;
2. workers were not on the defendant's payroll;

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 2) Temporary Employees (Con't.)

See, e.g., *Francis v. Town of Brookneal...* (Con't.):

3. workers did not receive benefits through The Town;
4. workers were short-term; and
5. because the contract between the defendant and the staffing agency clearly stated the workers were employees of the staffing agency.



### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 3) Partners Under Common Law Test

See, e.g. *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)

- Issue: Were Shareholders/Directors/Owners/Doctors (“SDODs”) “employees”?
- Wells was an employee who filed an ADA charge. Clackamas, however, lacked 15 employees, unless one counted the SDODs as “employees.”

NOTE: ADA does not define “employees” ... so, Common Law test applies

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 3) Partners (Con't.)

- SCOTUS remanded the case to trial court to determine whether the SDODs were “employees” (i.e. whether Clackamas exercised control over the SDODs)

**CONCLUSION:** Partners who are under the control of the management, who do not have equity stake in business, are “employees,” and go in AAPs, Disparity Analyses and job listings, etc.

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

- 4) Medical Residents: Definitely employees under Common Law Test (under hospital control)
  - Now also subject to FICA withholding: Mayo Foundation For Medical Education and Research vs. U.S., 562 U.S. 44, 131 S. Ct.704 (2011)

**CONCLUSION:** Medical residents go in AAPs for all purposes, in Disparity Analyses and job listings, etc.

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 5) Part-Time Ees

- OFCCP intended in 2000 to sweep “all” Ees into AAPs/Disparity Analyses, etc. - - including part-time Ees:

“Each employee in the Kor’s workforce must be included in an affirmative action program.”  
*(emphasis added)*

- See 41 CFR § 60-2.2 (d)

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 6) Co-op Students:

- These are students getting school credit for working and also getting pay, in part
- Common Law Analysis:
  - Not “volunteers” pursuant to Common Law because paid: So, proceed to Step 2
  - Step 2 Lifeline: See Slides 17-19, above

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 6) Co-op Students (Con't.):

Typically companies treat Co-op students as follows:

- right to control manner and means of work
- skill required
- tools and instrumentalities
- location of the work
- duration of the relationship
- method of payment (hourly or by the piece/project), and
- whether the work is part of the regular business of the hiring party, etc.).

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 6) Co-op Students (Con't.):

**CONCLUSION:** Co-op Students are almost always found to be Common Law Employees and thus go in AAPs/Disparity Analyses, etc

- Separate Job Title from any non-co-op employees who do the same work?
- Separate Job Group
- How do you calculate availability?
- Lifeline: See availability factor 3 = Applicant Flow

### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 6) Co-op Students (Con't.):

- But, will your co-op students be there on “school picture” day?
- If not, these Ees are not in AAP, but will nonetheless be in the subsequent Disparity Analyses
  - List jobs? [Yes]



### III. WHAT IS THE COMMON LAW (Con't.)

#### B. Special Issues (Con't.)

##### 7) Seasonal Ees:

- These are Common Law Ees
  - What's the issue? They are “employees”

**CONCLUSION:** Seasonal Ees go in AAPs/Disparity Analyses, etc.

- But, are they on-roll on “school picture day”?
- If so, separate JT? Separate JG? (How to calculate availability? Applicant Flow?)
- In your Disparity Analyses? [Absolutely!]

## IV. RECAP

	ISSUE:	COMMON LAW EMPLOYEE?
1	Interns	No, if not paid. If paid, apply Common Law test. If control, then Ee.
2	Temporary Employees through staffing company	Apply Common Law test: If control, then Ee.
3	Partners	Apply Common Law test: If control, then Ee, not "Partner."
4	Medical Residents	Always employees.
5	Part-Time Employees	Yes. Ees. Now must include them in AAPs, Disparity Analyses, etc. since OFCCP no longer has legal duty to publish change in interpretation of its Rule in <i>Federal Register</i> and to seek Comment.
6	Co-op Students	Yes. Typically Ees since they are students, learning a trade and often also in safety sensitive areas necessitating great Er control.
7	Seasonal Employees	Yes, but they often miss E.O. 11246 AAP "School Picture Day," but will nonetheless go in the Disparity Analyses, job listings, etc.