

## CHAPTER I

# WHO IS AN EMPLOYEE?

### A. Introduction

A person who works for another is not necessarily an “employee.” Persons who are not employees, but who work for another person or firm, usually fall into the category of “independent contractors.” The status of “employee” brings to bear a special set of rights and duties under the law that does not apply when the person merely contracts to do work for another.

The same person might be classified as an employee under one statute or legal doctrine but not under a different one. For instance, a person might qualify as an employee under the Fair Labor Standards Act, but not under the Internal Revenue Code. Additionally, some regulatory statutes may cover persons even if they are not “employees.”

Circumstances determine whether or not it is in the interest of workers or firms to characterize their relationship as an employee-employer relationship. Would-be employers and employees often have differing interests, and therefore contest the classification.

### B. Employees vs. Independent Contractors

1. **Disadvantages and Advantages of the Employee Classification**—Classifying workers as “independent contractors” rather than “employees” can create substantial advantages for a firm. With the “independent contractor” classification, would-be employers may be able to avoid provisions of the Fair Labor Standards Act (FLSA) including minimum wage and overtime pay. Independent-contractor status can also excuse firms from paying Social Security taxes and unemployment-insurance premiums on behalf of their workers. One advantage for employers in having workers classified as “employees” is that worker’s compensation laws can be used to preclude tort suits by injured workers.
2. **“Right-to-Control” Common-Law Test**—Under the common law, a worker is an employee if the employer can control the manner in which the work is done. In contrast, **a worker is an independent contractor if the hiring party controls only the ultimate result** of the work, leaving decisions about when and how to do the work to the contractor.
  - a. **Example:** A software programmer is hired to create a spell-checker for a word-processing program. The firm sets the parameters of the needed programming, occasionally meets with the programmer to resolve technical problems, and takes delivery of the programming. This programmer would be an independent contractor. However, if the programmer were hired into a department where the

company supervised his work and directed his tasks to fit into the effort of the whole programming team, the programmer would be an employee.

- b. Note that **the right-to-control test is narrower than the economic realities test**, discussed *infra*. That is, the right-to-control test classifies fewer people as employees.
  - c. **The IRS uses the common-law test** to determine whether workers are employees for the purposes of federal taxation. The IRS adds to or modifies the test, however, by setting out a list of factors to assist in determining which employees fall under the common-law definition.
- 3. The Economic-Realities Test**—Under the Fair Labor Standards Act (FLSA), whether someone is an employee depends on the “economic reality” of the relationship, as opposed to the common-law focus on formalistic issues of control over work. The economic-realities test is, under the totality of the circumstances, **if the worker is economically dependent on the hiring party, then the worker is an employee**. *Secretary of Labor v. Lauritzen* (7th Cir. 1988) and *Donovan v. DialAmerica Marketing, Inc.* (3d Cir. 1985) use six factors for the economic-realities test.
- a. **Control**—If a defendant controls the manner in which the work is done, rather than relinquishing control to the worker, the defendant is an employer.
    - i. Note that this one factor is similar to the entire common-law test.
  - b. **Profit and Loss**—The more exposure workers have to profit and loss, the less likely they are to be employees. Contractors face a risk of loss and the possibility of achieving higher profits through the better management of their work.
  - c. **Capital Investment**—Interrelated to profit-and-loss, the more of an investment workers make in tools, supplies, or other initial outlays, the less likely they are to be employees.
  - d. **Degree of Skill Required**—A high degree of skill militates in favor of workers not being employees.
  - e. **Permanency**—The more temporary the relationship, the less likely it is to be an employment relationship. Permanent arrangements (even if they are seasonal and recurring) favor finding that workers are employees.
  - f. **Integral Part of Hiring Party’s Business**—The more integral the work is to the would-be employer’s business the more likely it is that the persons doing such work are employees.
    - i. **Example:** Special efficiency consultants hired to streamline an automobile manufacturing process would be independent contractors. Assembly-line workers, however, who are employees, are integral to the core business of an automobile manufacturer.

- g. **Dependence of Workers**—The more the workers depend upon income from the defendant, the more likely it is that they are employees. Independent contractors often have more than one party for which they work.
- 4. **Statutory Function Test**—In a concurrence to *Lauritzen*, Judge Easterbrook advocated looking at the intended function of the statute at issue to determine whether workers should be treated as employees.
- 5. **Ability to Contract Out of Employee Status**—Most statutes prevent workers and firms from contracting out of the employment relationship. Courts will look to the circumstances of the relationship, regardless of what label the parties have agreed to.
  - a. **The Vizcaino Case:** Microsoft hired workers as “independent contractors,” but the workers were determined to have the legal status of employees. These employees were entitled to retroactively awarded employee benefits, even though they had contracted for compensation without such benefits. *Vizcaino v. Microsoft Corp.* (9th Cir. 1997).

### C. Coverage of Statutes

- 1. **Specific Statutory Definitions of Employees**—Statutes utilize different definitions of “employee.” The definitions may be contained in the language of the act, or developed through caselaw.

*See discussion of individual statutes to determine whether a worker would be considered an employee for that specific law.*

- 2. **Covered Employers and Employees**—Statutes may exempt employers and employees from their provisions for various reasons. For instance, federal and state statutes usually limit their coverage to firms with a certain minimum number of employees. Federal statutes also are generally limited to firms or industries that have a connection to interstate commerce.

*See discussion of individual statutes in this outline to determine coverage under those laws.*

CHAPTER IX

WORKERS' COMPENSATION

A. Introduction

1. **History**—During the industrial revolution, various evolutions of tort law made it increasingly difficult for employees to recover from their employers for injuries suffered in the workplace. In addition to establishing the negligence of the employer, a worker had to show that he had not *assumed the risk* of the employment or *contributed to the negligence* that caused the injury-producing accident.
2. **The Workers' Compensation Solution**—States enacted workers' compensation regimes that shield employers from large awards of punitive and compensatory damages in tort suits and at the same time make it much easier for workers to recover some compensation.
3. **Negligence Not Required**—Employees may recover workers' compensation benefits regardless of whether the employer was negligent.
4. **Causation Standard Different**—Rather than traditional tort concepts of causation, workers' compensation is awarded based on the concept of “in the course of and arising out of employment.”
5. **Benefits**—Workers' compensation benefits include payment of medical bills for the injury and disability benefits, which are usually calculated as a fraction of lost wages.
6. **Funding**—Employers can either pay premiums into a workers' compensation insurance fund or they can choose to self-insure. If employers opt for insurance coverage, the premiums are experience-based, so that employers with higher-accident rates will pay more in premiums.
7. **The Workers' Compensation Trade-off**—Workers' compensation schemes involve a trade-off for both workers and employers.
  - a. **For workers**, workers' compensation allows recovery regardless of employer negligence. This means that workers need not go through the difficult and expensive process of trying to prove that the employer was at fault for the injury. Additionally, workers can claim benefits for non-negligent injuries that the tort system would never provide. The disadvantage for workers is that their recovery is limited, often to two-thirds of lost wages. Also, permanent disabilities, such as the loss of a limb, are subject to maximum benefit caps, meaning that even as the worker continues to suffer from the injury, workers' compensation benefits may run out.
  - b. **For employers**, workers' compensation limits their liability, shielding them from large recoveries in lawsuits. Although employers avoid the risk of large losses sustained in legal actions, they must pay a regular premium to the state's workers-compensation fund. The premiums are experienced-based, so that dangerous firms

must pay more. Nonetheless, a disadvantage for safe firms is that even where employees suffer zero injuries, the company will still be required to pay minimum premiums to the workers' compensation fund, unless they can self-insure.

***FOR BETTER UNDERSTANDING:*** Because of the trade-off involved in workers' compensation, the **employers and employees may find themselves on different sides of the question of whether workers' compensation should be granted.** An employer trying to avoid paying workers' compensation benefits may argue that an accident is not covered by workers' compensation. An employee, however, may also argue that an injury is not covered by workers' compensation if that employee is attempting to open up the possibility suing the employer in tort.

## B. Requirements for Obtaining Benefits

A claim for workers' compensation is subject to a four-prong test. For an employee to obtain workers' compensation benefits, there must be a:

- i. Personal injury;
- ii. Resulting from an accident;
- iii. That occurs during the course of employment;
- iv. And arises out of employment.

The course-of-employment requirement deals with the time, place, and circumstances of the activity and associated injury. The arising-out-of-employment requirement is concerned with the causation question: Can the employment be said to be the cause of the accident?

Each of these requirements is explored in detail below.

1. **Personal Injury**—While most injuries are clearly compensable, the “personal injury” requirement becomes a point of contention when the injury involved includes a component of mental illness.
  - a. ***Physical-Physical***—Where both the cause and the effect are physical, the harm will be considered a personal injury.
    - i. ***Example:*** Where a blackjack dealer loses a finger because a security camera fell from the ceiling, the physical-physical injury is compensable.
  - b. ***Physical-Mental***—Where the cause is physical and the effect is physical and mental, the vast majority of states will consider the condition to be an “injury” for purposes of determining compensability.
    - i. ***Example:*** If a security camera falls on the blackjack dealer causing her to lose her arm and she therefore suffers a nervous breakdown, the mental consequence is considered an injury in most states.

- c. **Mental-Physical**—If the cause is mental, and the effect is physical, most courts will consider the physical injury to be a compensable personal injury.
    - i. **Example:** If the stress of being held at gunpoint during a casino robbery causes a blackjack dealer to inflict self-injury which mangles the fingers she uses to deal cards, most jurisdictions would allow compensation.
  - d. **Mental-Mental**—Cases in which both the cause and the effect are mental, and there is no accompanying physical cause or effect, the injury requirement is not usually met. Jurisdictions vary in their treatment of mental-mental cases.
- 2. Resulting from an Accident**—“Accident” may be defined in some states as a sudden, unexpected occurrence that happens in a particular place at a particular time. Using such a definition, some states have interpreted the accident requirement to exclude conditions that develop over a long period of time—such as disease arising from long-term exposure to hazardous materials, including asbestos-linked cancer.
- 3. Course of Employment**—An injury must arise during the course of employment to be covered by workers’ compensation. In general, activities that happen when one is working are covered; those that occur when one is not working are not covered. Case law has focused on situations that do not clearly fall into either category.
- a. **Recreational Activities**—Employer-sponsored recreational activities, such as company softball games, may or may not be covered by workers’ compensation.
    - i. **The “reasonable expectancy” test**—If the employee was expected to be involved in the recreational activity, then the activity is covered by workers’ compensation.
    - ii. **Subjective/objective components must be met**—For the activity to be covered, it must be the case that reasonable employees would believe that they were expected to participate in the activity (objective) and that the employee in this particular case actually thought that participation was expected (subjective).
    - iii. **Facts relevant to a finding of “reasonable expectancy” include:**
      - 1) Encouragement or pressure from the employer;
      - 2) Involvement by the employer in the activity;
      - 3) Benefit to the employer (e.g., “team-building”).
    - iv. **Example:** A summer associate at a law firm is hurt while she is playing softball for the firm’s team. The firm organized the team and encouraged participation in order to build camaraderie. Furthermore, without the participation of three females, the team would be forced to forfeit the game. Because of the encouragement, involvement, and benefit to the employer, the activity is covered by workers’ compensation. *Ezzy v. Workers’ Compensation Appeals Board* (Cal. App. 1983).
  - b. **Horseplay**—Rubberband fights, roughhousing, and other horseplay activities in the workplace are usually covered by workers’ compensation.

- i. **The “aggressor defense”**—While bystanders injured by horseplay are almost always covered, the employer may show that the person injured in the horseplay was a perpetrator of the conduct. A perpetrator can be considered to have temporarily “abandoned employment,” making the conduct ineligible for workers’ compensation coverage because the abandonment means the injury did not arise “during the course of employment” and benefits are therefore unavailable. Courts may, however, extend benefits to perpetrators of the horseplay based on the connection of the horseplay to the work environment.
  - 1) **Bystanders**—Some courts decline to recognize a difference between participants and bystanders, finding that if the horseplay is a natural byproduct of a stressful work environment, all workers are covered.
- c. **Commuting and Travel**
  - i. **The coming-and-going rule**—Injuries sustained while commuting are generally not covered by workers’ compensation, since workers’ compensation regimes are not intended to protect employees from the general perils of life outside the workplace. The “coming-and-going” rule holds that injuries sustained while coming to and going away from work do not arise during the course of employment. Coverage usually begins when the worker enters the employer’s property.
  - ii. **Exceptions**—This rule is inapplicable (or excepted) in several circumstances:
    - 1) **Necessary passages and noncontiguous spaces**—If employees must traverse a certain stretch of land in order to get to work, the employee may be awarded compensation for accidents occurring on that land. An exceptional danger posed by traversing that space will further increase the likelihood of coverage.
      - a) **Example:** If an employee worked as a fish packer at the end of a public pier, and the employee had to come to work when traversing the pier was made dangerous by storm conditions and high waves, then injuries sustained on the pier would be covered.
    - 2) **Special hazards near employer property**—Although jurisdictions vary, courts will sometimes award compensation for injuries caused because employees are exposed to hazardous conditions on public spaces near the employer’s property.
    - 3) **Returning to work**—When an employee must make a special trip from home during off-duty hours, such as coming back to the workplace to lock a door or turn off a machine, injuries sustained in transit are usually covered.

- 4) **Travel on employer-owned conveyances**—If the employer provides buses or other vehicles for commuting employees, injuries are usually covered.
  - 5) **Vehicle required at work**—If the employee drives a vehicle to work because the vehicle is required during working hours to carry out certain work-related tasks, the commute is usually covered.
- iii. **Travel for Work**—If the employee travels for work, such as on sales trips or to conferences, compensation is always available for injuries sustained during the performance of work-related tasks. Increasingly often, courts are awarding compensation for injuries sustained while dressing, eating, and bathing during the time in which the worker stays in hotel accommodations, since these tasks are considered essential to work-related travel.
- 1) Activities undertaken on a business trip, which are of an exclusively personal nature and not necessary to work performed on the business trip, are generally not covered by the workers' compensation regime.
4. **Arising Out of Employment**—This requirement of workers' compensation coverage deals with the issue of causation. Whether or not a certain injury must be compensated depends on the category of risk into which the injury falls.
- a. **Types of Risk**—There are three general categories of risk. The vast majority of cases fall into the categories of occupational risk or personal risk, and are therefore easily resolved without further analysis.
    - i. Occupational risks—*always compensable*.
    - ii. Personal risks—*never compensable*.
    - iii. Neutral risks—*sometimes compensable*.
      - 1) Only injuries associated with a “neutral risk” require further analysis (discussed *infra* at IX.C.2.d) to determine whether or not they are compensable.
  - b. **Occupational Risks**—Also called “employment risks,” occupational risks are those that are directly related to the job at hand. The potential of a factory machine to break and injure a nearby worker is clearly an occupational risk.
  - c. **Personal Risks**—Succumbing to a heart attack caused by arteriosclerosis while at work would not be covered, because the risk of suffering such a heart attack, caused by poor nutrition, lack of exercise, and genetic propensity, has nothing to do with work.
  - d. **Neutral Risks**—So-called “neutral risks” are those that are not clearly occupational or personal. Examples include acts of nature and assaults by strangers. Various jurisdictions use different doctrines in evaluating the facts of particular case and deciding whether or not to award compensation.



- *These doctrines are presented from the least liberal in providing for compensation to the most liberal. This order also mirrors the general historical trend of increasing willingness of courts to grant compensation.*
- i. ***Proximate-cause doctrine***—This doctrine is borrowed from tort law. To satisfy the proximate-cause test, the worker must prove that there is an unbroken chain of causation, without intervening causes, which links an employer action to a foreseeable harm for the worker. Given that workers' compensation is intended to have broader coverage than tort law, this doctrine is seemingly inappropriate and is scarce in contemporary cases.
  - ii. ***Peculiar-risk doctrine***—To satisfy this test, the risk must be “peculiar” to the workplace and not present for members of the general public. Thus, steam burns from boilers would be compensable, but a delivery person's injuries sustained in an automobile accident would not be compensable, since the public-at-large is exposed to the hazards of auto accidents. Modern courts have largely abandoned this doctrine.
  - iii. ***Increased-risk doctrine***—Less severe than the peculiar-risk doctrine, the increased-risk doctrine demands only that the risk must be greater than that borne by members of the general public. Under this doctrine, a person charged with sitting in a crow's nest in South Florida would suffer an increased chance of being hit by lightning than the average member of the public, and her lightning-burn injury would be compensated. Likewise, a delivery person who spent eight-hours a day on roads with high-accident rates would suffer an increased risk of auto accidents compared to most people, and therefore would be compensated under an increased-risk test.
    - 1) ***Specific statutory inclusion of accidents on public thoroughfares***—Note that workers not employed primarily as drivers, but only required to drive occasionally as a part of their jobs, would have a difficult time showing increased risk. Thus in many increased-risk states, statutes specify that injuries sustained while traveling in the course of employment will be covered.
  - iv. ***Actual-risk doctrine***—As long as the risk is one that actually accompanies employment, the resultant injury will be compensated regardless of whether workers have a higher chance of being injured in this particular way than the general public does. For instance, tripping over an electrical cord that the worker installed in order to operate a computer would be an actual risk of employment, even though the risk might be the same or less than that suffered by the general public. This doctrine has been adopted by a large number of states.
  - v. ***Positional-risk doctrine***—Any injury which would not have been sustained but for the fact that the employee was in a certain place at a certain time because of his employment is covered under the positional-risk doctrine. A meteor-impact at the office would qualify, for instance,

since the worker would not have been at the office but for the fact that he was employed there. This is the applicable doctrine in a growing minority of jurisdictions.

- 1) Note that while the positional-risk doctrine is very permissive, it is not the same as a repudiation of the arising-out-of-employment requirement. Many personal risks—such as a heart attack caused by arteriosclerosis—would strike an employee whether at work or elsewhere, and therefore are uncompensable under the positional-risk doctrine.

**5. Arising-Out-of-Employment and Course-of-Employment considered together—**

Some courts hold that a strong case for arising-out-of-employment will offset a weak showing for the course-of-employment requirement.

- a. *Example:* When very long hours without rest and/or where exposure to drowsiness-inducing chemicals causes the worker to fall asleep while driving home, the injury may be compensable despite the fact that the accident happened during the commute and therefore would normally fall under the coming-and-going rule.

### C. Typology of Benefits

1. **Introduction**—There are two basic types of benefits: the provision of medical and rehabilitation care, and the payment of cash to compensate for lost-earnings capacity because of disability or death. The touchstone for workers' compensation benefits is *earning capacity*. Benefits are not calculated to compensate the worker for the harm the injury will have on her greater well being, but rather the effect on her ability to work and earn wages.
2. **Medical and Rehabilitation Care Benefits**—Workers' compensation will typically pay for the entire amount of medical care and rehabilitation required for the worker's recovery. However, if the worker reaches a plateau of recovery, where she has not been fully restored to her pre-accident health, but appears not to be capable of getting better, many regimes will cease to provide medical and rehabilitation benefits, allowing the worker to receive disability benefits if she is eligible.
3. **Cash Payments for Disability and Death**—To compensate a worker—at least partially—for lost wages, the worker is given cash payments. Benefits may be disbursed under five statuses:
  - a. *Temporary Partial Disability*—Workers who temporarily suffer reduced earnings may be paid a fraction of their lost wages.
  - b. *Temporary Total Disability*—Where a worker cannot work at all for a limited time, cash payments equal to some percentage of wages will be paid to the worker.

- c. ***Permanent Partial Disability***—A worker who can work, but has a permanent condition that will reduce earnings capacity, may receive permanent partial disability payments. These may come in two varieties:
  - i. ***Scheduled***—States have lists of set rates of disability payments for the loss of various limbs and for other impairments and diseases. Using a scheduled-benefit scheme, disabled workers receive a set amount of money for their lost limb or injury, without regard to their actual reduction in earnings capacity.
  - ii. ***Unscheduled***—Some injuries are not compensated according to a schedule or chart, but are calculated according to the circumstances of the individual case.
- d. ***Permanent Total Disability***—The status of permanent total disability applies to workers who will never be able to work again, even in a partial capacity. Permanent total disability payments are usually based on lost earnings capacity.
- e. ***Death***—When a worker is killed through a work-related accident, workers' compensation may provide death benefits to the dependents of the worker.

## D. Exclusivity/Preclusion

1. **General Rule**—Workers' compensation is intended to be the **exclusive means of recovery for a worker against the employer**, thus workers' compensation precludes the possibility of tort suits against employers. There, are however, exceptions to this rule.

### 2. Exceptions

- a. ***Intentional Wrongs***—If the employer intentionally injured the employee, then a tort suit may go forward.
  - i. ***Genuine intentional wrongs***—If the injury is the result of a genuine intentional wrong, there is no tort immunity.
    - 1) In some courts, if the employer created a condition in which the employer knew or should have known that there was a **substantial certainty** that injury would result, then the wrong is considered intentional.
  - ii. ***Reckless or wanton acts***—In some courts, reckless or wanton behavior by an employer is not covered by workers' compensation and thus a tort suit may go forward. In other jurisdictions, reckless or wanton acts are covered by the workers' compensation scheme and are shielded from tort liability.
  - iii. ***Fraudulent concealment***—Where company doctors discover an employee's illness, but do not inform the employee, a theory of fraudulent concealment may allow a suit for worsening of the condition caused by a delay in proper medical treatment. The underlying condition, however,

would still be barred by the exclusivity provision, unless it fell under another exception.

- b. **Dual Capacity**—In some states an employee may sue her employer if she is injured when the employer acts in a non-employer capacity. For instance, in some jurisdictions, a person employed by a physician may sue the physician for medical malpractice when the injuries result from the physician/patient relationship rather than the employer/employee relationship.
  - c. **Third-Party Defendants**—Employees are sometimes free to sue parties other than the employer, such as contractors, suppliers, and other employees, although jurisdictions vary. Occasionally, these third parties can sue the employer for contribution toward the judgment, meaning that employers may end up with tort liability despite workers-compensation/tort immunity.
    - i. **Third-party plaintiffs**, such as spouses or children of workers, are ordinarily barred from suing the employer in tort, just as the worker is.
  - d. **Federal Causes of Action**—If an employee is specifically authorized to sue under a federal statute, such as Title VII, the suit may go forward. State workers' compensation schemes cannot bar suits under federal law.
3. **Preclusion Without Recovery**—In some jurisdictions it is possible for a tort suit to be precluded even when workers' compensation is not awarded. This is because the tort-preclusion aspect works separately from the scheme that determines whether compensation will be awarded. Thus, an injury arising out of and in the course of employment will trigger the preclusive aspect of a workers-compensation statute. If the injury is unaccompanied by an industrial liability, it will not be compensable by disability benefits.
- i. **Example:** If a factory worker suffers an accident that gives her disfiguring burns, some workers' compensation regimes would not award benefits to the worker since the disfigurement does not affect her ability to work. Additionally, the worker could not receive disability benefits or tort-like compensation for pain and suffering or emotional distress absent intentional wrongdoing on the part of the employer. The worker would, however, ordinarily be able to receive medical benefits from workers' compensation to cover the cost of treatment for the condition.