Coalition to Promote
Independent Entrepreneurs
ICCoalition.org · (202) 659-0878

December 7, 2017

BY EMAIL
Mr. Steve Richardson
Office of the Assistant Secretary
for Administration and Management
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on the Draft DOL FY 2018 – 2022 Strategic Plan

Dear Mr. Richardson:

On behalf of the Coalition to Promote Independent Entrepreneurs,[1] we appreciate the opportunity to submit comments on the FY 2018-2022 Strategic Plan for the U.S. Department of Labor ("DOL").

We have only one request, namely, that DOL's FY 2018 – 2022 strategic plan include within its Strategic Objective 2.3, which will focus on securing lawful wages and working conditions for America's workers, the opening of a new regulation project devoted to updating the regulations that define the term "employee" for purposes the Fair Labor Standards Act ("FLSA") to reflect more recent U.S. Supreme Court precedent.

I. Summary of Request

Commencing in 1947, courts have followed an "economic realities" test to define the term "employee" for purposes of the FLSA. DOL regulations contain a definition for the term that reflects this test. And most (but not all) federal courts continue to apply an "economic realities" test for the term "employee" for these purposes.

But a trilogy of more recent U.S. Supreme Court decisions hold that a common-law test governs the term "employee" for purposes of a statute that defines the term with a definition that is circular. The FLSA defines the term "employee" with a definition that is circular. It follows that the definition given the term "employee" in DOL regulations conflicts with the test the U.S. Supreme Court held is to govern the term, as so defined.

[1] The Coalition to Promote Independent Entrepreneurs, www.iecoalition.org, is a coalition dedicated to preserving an individual's right to be self-employed and a company's right to do business with self-employed individuals. Its members consist of associations, companies and independent entrepreneurs.

To resolve this conflict, we urge that DOL open a new regulation project to consider updating its regulatory definition of the term "employee" for purposes of the FLSA to reflect more recent U.S. Supreme Court precedent.

II. Origin of the Economic Realities Test

During the 1930s, Congress enacted three statutes as part of the New Deal legislation, namely the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.* ("NLRA"), the Social Security Act of 1935 (the "SSA"), 42 U.S.C. § 401 *et seq.*, and the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"). The U.S. Supreme Court interpreted the term "employee" for purposes of each of these statutes by adopting an "economic realities" test, reasoning that the intended coverage of each statue was broader than what would be permitted at common law.

The first U.S. Supreme Court decision to interpret the term "employee" for purposes of a New Deal statute is *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). The Court rejected a common-law test to define the term "employee" for purposes of the NLRA and, instead, adopted the broader economic realities test.[2]

Three years later, in *United States v. Silk*, 331 U.S. 704 (1947), the U.S. Supreme Court, relying on its decision in *Hearst*, determined that an economic realities test should be used to define the term "employee" for purposes of the SSA.[3] Later that same year, the U.S. Supreme

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[2] To arrive at this interpretation, the Court reasoned:

> *Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations*, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.
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> *It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions* or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. *That result hardly would be consistent with the statute's broad terms and purposes.*

NLRB v. Hearst Publs. 322 U.S. 111, 120, 124-25, (1944) (emphasis added).

[3] In reaching this conclusion, the Court reasoned:

> Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. *The very specificity of the exemptions, however, and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation.* As the federal social security legislation is an attack on recognized evils in our national economy, *a constricted interpretation of the phrasing by the courts would not comport with its purpose. . . .*
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> Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case.

United States v. Silk, 331 U.S. 704, 711-12, 714-15 (1947) (emphasis added).

Court decided *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), in which the Court adopted an "economic realities" test to define the term "employee" for purposes of the FLSA.[4]

III. Return to the Common-Law Test

Subsequent to the U.S. Supreme Court decisions in *Hearst* and *Silk*, Congress enacted legislation to reverse the Court's expanded scope of coverage under the NLRA and SSA. In June 1947, Congress amended the definition of the term "employee" for purposes of the NLRA to exclude "any individual having the status of an independent contractor."[5] The next year, Congress in June 1948 similarly amended the definition of "employee" for purposes of the SSA to adopt a common-law test.[6]

While Congress has not taken similar action with respect to the FLSA, subsequent U.S. Supreme Court decisions adopted a common-law definition for the term "employee" for purposes of a statute that does not define the term or defines it with a definition that is circular.

The first such decision is *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). This case involved the Copyright Act of 1976, 17 USC § 101 *et seq*. The Court observed that the Copyright Act of 1976 does not define the term "employee." It applied a common-law test, as articulated in the Restatement (Second) of Agency § 228 (1958), to define the term.[7]

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[4] The Court's interpretation was based on the following analysis:

> [I]n determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See *N. L. R. B.* v. *Hearst Publications*, 322 U.S. 111, 128-129. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.

Walling v. Portland Terminal Co., 330 U.S. 148, 151-52 (1947).

[5] *See* 61 Stat. 137, ch 120, Title I, § 101 (1947). *See also NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (The "obvious purpose of this amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors . . . there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor." *Id.* at 256).

[6] The Congress amended the SSA exclude "(1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules." *See* 62 Stat. 438, ch 468, § 2(a) (1948).

[7] In reaching this decision, the Court reasoned:

> The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *See, e. g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).

Several years later, the U.S. Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), interpreted the term "employee" for purposes of Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA"). Characterizing ERISA's statutory definition of "employee" as circular, the U.S. Supreme Court adopted the common-law test for the term.[8]

The final decision in this trilogy is *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003), which considered the definition of "employee" for purposes of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, ("ADA"). The U.S. Supreme Court observed that this statute, like ERISA, defines the term "employee" with a definition that is circular. Consequently, the Court adopted a common-law test.[9]

IV. DOL Should Update Regulations Interpreting the Term 'Employee' for Purposes of the FLSA to Reflect More Recent U.S. Supreme Court Decisions

The trilogy of landmark U.S. Supreme Court decisions discussed above establish the interpretative rule that the term "employee," when used in a statute that does not define the term, or that contains a definition that is circular, is to be given its meaning under the common law.

Notably, the statutory definition for the term "employee" in ERISA, which was at issue in *Darden*, is identical to the statutory definition given the term in the FLSA. Both ERISA, at

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[8] The U.S. Supreme Court reasoned:

> ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U. S. C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA, a test we most recently summarized in *Reid* . . . .

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

[9] In adopting a common-law test, the U.S. Supreme Court reasoned:

> "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992). The definition of the term in the ADA simply states that an "employee" is "an individual employed by an employer." 42 U.S.C. § 12111(4). That surely qualifies as a mere "nominal definition" that is "completely circular and explains nothing." *Darden*, 503 U.S., at 323. As we explained in *Darden*, our cases construing similar language give us guidance on how best to fill the gap in the statutory text.
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> In *Darden* we were faced with the question whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA). Because ERISA's definition of "employee" was "completely circular," 503 U.S., at 323, we followed the same general approach that we had previously used in deciding whether a sculptor was an "employee" within the meaning of the Copyright Act of 1976, see *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989), and we adopted a common-law test for determining who qualifies as an "employee" under ERISA. Quoting *Reid*, 490 U.S., at 739-740, we explained that "'when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" Darden, 503 U.S., at 322-323.

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-45 (2003).

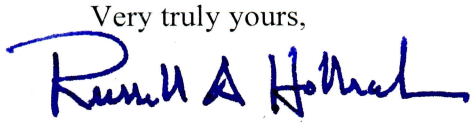
29 U. S. C. § 1002(6), and the FLSA, at 29 U.S.C. § 203(e)(1), define the term "employee" to mean "any individual employed by an employer." Yet, while the U.S. Supreme Court in *Darden* held that the term "employee" as so defined is to be interpreted under the common-law test, DOL regulations defining the term "employee" for purposes of the FLSA – which predate the *Darden* decision – continue to follow an "economic realities" test.[10] Moreover, most (but not all[11]) federal courts also continue to apply an "economic realities" test for purposes of the FLSA.

To resolve the conflict between DOL regulations and recent U.S. Supreme Court decisions interpreting the term "employee," we respectfully request that the DOL's FY 2018 – 2022 strategic plan include the opening of a new regulation project devoted to updating the definition of "employee" for purposes the Fair Labor Standards Act ("FLSA") to reflect more recent U.S. Supreme Court decisions.

If you have any questions or would like any additional information concerning the foregoing, please let me know.

Thank you very much for your consideration.

Very truly yours,



Russell A. Hollrah
Executive Director
(202) 659-0878
rhollrah@iecoalition.org

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[10] *See, e.g.*, 29 C.F.R. § 779.19 (Apr. 9, 1970) ("The employment by an 'employer' of an `employee' is, to the extent specified in the Act, made subject to minimum wage and overtime pay requirements and to prohibitions against the employment of oppressive child labor. The Act provides its own definitions of `employer,' `employee', and `employ', under which `economic reality' rather than `technical concepts' determines whether there is employment subject to its terms (*Goldberg v. Whitaker House Cooperative*, 366 U.S. 28; *United States v. Silk*, 331 U.S. 704; *Rutherford Food Corp. v. McComb*, 331 U.S. 722)"); 29 C.F.R. § 780.330 (June 17, 1972) ("In determining whether such individuals are employees or independent contractors, the criteria laid down by the courts in interpreting the Act's definitions of employment, such as those enunciated by the Supreme Court in *Rutherford Food Corporation v. McComb*, are utilized. This case, as well as others, made it clear that the answer to the question of whether an individual is an employee or an independent contractor under the definitions in this Act lies in the relationship in its entirety, and is not determined by common law concepts. It does not depend upon isolated factors but on the `whole activity.' An employee is one who as a matter of economic reality follows the usual path of an employee."). *See also* 29 C.F.R. § 783.7 (Aug. 21, 1962); 29 C.F.R. § 784.8 (Aug 20, 1970).

[11] *E.g., Tetzlaff v. United States*, No. 15-161C, 2015 U.S. Claims LEXIS 1577 (Fed. Cl. Nov. 25, 2015).