

A more fundamental distinction for the contemporary economy between employee and independent contractor status

by Michael C Harper

I. THE RESTATEMENT OF EMPLOYMENT LAW

The common law remains an intellectual battle ground in Anglo-American legal systems, even in the current age of statutes. This is true in significant part because the common law provides legitimacy for arguments actually based on policy, ideology, and interest. It also is true because of the common law's malleability and related susceptibility to significantly varied interpretations.

Mere contention over the meaning of the common law to provide legitimacy for modern statutes is most often not productive of sensible policy, however. It generally produces no more than reified doctrine unsuited for problems the common law was not framed to solve. Yet, when viewed more flexibly, not to find doctrinal rules, but rather to find insight from the collective judgment of judges about the weighing of social values, examining the common law may have a different kind of use for modern policy makers.

I came to appreciate all of the above in my work as a Reporter for the Restatement of Employment Law (Restatement) project of the American Law Institute (ALI). The ALI was founded in 1923 to help clarify and simplify common law in America by the production of what are called Restatements of that law. The membership of the ALI includes several thousand distinguished American lawyers, judges, and academics, invited to join through a membership process. The Restatements must be accepted not only by a final vote of the general membership, but also first by a self-perpetuating inner Council of about 50 members. The Restatements are to articulate in black letter with supporting illustrations and comments a wise synthesis of the sometimes variant positions taken by courts in the more than 50 judicial systems that apply American law. One of the ALI's directors explained that the Restatements should take a position on an issue that would be taken by a wise judge in a jurisdiction that had not yet ruled on the issue. This ruling presumably would be influenced by holdings and their

rationales in other jurisdictions that had ruled, but it would not necessarily embrace a majority position if the minority position was more persuasive. The first set of Restatements were completed over the next two decades in important common law topics, including contracts, torts, property, judgments, and agency. By the 1950s, the ALI started a new generation of Restatements Second, and by 1987 issued the first of the third generation. The ALI is indeed now working on some fourth generation products. There has been only one Restatement of Employment Law, however, which took over a decade to achieve membership approval in 2015.

The ALI probably had not turned to employment law as a separate topic in the twentieth century because the common law principles relevant to the regulation of employment relations were expressed in contract, tort and agency law. Furthermore, in the US as in the UK, employment and/or labour law is governed primarily by a matrix of statutes. Nonetheless, the ALI Council in the early twenty first century approved preparation of a Restatement that would bring together in one book the American common law principles that provide a background to our statutory matrix.

I was assigned as a Reporter to prepare drafts of the first chapter of this Restatement, one that would define the employment relationship that not only would set the boundaries for our project, but also, and more importantly, would articulate an effective default rule for the scope of most American employment protection and benefit statutes. The reason it would do the latter is that most federal employment or labour statutes define coverage through use of the term "employee" and then define employee in a meaningless circular fashion to be "any individual employed by an employer." As a result of this circularity, the US Supreme Court for at least the past 40 years has invoked the "common law" to provide legitimacy for its opinions concerning the scope of federal employment statutes that offer protection to employees but not to independent contractors.

The Supreme Court's invocation of the common law may

have provided some legitimacy, but it certainly has not provided clarity. The reason for this lack of clarity in the US is not simply the many state court jurisdictions with the authority to make their own common law, and a federal court system that since 1938 has been denied the authority to make general American federal common law not tied to the interpretation of statutes (see *Erie Railroad Co v Tompkins* 304 US 64 (1938)). It also is because the state court systems have not been able to develop a clear consensus on a definition of the employee relationship, even with the assistance of the ALI's Restatements.

It was not as if the ALI did not try to provide a meaningful definition, even before the recent Restatement of Employment Law. Agency law's treatment of the master's vicarious or *respondet superior* liability for the torts of servants required a definition of servant, and all three of the Restatements of Agency have attempted to provide one, primarily through a right to control test. The mid-twentieth century Second Restatement of Agency, which remains the most influential on this issue, defines servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control" (Restatement Second of Agency § 220(1)). The Restatement Second of Agency recognised, however, that the decisions could not be fully captured by so simple a formulation. A "full-time cook", "ship captains, "managers of great corporations," a "traveling salesman," and "skilled artisans ... with whose method of accomplishing results the so-called master has neither the knowledge nor the desire to interfere," all could be servants regardless of the attenuation of the master's control or even right to control physical conduct (§ 220, *Comments a, e, i*).

The Second Restatement of Agency thus supplemented the "right-to-control" test with a non-exclusive list of 10 factors to determine "whether one acting for another is a servant or an independent contractor" (§ 220(2)). It did not, however, specify whether these factors were to be used to expand the scope of employee status beyond that indicated by the right-to-control test, or rather they were to be used in service to this test. The Restatement Second of Agency thereby presented judges with great discretion and lawyers with great uncertainty.

The Supreme Court has not provided more clarity with its formulation of a default definitional line between employees who are protected by federal statutes and independent contractors who are not. That formulation, which the Supreme Court purports to be based on the common law, includes consideration of "the hiring party's right to control the manner and means by which the product is accomplished," but also lists "[a]mong the other factors relevant to [the] inquiry" 12 other factors, including six that were at least similar to those in the Restatement Second list (see *Community for Creative Non-Violence v Reid* 490 US 730 (1989)). The court has not explained why it provided additional factors or declined to include others in the Restatement list. It has offered no guidance on the relative weight that is to be given to the factors, and has even declined to confirm a primary role for the "right-to-control" factor. It

has stated only, and unhelpfully, that "[n]o one of these factors is determinative." Furthermore, in a case interpreting the circular definition of employee in the Employment Retirement Income Security Act (ERISA) the court cited not only the Restatement Second, but also an Internal Revenue Service ruling that sets forth "20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts" (*Nationwide Mutual Insurance Co v Darden* 503 US 318 (1992)). The court, however, has not explained its choice of listed factors or their relevance to any essential difference between employees and independent contractors that relates to the general purpose of federal statutes that use employment status to define the scope of their protection or benefit conferral.

In my view, multifactor tests can be helpful when a legal question turns on highly variant factual contexts. They cannot alone provide adequate rules of decision, however, without a structure provided by an ultimate question the various factors are to answer. Without such a structure, such tests offer only minimally confined judicial discretion. Factors can be tallied without regard to relative weight, or alternatively ranked in importance and subordinated, without the judge revealing what considerations are actually driving a decision.

Thus, I recognised that my challenge in formulating a definition for the employment relationship in the first chapter of the Employment Restatement was to provide clarity through an ultimate standard. That standard would have to offer an explanation for at least the more cogent decisions issued by state and federal courts purporting to apply the common law. At the least, it would have to show the relevance of the deciding factors in those cases. In order to be acceptable to the ALI Council and membership, moreover, it would have to build on language actually used by the courts, especially the "control" language.

But to be truly useful and compelling the definition also needed to distinguish between sets of workers with significantly different needs of having other entities provide the minimum protections and benefits that our statutes offer. Although the definition of course would only offer a default standard that could be modified to serve the purposes of any particular statute, the definition needed at least to provide an economically relevant base line, particularly because the pull of the common law's legitimacy resists modification. Furthermore, given the incentives for employers to cut labour costs by avoiding liability and responsibility for protections and benefits promised by employment statutes, the definition had to be one that could not be easily manipulated by employers through the structuring of their labour market and their formal contractual commitments.

The final adopted draft, in the critical language of the Restatement of Employment Law's first section, states that:

an individual renders services as an employee of an employer if ... the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively

prevents the individual from rendering those services as an independent businessperson. . . . An individual renders services as an independent business person and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers (Restatement of Employment Law, § 1.01).

This language, a product of several drafts, is not as direct as I would have preferred. It represents a necessary compromise with others centrally involved in the process and, as suggested above, with the common law's language of control. The use of the word "entrepreneurial" may be particularly unfortunate because it may suggest to some a quite different and, in my view, fully unhelpful "opportunity of profit or risk of loss" standard.

Yet, the formulation when read carefully should convey the central idea that employees are those rendering service without actual control over the use of capital, including their own human capital, and the labour of others, to advance their own interests independently of the interests of others. The standard is much better encapsulated as an independent business standard than as an entrepreneurial opportunity standard. The so-called common law standard of employer control over the manner and means of service is presented as a sufficient but not necessary way by which an employer prevents a controlled employee from operating an independent business by the allocation of capital and labour. As explained in the ALI-adopted comments to the formulation, workers whose manner and means of work are controlled by another entity are not allowed to make capital and labour allocation decisions for any independent interests that are not fully aligned with those of the controlling entity. Furthermore, as also explained in the comments, other workers – including the managerial, skilled, and off-site workers whose manner and means of work are not controlled – still may be prevented from rendering services in their independent interests by an alignment of their duties with the interests of an employer. Stated most succinctly, service is rendered as an employee rather than as an independent business person when the service renderer does not render the service with significant discretionary control over capital and labour. Retaining such control enables business persons to advance their own economic interests without also advancing proportionately the interests of another party who has denied such control.

In my view, there are two very strong reasons why the best default definition of employee for employee protection and benefit statutes is based on the difference between independent discretionary control over capital and labour, on the one hand, and the lack of such control and the consequent alignment of the worker's service with the interests of a controlling entity, on the other. First, any rational delineation of those who are assumed to be granted statutory protections and benefits as employees should be based on relative need. Workers in a

developed capitalist economy who can render service with control of capital and of labour are in a fundamentally stronger economic position to protect their own interests and provide for their own benefits than those who cannot. Second, a distinction between independent discretion and controlled alignment also provides a basis for determining whether there is another entity, or entities, that can more appropriately be assigned responsibility for the protections and benefits than can the workers themselves. If the workers do not have discretion to serve their own independent interests, if their service is to be aligned with the interests of a controlling entity, then that entity, or entities, can appropriately be assigned responsibility for the protections and benefits that the polity has determined are warranted by their work.

II. UNITED KINGDOM LAW

I had hoped that the use of the common law in the United Kingdom to define the scope of employee protection and benefit laws would offer support for my clarification and enhancement of a default scope definition for American law. After all, American jurists seeking legitimacy might view English common law to provide both the antecedents and a parallel subsequent path for American common law. Furthermore, the UK has enacted perhaps an even more tangled matrix of employee protection and benefit statutes.

But alas! In defining the scope of employee protection and benefit statutes, UK decisions also have offered unfocused multifactor tests similar to those that have lacked clarity in the US; and worse, UK decisions also have applied formulaic doctrinal distinctions that seem to be based on an unnecessary application of the common law of contracts. Like that of the US, UK law has set the limits of employment statutes through a definition that purports to be based in part on the common law. Like US courts, and like the ALI Restatements of Agency, UK courts have understood that a simple actual control or right to control test cannot make distinctions that accord with past precedents, including those defining *respondeat superior* liability. In response, UK courts have stressed additional factors – such as the degree of integration into the organisation and the worker's opportunity-for-profit-or-risk-of-loss – and often resorted to multifactor analyses, like that endorsed by the US Supreme Court, without explaining the ultimate question that application of the multiple factors is to answer.

Significantly, because UK employment statutes require that protected or benefitted workers be in a contractual relation with an entity responsible for providing the protections or benefits, British courts have determined it necessary to consider the common law of contracts in setting the scope of these statutes. In doing so, some of these courts added two further doctrinal impediments to clarity in British law.

The more important doctrinal impediment formulated by your courts through the use of contract law is the conditioning of employment status on a mutuality of obligations between workers and a putative employer (see, eg, *Nethermere Ltd v*

Gardiner [1984] ICR 612) This has provided special difficulties for casual workers who are not given commitments of future work and who are not asked to commit to accepting any work that is offered. The British courts have held that such casual workers do not have a general or “umbrella” contract on which their status as employees can be based (see *Carmichael v National Power Plc* [1999] 4 All ER 897 HL) There is no reason, however, that a worker who renders service outside the coverage of a general “umbrella” contract in consideration for an employer’s promise of remuneration should be treated differently under employee protection or benefit statutes than a worker who renders service that he or she earlier pledged to perform and the employer pledged to request. Whether or not workers under or outside such an umbrella laboured for sufficient hours over a sufficient number of continuous weeks to be covered by a statute, they should have the same protection if their working hours were the same. The need of a worker for protections and benefits is surely not less if the worker has no commitment of future work from an employer.

To be sure, British courts, after a period of uncertainty, have managed to address the problem posed by the mutuality of obligations condition by recognising that workers without a general umbrella contract with a particular employer may still qualify as employees based on a series of more specific employment contracts covering each separate period of work (see, eg, *Cornwall County Council v Prater* [2006] IRLR 362 (CA)). The decisions recognise that there is an obligation to perform and compensate service during each specific period. To achieve protection under statutes requiring continuity of employment, however, the workers still must be able to establish that any break in service between the specific contracts qualifies as a “temporary cessation of work” under the relevant employment law (ERA § 212(3)).

The other doctrinal impediment to employment status derived by British courts from the statutes’ requirement of contractual status is that the employee’s obligation be for personal service. Even an employee who has committed to ensuring that future committed work will be performed may not have the actual performance of this work covered by British employment statutes if he or she did not commit to doing the work personally.

I understand why a commitment of personal service may be relevant to the demonstration that the service will be rendered as an employee rather than as an independent contractor; as we noted in the Restatement black letter, an individual running an independent business in their own interest generally will have the discretion to satisfy contractual commitments through the allocation of workers as well as capital. Thus, the decision in *Mirror Newspaper Group Ltd v Gunning* seems to have correctly rejected employment status for a daughter who took over ownership of her deceased father’s newspaper delivery business ([1986] ICR 145 (CA)) Moreover, the British courts have mitigated the impact of the personal service requirement by recognising that contractual provisions that allow or require substitute workers may not reflect the reality of the economic

relationship and thus can be set aside as shams (*Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All ER 745 [2011] ICR 1157 SC).

However, in cases where there is not a true independent business being operated, a worker’s actual discretion to share hours with or substitute another labourer to do the same work and collect the same pay does not mean that the actually performed work of the contractually bound worker or the substituted worker is in less need of protection or benefit than work performed by a contractually obligated worker. Drawing a distinction based solely on a personal service commitment, like drawing a distinction based on the existence of an overarching mutuality of obligations constitutes doctrinal formalism with no nexus to the purpose of employee protection or benefit statutes. Both distinctions only serve to provide employers with possible loopholes to obtain cheaper labour by escaping the force of employment statutes.

Parliament, unlike the American Congress, however, has at least made some purposeful attempts to break the bounds set by reified common law doctrine. I refer in particular to the broader coverage of statutes passed by the new Labour Government in 1998, including the National Minimum Wage Act 1998, the Working Time Regulations Act 1998, and the Public Interest Disclosure Act 1998. These statutes cover not only workers with (a) contract of employment, but also those subject to:

... (b) any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual (Employment Rights Act 1996, § 230(3)).

Also, the Equality Act 2010 prohibits race, sex, age, disability, gender reassignment, marriage, pregnancy and childbirth, religion or belief, and sexual orientation discrimination in employment for those who are employed under or apply to be employed under “a contract personally to do work” (§ 83).

All of this legislation seems a commendable attempt to break free of the controlled and subordinated servant model of employment. The attempts fall short for several obvious reasons, however. First, the distinctions made by the definitions, especially in limb (b) of the worker definition, are far from clear. What, for instance, is intended by the critical word “business” in this prong? Second, this lack of clarity is compounded by the absence of rationales for not expanding coverage in all employment protection and benefit statutes. Providing especially broad coverage for any prohibition of discrimination is easy to justify, but less obvious are rationales for not providing equally broad coverage for such topics as unfair dismissal, redundancy pay, dismissal notice, and family-friendly leave, as for topics covered by the “worker” definition, such as minimum wages and vacation pay.

An additional problem with the expanded definitions of coverage in some British statutes is their apparent allowance

of continued judicial application of the personal service and mutuality of obligations doctrines. The definitions require as a condition of coverage both the existence of a contract and also that this contract commit the covered worker “personally” to do work or provide the service.

III. VICARIOUS LIABILITY AS A COMMON LAW SUPPORT

Ultimately, I do not think the cumbersome use of the common law to define the scope of employment statutes in the UK, any more than the unfocused use of it in the US, need pose an insurmountable obstacle to the formulation of a default definitional standard that can be both clear and consistent with the usual purposes of such statutes. Indeed, if used not to delineate formalistic barriers based on inapplicable contractual or master-servant models, but rather to understand how modern societies might assign responsibility for the benefits and protections they wish to attach to work, the common law can contribute to a solution rather than aggravate the problem of defining coverage. Thus, I would like to propose a different use of Anglo-American common law to define a default rule for coverage, consistent with what we proposed in the Restatement of Employment Law and reachable, I believe, through a liberal construction of the United Kingdom’s employment law statutes as well.

The common law that can be used as a source of insight is not that of contracts, but that of torts and agency. It is the law of *respondeat superior*, the law of vicarious liability of “masters” for the torts of their “servants” that provided the common law’s first reason to distinguish independent contractors from other workers classified as servants.

This use of the law of vicarious liability may seem both superficially obvious and fundamentally misguided. It may seem superficially obvious precisely because it was for purposes of *respondeat superior* vicarious liability that the common law of both the US and the UK both first used the right to control details of work as the central factor to distinguish servants from independent contractors. The use of vicarious liability as a source of insight for defining the scope of employment protection and benefit statutes, on the other hand, may seem fundamentally misguided because the master-servant relationship and its central element of total subordination and control are not descriptive of labour relationships in modern economies.

When considered more closely, however, the law of *respondeat superior* and its distinction of independent contractors offer a very different and superior model from that of a fully master-controlled servant for defining work that warrants the protection of modern employment statutes. That model is one of employer cost internalisation where there is an alignment of employee duties and employer interests. It is the alignment of their duties with the interests of their employers, not their employers’ control over their work, that ultimately distinguishes employees from independent contractors for

purposes of *respondeat superior* liability. Employer control over a worker is neither sufficient nor necessary for *respondeat superior* liability, while an alignment of an employee’s duties with the interests of the employer is both necessary and sufficient.

That master-employer control, or even right to control, is not sufficient for *respondeat superior* liability is clear from the “scope of employment” condition on such liability. Under the law of *respondeat superior*, an employer is liable for torts committed by its employees, even when those torts are committed through acts contrary to the employer’s instructions, as long as the employees are acting in accord with their duty to serve the interests of their employer within the scope of their employment. Whenever the employees, however, depart from their employer-aligned duties in pursuit of their own independent interests, “on a frolic of their own” as described in the memorable phrase, liability for any torts they commit is not imputed to their employer. This qualification is not explained by the level of control exercised by the employer over its employees because that level of control does not change when the employees take a detour from their duties to pursue their own interests. Rather what changes is the alignment of the employees’ purposeful actions with their duties to serve the interests of their employer.

The misalignment of an independent contractor’s duties with the interests of even an economically dominant contractor, rather than some variation on a control test, also explains why the dominant contractor is not responsible for an economically subordinate but independent contractor’s torts. Given sufficient incentive of potential liability, an economically dominant contractor presumably could increase its control over the subordinate contractor. But such potential control is not sufficient for vicarious liability when the subordinate contractor retains discretion over sufficient resources to pursue, at least to some extent, its own independent interests in its performance of work for the dominant contractor.

Thus, control or the potential for control is not a sufficient condition for the imposition of *respondeat superior* liability; the tortfeasor also must be exercising duties in alignment with the interests of the principal. Similarly, control or the realistic potential for control is not a necessary condition of *respondeat superior* liability. Such liability is imposed when employees are performing their duties in alignment with the interests of their employer, regardless of whether the employer is in a position to control this performance. This explains, better than any unpredictable multifactor test, why corporate chief executives, airplane pilots, ship captains, orchestra maestros, gourmet cooks, traveling salespersons and long distance truck drivers all can impose liability on their employers through torts committed while loyally performing their discretionary duties in the scope of their employment, even though outside any practical ability of their employer to control.

The principle of policy that justifies an alignment with employer-interests standard for *respondeat superior* liability might be termed reciprocal cost internalisation. An entity that causes and benefits from the service of workers should have to pay the

reciprocal external social costs resulting from that work, when the workers cannot themselves pay. This principle, of having to ensure payment for dangers created in your service, I believe, has great social appeal and explains the boundaries of *respondeat superior* liability.

The principle clearly differs from and explains better these boundaries than does one based solely on economic efficiency. Where the transaction costs of control are low, economic analysis indicates that a dominant business with economic control over an insolvent supplier or distributor should pay for the costs of the negligence of the supplier's or distributor's insolvent employee's negligence, regardless of whether that employee's duties are aligned with the interests of the dominant business. The law of *respondeat superior*, as it developed in the nineteenth century in both the UK and the US, however, does not impose vicarious liability on entities that merely benefit from the work of the tortfeasor employees of other independent employers.

Similarly, this principle of reciprocal internalisation differs from and explains better the boundaries of *respondeat superior* liability than does the other most frequent principle of policy used to explain this form of vicarious liability, the principle of distributive justice. If a wider distribution of risk could justify vicarious liability, any large business would be required to act as an insurer against the torts of employees of the most thinly connected smaller employers, at least when the employees' torts were committed in the course of work that was somehow related to their employer's connection with the large employer. Needless to say, this is inconsistent with the law of *respondeat superior* not imposing liability on dominant, larger enterprises for the torts of the employees of independent business contractors.

Once the alignment of employee duties with employer interests based on reciprocal cost internalisation is recognised as central to the common law of *respondeat superior*, the relevance of this law to defining the bounds of modern employment statutes should be clear. These statutes define the minimum protections and benefits that a modern polity has determined should be associated with a given level of work. Because these protections and benefits generally would not exist in the absence of a statutory command, no entity can be charged with directly injuring workers by their theft. Employment statutes instead impose affirmative duties on employers. This assigning of affirmative duties to incur the costs of the provision of statutory benefits and protections is like assigning responsibility for the costs of the torts of insolvent tortfeasors; a business or other entity should have responsibility to pay these costs when it may reap the benefit of work aligned with its interests. Where there is such alignment, there should be responsibility based on a principle of reciprocity: an enterprise with the opportunity to benefit fully from work should be responsible for all of its potential social costs. Where there is not the opportunity for full benefit because the work's vector is not fully aligned with the employer's interests, a worker denied statutory benefits and protections is like a third

party victim of the tort of an insolvent independent contractor. Both the worker and the victim must provide for themselves or seek support from society more generally.

This alignment-reciprocal cost internalisation analysis, however, supports a very broad scope of coverage for employment statutes. The broad coverage is consistent and not burdened by the easily manipulated, formalistic categories that have plagued Anglo-American common law. Work covered under this analysis, for instance, is not limited to work rendered under a contract of subordinate service rather than a contract for defined services. The latter through specifications and conditions can be as fully aligned as the former with the interests of a responsible employer. The old distinction of Roman law is not useful for defining the scope of modern employment statutes.

Similarly, the coverage of work need not depend on an employer's control, as long as the work is to be done and is intended to be done in the interests of the employer. Further, even work not integrated into the core of an employer's business may be performed in full alignment with the interests of the employer. And coverage need not depend on the existence of a contract for future work, whether or not with mutual obligations. The alignment-reciprocal cost internalization analysis of work can be applied *ex post* without consideration of *ex ante* obligations.

Significantly for American law, this alignment-reciprocal cost internalization analysis can be applied within the definition of the employment relationship stated in § 1.01 of the ALI's Restatement of Employment Law. Section 1.01, recall, states, in its critical language, that an employment relationship exists when an employer prevents a worker who is rendering services for an employer to do so "as an independent businessperson." Section 1.01(b) states that an "individual renders services as an independent in the worker's independent interest through exercise of retained discretion to assign assistants and deploy capital equipment, and whether and when to provide service to other customers." Notice that this definition of employment focuses on whether particular "service" or work is rendered as an employee, not on whether the service renderer is an employee in the abstract. Notice also that the definition assumes that service rendered to serve the interests of an employer is within an employment relationship unless the renderers of particular service or work have sufficient control over the allocation of capital and labour used in rendering this service to advance their own interests independently of the interests of the party they are serving.

The exclusion of service rendering from employment only when the service renderer advances his or her own independent interests makes employment turn on whether the service is rendered in alignment with the interests of the employer. The definition realistically assumes that misalignment will be possible only where the service renderer retains and exercises in the course of the service significant control over the use of capital and other labour. Where the legal or economic relationship empowers the party served to prevent the service

renderer from making decisions in its own interest about how capital and labour are used in the course of the service, there is an alignment of interests that warrants both *respondeat superior* vicarious liability and a default assumption, reversible of course in particular legislation, that the party who benefits from the service should internalise the costs of ensuring statutory protections and benefits for the server.

This interpretation and analysis of vicarious liability law provides both a compelling and also an easily applied standard. On the one hand, it sharply distinguishes from employment status owners of independent businesses in a material or component supply or distribution chain. These independent businesses hire and assign employees and deploy equipment and other capital in order to maximise their own profits rather than those of other businesses that the independent business owners benefit through sales or purchases.

On the other hand, it highlights that individuals who provide service to private or public enterprises do so as employees unless they have control over substantial capital or significantly differentiated human capital. Without such control, no service provider while providing service to one enterprise can command the ability to deploy capital or assign assistants in its independent interests. A service provider without such control, like a plumber or a gardener or a delivery driver, may have discretion to provide service to others when it is not working for the enterprise, but unless such a provider has control over sufficient capital to increase its profits without also proportionately enhancing its service, the provider is serving the enterprise as an employee.

In accord with the analysis drawn from *respondeat superior* vicarious liability, as noted above, the Restatement § 1.01 definition tests whether particular service is rendered in an employment relationship, not whether a particular individual is an employee. Thus, any individual can render service to multiple employers in multiple employment relationships seriatim. The fact that the plumber or gardener or delivery driver without significant capital can serve other enterprises at different times is not relevant to the question of whether particular service is rendered within an employment relationship.

The Restatement of Employment Law indeed expressly anticipates seriatim employment relationships, occurring within a “given day, week, or other time period” in § 1.04(a). This also is in accord with how *respondeat superior* would be applied. We would expect any principal to be liable for the torts of an agent within the scope of their service, regardless of how many other principals the agent served within any given time period.

IV. AN APPLICATION

Currently, the most prominent troublesome cases testing the boundaries of employment statutes involve workers who can choose when and whether to accept work, perhaps even without a commitment to render some minimum amount of service. Some of these cases involve “crowd sourcing” through

a digital platform that does not provide any guarantee of work to users. The absence of mutual commitments indicates why digital platforms can pose difficulty for the application of British statutes that condition coverage on the existence of a contract of employment that requires mutual obligations. However, as the example of Uber drivers demonstrates, this kind of case has been difficult for American tribunals and commentators as well. Even liberal academics, like the economist Alan Krueger and the law professor Seth Harris, both Obama administration veterans, have taken the position that the discretion of workers like UBER drivers to choose when to make themselves available to work probably removes them from the status of employee under American common law and requires the formulation of a new legal category of “independent worker,” with some protections, not including a minimum wage.

I applaud the decision of the Employment Tribunal in *Aslam v Uber* [2016] EW Misc B68 (ET)), to treat the Uber drivers as workers under the “(b) limb” of the definition in the ERA, based on a rich contextual multifactor analysis. Unlike the ex-Obama administration officials, the tribunal recognised that the drivers were as much in need of the protection of the applicable employment laws as drivers of a traditional transportation company.

Assigning the drivers an appropriate full employee status could be made much easier and more straightforward, however, by asking simply whether the drivers were able to utilise capital and labour in their own interest without directly benefiting aligned Uber interests in doing so. The answer of course is no. After logging on to make themselves available for Uber-solicited rides, the drivers had to accept most fares that Uber offered. Uber set the price the riders paid, collected the fare, and paid the drivers a share. Uber also prohibited the drivers from exchanging information to form future relationships with riders. While in Uber’s pool of available drivers, a driver had no discretion to use the limited capital he had invested in his car in a way that could benefit him without proportionately benefitting Uber. The driver’s duties were fully aligned with Uber’s interests. Thus, just as Uber should be vicariously liable to third parties for injuries caused by the negligence of Uber drivers, so should Uber presumably be responsible for ensuring the protections and benefits defined in employment statutes. An Uber driver’s ability to use a car at a different time for the riders of a competitor like Lyft is irrelevant. The alignment analysis is applied to particular work; as noted above, a worker may have multiple employers seriatim.

The work of service providers connected to clients or customers by a digital platform need not be aligned with the interests of the platform in all cases. While the tribunal in *Aslam* appropriately rejected Uber’s claim that it only sold a passenger software connection to drivers running their own businesses, if digital workers pay their platform only a flat fee for each connection and also retain discretion to bargain for their own price, employee status is not appropriate because the workers’ obligations are not aligned with the interests of the platform. Worker obligations and platform interests would

not be aligned in that case because the platform benefits from further connection fees made possible by satisfied customers who feel they received a good bargain, while the workers are free to attempt to reap greater benefits for themselves by deploying their labour and capital at a higher price. As long as the platform reaps a percentage of the payment for the worker's service, however, the obligations and interests stay as aligned as those of a traditional employee and employer.

In the real commercial world, the business models of most digital platforms, like that of Uber, require some means of control over the discretion of workers to pursue their independent interests while servicing clients or customers identified by the platforms. Thus, most work assigned or obtained through a platform should qualify as fully protected employment.

V JOINTLY RESPONSIBLE EMPLOYERS

The use of the “contract of employment” model in UK statutes to assign responsibility for employment protections poses even greater problems in cases where an employee's duties are aligned with the interests of multiple parties, but the employee is in privity of contract with only one. The problem might not seem to be mitigated by use of vicarious liability law, as the commonly stated proposition that a servant cannot serve two masters simultaneously would seem to preclude imposing vicarious liability on two entities for the same negligence, and thus would seem similarly to preclude multiple employer responsibility for ensuring protections and benefits for the same work. Nonetheless, joint employer responsibility for ensuring the protections and benefits promised by modern employment statutes can be supported by the controlling principle of reciprocal cost internalisation that underlies *respondeat superior* liability.

Section 1.04(b) of the Restatement of Employment Law expressed American law's recognition of the responsibility of multiple entities to internalise the same costs of employee protections and benefits. The section states that an “individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and other joint employers each control or supervise such rendering of services as provided” in the section defining the employment relationship discussed above.

This statement reflects American judicial and administrative decisions recognising “joint employer” responsibilities. Joint employers are distinct from single employers under American law. Single employers are under common ownership and

control and thus do not have distinct ultimate interests. Joint employers do have distinct interests. Nonetheless, particular work and thus particular workers can serve the interests of joint employers simultaneously if the interests of each do not conflict with respect to that particular work. This will be the case where the best rendering of particular efficient service to one employer serves the interests of a second employer.

The rendering of efficient service to one employer can serve the interests of a second employer in at least four kinds of relationships between the two employers. First, it can do so where one employer is paid for administering personnel policy, including staffing and hiring, termination, compensation and benefits, for a second employer that directs the performance of work in its interests. Second, it can do so where one employer both generally controls the work and compensation of the employees as a service to a set of customers who have some discretion to direct the service and ultimately pay for the employees' compensation. Third, it can do so where one employer is compensated by a second employer for ensuring that work serves the interests of the second employer. And, fourth, it may do so where the second employer otherwise has sufficient control over the first employer to ensure that the work is aligned with interests of the first employer that do not conflict with interests of its own.

Assigning joint and several responsibility to two employers for the provision of the same employment benefits of course does not mean that an employee can receive double benefits any more than vicarious liability can result in double recovery for an injured third party. One employer must be assigned primary liability, presumably the employer most directly involved in the denial of the benefit. The most direct involvement usually is not difficult to identify, whether the denial of a benefit or protection comes from a discriminatory or unfair discharge, a nonpayment of a wage, the allowance of discriminatory harassment, an unsafe work place, or a refusal to discharge a duty to bargain collectively. Any judicial determination of primary responsibility, in any event, can always be obviated by indemnification agreements between the employers, which inevitably will be in a contractual relationship. Assigning responsibility to both employers is most important in cases where the employer that seems to have the most direct involvement is insolvent.

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