The Definition of "Employee" in American Labor and Employment Law

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I. Introduction

Although there are certainly many specific legislative exceptions, the general practice in the United States is to define who is a covered "employee" for a labor or employment law statute or doctrine, according to the purposes for which the statute or doctrine were adopted. For example, under the common law doctrine of respondeat superior, an "employee" is one who a person has the right to "direct and control" in the performance of some compensated duties, and accordingly, it is appropriate to hold the "employer" liable for the torts of the employee he "controls."[1] Similarly, the default definition of employee in most federal protection legislation, for example the Fair Labor Standards Act,[2] is the "economic realities test" in which the court looks to see if a person is in such a relation to another under the economic realities of the situation that it effectuates the purposes of the act to find that person is an "employee" under the act.[3] Under most state Workers' Compensation statutes, the definition of "employee" is specifically provided in the statute, but broadly interpreted to "effectuate the remedial purposes of the act."[4]

This practice of adapting the definition of "employee" to meet the purpose of each individual act is in some ways optimal, since it allows courts to most fully follow the purposes of Congress or state legislatures in enacting the legislation in question. However, the practice can also create problems of notice and uniformity where the purpose of the statute is not clear to the parties or where people who are employees for one statute are surprised to find they are not employees for the purposes of another statute.[5]

There is at least one major exception to this basic principle that American law defines employees according to the purposes of the act. Congress has expressly confined the definition of "employee" under the National Labor Relations Act to the tort definition of "employee."[6] Furthermore, Congress also added an exception for "supervisory employees" while the Supreme Court has added exceptions for "managerial" and "confidential" employees.[7] Although it fulfills congressional intent for the courts to follow this constrained definition in determining the coverage of the National Labor Relations Act, this definition and its exceptions create a tension between the purposes of the Act in promoting equity in bargaining power and industrial peace and the scope of the Act by excluding vulnerable employees who would undoubtedly benefit from it.

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1 *See infra* Part IIA.
2 29 U.S.C. §§ 201-219 (1994).
3 *See infra* Part IIB.
4 *See infra* Part IIC.
5 *See infra* Part IID.
6 *See infra* text at notes 52-54.
7 *See infra* Part IIIC.

II. Defining "Employee" to Effectuate the Purposes of an Act

A. *Tort Law— The "Direct and Control" Test*

According to the common law doctrine of respondeat superior, an employer is responsible for an employee's torts committed within the scope of employment.[8] Liability is based on the equitable principle that "just as the employer is entitled to reap the benefits of the employee's conduct, so too must the employer bear the responsibilities of that conduct."[9] The principal means of determining who is an employee for the purposes of respondeat superior liability is by applying the "direct and control" test.[10]

The "direct and control" test concerns the capacity of the contractor to regulate the means and manner of job performance.[11] If the contractor of work merely specifies the final product, while the contractee controls the time, place and means of his or her work, and provides his or her own tools and materials, it is likely the contractee will be found to be an independent contractor.[12] Correspondingly, if the contractor specifies how the work is to be done, "directing and controlling" the contractee, and providing tools and materials, then the contractee is likely to be found to be an "employee" for the purposes of the doctrine of respondeat superior and the contractor or "employer" will be held liable for any negligence on the employee's part in performing his or her duties. The Supreme Court summarized the "direct and control" test as follows: "the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done."[13] This principle is well established in American law.[14]

The purpose of defining "employee" by applying the "direct and control" test under tort law is to ensure that the proper party pays for the wrongs. This test meets that purpose since it determines whether the employer has the right to control how the employee performs his work and the precautions that are undertaken in the course of that work.[15] By imposing liability on the employer, it is more likely that the employer will take a proactive stance to prevent accidents by exercising considerable control over employees in order to avoid such liability.[16] In other words, efficiency, as well as the basic concepts of fairness and equity, dictates that the employer should accept the burdens that accompany the benefits of its respective operation.[17]

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[8] ALVIN L. GOLDMAN, LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 133 (1996).

[9] Id. It is also relevant to note that if the employee is acting solely for his own behalf, and in a manner which is not reasonably foreseeable, the employer will likely be able to escape liability. *Id*. at 134.

[10] Most common law definitions of respondeat superior derive from §2 of the Restatement (Second) of Agency. That section uses the terms "master," "servant," and "independent contractor." A master is defined as "a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service." RESTATEMENT (SECOND) OF AGENCY §2 (1) (1958). The term "master" is often used interchangeably with "employer." The Restatement defines "servant" as "an agent employed by the master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master." *Id*. at §2(2). "Servant" is also used interchangeably with "employee." An independent contractor is defined in the Restatement as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's control with respect to his physical conduct in the performance of the undertaking." *Id*. at §2(3).

[11] *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 548 (1999).

[12] And thus, the employer will not be responsible for the injuries caused by the independent contractor.

[13] Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889)

[14] *See, e.g*, National Convenience Stores, Inc. v. Fantauzzi, 584 P.2d 689, 691 (Nev. 1978) (stating "Nevada's policy rationale for the doctrine of respondeat superior is grounded on the theory of control ...").

[15] *See* Kyoungseon Kim, *A Study of the Definition of "Employee" under the Federal Employment and Labor Statutes* at 11-12 (document on file with author).

[16] *See generally* Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1935). The argument proceeds that this is most economically efficient means to prevent harmful activities. *See also* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

[17] *See generally* DAN B. DOBBS, THE LAW OF TORTS, VOL. 2, 909 (2001).

B. *The Fair Labor Standards Act---The "Economic Realities" Test*

According to the Fair Labor Standards Act,[18] an employee is defined as "any individual who is employed by an employer."[19] The Act further states that "employ includes to suffer or permit to work."[20] In interpreting this vague definition, the Supreme Court has applied the "economic realities test."[21] The economic realities test focuses on the "whole activity" surrounding the employment relationship in determining whether the workers are employees for the purposes of the Act.[22] Neither the common law definitions of employee and independent contractor nor any agreement between the parties are controlling in determining the nature of the relationship.[23] Instead, the economic realities test considers whether the individuals at issue are economically dependent on the business for which they labor.[24] This inquiry is highly fact-dependent and requires an analysis of the entire employment relationship.[25]

In *Rutherford Food Corp. v. McComb*, the Supreme Court interpreted the definition of employee to be quite broad under the Act, stating that "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."[26] The definition of employee under the Act deserves such broad construction because "the Act concerns itself with the correction of economic evils through remedies that were unknown at common law."[27] The Court determined *in Rutherford* that, according to the economic realities of the situation, the workers at issue were employees under the FLSA. The Court based this decision on the facts that: (1) the company's equipment and facilities were used by the workers; (2) the workers had no business organization that could or did shift from one facility to another; (3) the workers were under close supervision by the managing official of the plant; and (4) the profits to workers depended upon their work.[28] Therefore, the workers in question were economically dependent on the business for which they worked, and thus employees under the act.

The Fair Labor Standards Act is social legislation intended to cover a wide spectrum of workers.[29] In *Mednick v. Albert Enterprises, Inc.,*[30] the Fifth Circuit stated that the meaning of such words as "employee," "independent contractor," and "employer," are "to be determined in light of the purposes of the legislation in which they are used."[31] The court further stated that "[t]he ultimate criteria are to be found in the purposes of the act."[32] The purpose of the FLSA, according to the court, is "to protect those whose livelihood is dependent upon finding employment in the business of others."[33]

While the purpose of the FLSA was to cover a broad range of workers, in practice, such has

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[18] 29 U.S.C. §§ 201-219 (1994). The Fair Labor Standards Act contains four major requirements: a minimum wage, an overtime standard, restrictions on child labor, and equal pay. *See* ROTHSTEIN, ET AL., *supra* note 17 at 263.
[19] 29 U.S.C. § 203 (e).
[20] 29 U.S.C. § 203(g).
[21] *See, e.g.*, Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28 (1961).
[22] *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
[23] *See* ROTHSTEIN, ET AL., *supra* note 11, at 265.
[24] *Id*. at 265-66. In determining who constitutes an "employee" under the test, courts have used a number of factors such as: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments in equipment and material; (3) the worker's opportunity for profit and loss through the managerial skill; (4) the skill and initiative required for the work; (5) the permanence of the relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business. *Id*. at 266.
[25] *Id.*
[26] 311 U.S. at 728-29.
[27] *Id*. at 727.
[28] *Id*. at 730.
[29] *See* 81 CONG. REC. 7,657 (1937) (Statement of Sen. Black) (stating the definition of employee under the FLSA is regarded as having "the broadest definition that has ever been included in any one act").
[30] 508 F.2d 297 (5th Cir. 1975).
[31] *Id*. at 299.
[32] *Id*. at 300.
[33] *Id.*

not always been the case.[34] For example, in *Donovan v. Brandel*,[35] the Sixth Circuit held that migrant farm workers who labored as "pickle-pickers" were not employees and thus, not entitled to the protections of the Act.[36] The court had several reasons for denying the migrant workers protection. Most notably, the court relied on the facts that there the workers had a temporary relationship with the farm,[37] pickle picking requires a degree of skill,[38] the farmer lacked control over the workers,[39] and the pickle-pickers were not an integral part of the farmer's operation.[40]

As a matter of policy, it seems fundamentally unfair to exclude workers such as the "pickle-pickers" who may be working long hours for a relatively low wage. This would seem to be the exact problem that the FLSA was enacted to correct. In addition, the court's interpretation of the "economic realities" test as used in *Brandel* would exclude vulnerable classes of workers, like migrant farm workers, who most need the protection of the Act. For example, if picking pickles is a "skill' as the court held, it is hard to imagine an occupation which would not require "skill."[41] Despite the problems with the economic realities test, however, even its critics concede that it meets the purposes of the FLSA better than the common law direct and control test.[42]

C. *Workers' Compensation Laws*

The definition of a covered "employee" in most Workers' Compensation statutes is based on common law master-servant concepts.[43] However, these definitions have a significantly different meaning in the context of workers' compensation. The terms contained in the various statutes are consistently read broadly so as to encompass a wide range of workers who may otherwise have been excluded under traditional common law definitions. As famous commentator Arthur Larsen notes:

> [A] recognition of the difference between compensation law and vicarious liability in the purpose and function of the employment concept has been reflected both in statutory extensions of the term "employee" beyond the common law concept and in a gradual broadening of the interpretation of the term to bring within compensation coverage borderline classes for whom compensation is appropriate and practical."[44]

The trend of interpreting workers' compensation statutes broadly is quite well established across the various states.[45] Since the purpose of Workers' Compensation statutes is to provide benefit and protection to the injured worker it is logical that such a statute would favor coverage

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[34] According to one commentator, the reason for these failures is due to the fact that the economic realities test focuses on economic dependence, which is an inherently subjective concept. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302-304 (2001).

[35] 736 F.2d 1114 (6th Cir. 1984).

[36] *Id.*

[37] Although between 40-50% of the workers returned annually. *Id*. at 1117.

[38] *Id*. at 1117-18.

[39] *Id*. at 1119.

[40] *Id.*

[41] The exercise of skill and initiative is one of the factors courts have used to exclude workers from the protection of the FLSA under the "economic realities test. *See* ROTHSTEIN, ET AL., *supra* note 11, at 266.

[42] *See* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 260 (1997).

[43] *See* ROTHSTEIN, ET AL., *supra* note 11, at 548. Courts frequently consider the factors set forth in §220 of the *Restatement (Second) of Agency* to determine the nature of the employment relationship. *Id.*

[44] ARTHUR LARSEN, WORKERS' COMPENSATION LAW: CASES, MATERIALS, AND TEXT 269 (1984).

[45] *See, e.g,* Stainless Specialty Mfg. Co. v. Indus. Com'n, 144 Ariz. 12, 15 (1985) (holding workers' compensation law is to be construed liberally in order to effectuate its remedial purpose); v. Workers' Compensation Review Bd., 5 Cal.Rptr. 3d 485 (2003) (stating "Courts are required to view the Workers' Compensation Act from the standpoint of the injured worker with the objective of securing for him or her the maximum benefits which can lawfully be given."); Driscoll v. General Nutrition Corp., 252 Conn. 215, 220-21 (2000) (stating "[i]n [reservations] arising under workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purposes of the act"); Griffin Pipes Products, Co. v. Griffin, 663 N.W. 2d 862 (Iowa 2003) (stating "The primary purpose of the workers' compensation statute is to benefit the worker, and thus, the court interprets those statutes liberally in favor of the worker."); Robertson Gallo v. Department of Labor & Industries, 81 P.3d 869 (Wash. App. Div. 3, 2003) (stating "Where reasonable minds can differ over what provisions in the Workers' Compensation Act mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker.").

rather than exclusion.

D. *Problems with Notice and Uniformity*

The lack of uniformity in the definition of "employee" has both positives and negatives. While defining "employee" according to the purposes of the statue can most fully effectuate the intent of state legislatures and Congress, it can also cause problems for the average American worker and employer by making it difficult to determine when, and by which, labor and employment law doctrines and statutes a person is covered. The problems are of course magnified when the legislature fails to clearly express the purposes of the statute that will guide the determination of who is an employee. Lack of uniformity and clarity raise legitimate notice objections in that potential employers and employees do not always know which doctrines or statutes apply to which potential employees, and also raise litigation costs as the parties endeavor to sort out these controversies.

III. The Definition of "Employee" Under the National Labor Relations Act

The general principle that who is an "employee" is defined according to the purposes of the examined act has been violated in the case of the National Labor Relations Act (NLRA), the primary act governing the conduct of union organizing and collective bargaining in the United States. Although the Supreme Court initially followed this general principle by adopting the "economic realities test" in the case of *NLRB v. Hearst Publications, Inc.*,[46] Congress later amended the NLRA to specifically exempt "independent contractors," according to the common law tort definition, and "supervisors" from the definition of employee in the act. These exemptions have proven problematic for American labor law.

A. *The Hearst case*

In *NLRB v. Hearst Publications, Inc.*,[47] the Supreme Court held that "newsboys"[48] qualified as a group which deserved protection under the NLRA. The Court stated that the test for an "employee" was not confined "exclusively to 'employees' within the traditional common law distinctions separating them from 'independent contractors.'"[49] Instead, courts should determine whether the group at issue is subject, "as a matter of economic fact, to the evils the [NLRA] was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in a special situation."[50] The Court further stated that the term "employee" was to be defined broadly under the National Labor Relations Act when "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections. . . ."[51] Thus the economic realities test began its short sojourn as the working definition of who constituted an "employee" under the NLRA.

B. *The Exclusion of Independent Contractors—Congressional Response to Hearst*

Three years later, Congress responded to the Hearst decision by amending the NLRA to specifically exclude independent contractors and supervisors from the Act's coverage.[52] Congress stated "[t]o correct what the [National Labor Relations Board] has done, and what the

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[46] 322 U.S. 111 (1944)
[47] *Id.*
[48] More specifically, the Court held that full-time "newsboys" who sold papers at established spots qualified as a group which the NLRA was enacted to protect. *Id*. at 130.
[49] *Id*. at 126.
[50] *Id*. at 127.
[51] 322 U.S. at 128.
[52] *See* 29 U.S.C. §§ 151-69 (1947). The amended act was called the Taft-Hartley Act. *See generally* SAMUEL ESTREICHER & MICHAEL C. HARPER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 134 (1996).

Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee"."[53] The Board thus began applying the "right to control" test to determine employee status.[54]

In *NLRB v. United Insurance Co.,*[55] the Court's holding reflected the Congressional amendments. The Court held that whether a worker is an independent contractor or an employee under the National Labor Relations Act should be determined according to "pertinent common-law agency principles."[56]

C. *The Managerial and Supervisory Exceptions*

In order to facilitate the interests of employers in obtaining the undivided loyalty of supervisors, supervisors were excluded from the protection of the Act.[57] Supervisors are defined by the Act as follows:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine of clerical nature, but requires the use of independent judgment.[58]

The Court elaborated on this test in *NLRB v. Health Care & Retirement Corporation of America*[59] stating:

> [T]he resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of 12 listed activities. Second, does the exercise of that authority require the "use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer?"[60]

The distinction between supervisors and lead employees often comes down to a matter of degree. This issue is frequently decided according to fact specific case by case approach.[61] The modern trend in these cases has been towards a greater willingness to find that the employees in question are supervisors and away from analysis in terms of the Act's policies.[62]

Although not specifically listed in the statute, managerial and confidential employees are also excluded from the coverage of the Act.[63] Managerial employees are defined as "those who 'formulate and effectuate management policies by expressing and making operative the

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[53] House of Representatives Report No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

[54] *See* DOUGLAS E. RAY, ET AL., UNDERSTANDING LABOR LAW 21 (1999).

[55] 390 U.S. 254 (1968).

[56] *Id.* at 258. The Court further listed the following as decisive factors in the determination: (1) the worker performs operations that are an essential part of the company's normal operations; (2) training by company personnel; (3) the worker has considerable assistance and guidance from the company during the performance of his/her duties; (4) the workers are accountable to the company for collected funds and must report them; (5) benefit from the company's vacation, pension, and group insurance plans; (6) a permanent working arrangement with the company. *Id.* at 259. The Court also stated that no one factor is determinative. *Id.* at 258. *Accord Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971) (holding retired employees are no longer workers for hire); *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995) (holding Congress intended to define employee according to conventional common-law agency doctrine).

[57] *See* 1 NLRB, Legislative History of the Labor Management Relations Act at 305 (1947). Other policies influential in the administration of the NLRA include: (1) free choice needs protection against employer manipulation that could follow from permitting representatives of management to participate in the election process; (2) certain employees need not be protected by the Act because they already enjoy protection by virtue of their employment status; and (3) permitting a union voice with respect to any management and the union would improperly confuse the distinction between management and the union and therefore prevent workers properly on the management side of the line from performing their tasks adequately. JULIUS G. GETMAN, ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 24 (1999).

[58] 29 U.S.C.A. § 152 (11)

[59] 511 U.S. 571 (1994). This case is also known as the LPN case.

[60] *Id.* at 573-74.

[61] *See* GETMAN ET AL., *supra* note 57, at 24.

[62] *Id.*

[63] *See* RAY ET AL., *supra* note 54, at 23.

decisions of their employer."[64] Confidential employees are defined as "persons who exercise managerial functions in the field of labor relations."[65]

D. *The Problems of Exclusions*

The definition of "employee" under the National Labor Relations Act has been a significant source of conflict and debate in recent years.[66] The willingness of the courts to exclude an increasing number of workers as "independent contractors," "supervisors" or "managerial" employees has denied many workers who could have benefited from the provisions of the NLRA the protections of the Act. For example, American employers have been known to restructure their technical legal relationship with employees in order to escape coverage under the NLRA. For example, a trucking firm that employs drivers might "sell" the trucks to their drivers, with a lien on the truck and payments and a service agreement subtracted from future carrying fees, in an effort to make the drivers "independent contractors" under the NLRA, and so exempt from the act.

With respect to the managerial exception, in *NLRB v. Yeshiva University*,[67] the Supreme Court held that full-time faculty members at a large private university were "managerial" employees due to the faculty's role in various areas such as faculty appointments, the setting of curriculum, and graduation requirements.[68] The Court dismissed the National Labor Relations Board's argument that faculty members were not aligned with management because they were exercising independent judgment rather than "conform[ing] to management policies."[69] The Court stated that "the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution…. The "business" of a university is education."[70]

In NLRB v. Health Care & Retirement Corp.,[71] the Court similarly held that licensed practical nurses (LPN's), who directed less skilled employees in the performance of their duties were also supervisors under the NLRA.[72] The Court reasoned that nurses' professional interests in caring for patients were not distinct from the nursing home which employed them.[73] The direction of subordinate nurses by the LPN's was held to be "in the interest of the employer" and the LPN's were denied the protections of the Act.[74]

Both the *Yeshiva* and LPN case have been a significant source of criticism by academic commentators.[75] The potential impact of the *Yeshiva* and LPN case may be to effectively deny

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[64] NLRB v. Bell Aerospace Co. Div. of Textron. Inc., 416 U.S. 267,288 (1974).
[65] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981).
[66] Some commentators blame this conflict on the increasing level of skill, education, and experience in the American work force. *See* Harry G. Hutchinson, *Toward a Robust Conception of "Independent Judgment": Back to the Future?*, 36 U.S.F. L. REV. 335, 335 (2002).
[67] 444 U.S. 672 (1980).
[68] *Id.*
[69] *Id.* at 688.
[70] *Id.*
[71] 511 U.S. 571 (1994)
[72] *Id.*
[73] *Id.*
[74] *Id.* at 580.
[75] *See, e.g.*, Teresa R. Laidlacker, *The Classification of the Charge Nurse as a Supervisor Under the National Labor Relations Act*, 69 U. CIN. L. REV. 1315 (2001) (arguing the unionization of nurses would be beneficial to the future of the American health care system); Jennifer Myers, *A Critical Look at the Circuit Court Split After NLRB v. Hilliard Development Corporation*, 3 U. PA. J. LAB. & EMP. L. 671, 701-02 (2001) (stating the negative effects on the labor movement of classifying nurses as supervisors under the NLRA). *But see* R. Jason Straight, Note, *Who's the Boss? Charge Nurses and "Independent Judgment" After National Labor Relations Board v. Health Care and Retirement Corporation of America*, 83 MINN. L. REV. 1927 (1999) (arguing that the Supreme Court's interpretation of nurses as supervisors is consistent with the goals of the NLRA).

NLRA coverage for many professionals.[76] This trend towards increasing exclusions seems contradictory with the stated purpose of the NLRA which is to "encourage[] the practice and procedure of collective bargaining … by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[77] The exclusion of workers from NLRA denies them protection for their basic rights of organization and, in doing so, precludes them from forming an effective union to bargain with their respective employers.

IV. Conclusion

In most aspects of American labor and employment law, the word "employee" is defined according to the purposes of the statute. This process enables the courts to most fully effectuate the purposes of the legislature. However, when the legislature fails to give the statute an explicit purpose, problems can arise. In addition, the varying definitions of "employee" can cause significant problems for workers attempting to discern if they qualify for coverage.

While most definitions of "employee" are intended to comport with the legislative purpose of the statute, the National Labor Relations Act stands in opposition. While the purpose of the NLRA is to promote equity in bargaining power and industrial peace, the modern trend has been to exclude an increasing amount of workers who would benefit from the protection of the Act. This has resulted in the formation of a significant number of workers unable to organize under the Act's protections.

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[76] Justice Ginsburg stated this point in her dissent in the LPN case:

> If any person who may use independent judgment to assign tasks to others or direct their work as a supervisor, then few professionals employed by organizations subject to the Act will receive its protections. The Board's endeavor to reconcile the inclusion of professionals with the exclusion of supervisors, in my view, is not just "rational and consistent with the Act," … it is required by the Act. 511 U.S. at 598-99.

It is also important to note "professional employees" have been deemed to fall within the protection of the Act. *See* Jeffrey M. Smith, *The Prospects of Continued Protection of Professionals Under the NLRA: Reaction to the Kentucky River Decision and the Expanding Notion of the Supervisor,* 2003 U. ILL. L. REV. 571, 571 (2003). The Act defines "professional employees" as follows:

> One whose work is "predominantly intellectual and varied in character," involves "the consistent exercise of discretion and judgment in its performance," produces a result that "cannot be standardized in relation to a given period of time," and requires knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital." Frederick J. Woodson, *NLRB v. Retirement & Heath Care Corp. of America: Signaling a Need for Revision of the NLRA*, 13 J. L. & COM. 301, 306 (1995) (citing 29 U.S.C. §152 (12)(a)(1989)).

[77] 29 U.S.C.A. § 151 (1988).