Explaining the Blurred Line Between Employment and Independent Contracting

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Date : September 16, 2015

Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 **S.C. L. Rev.** 315 (2014), available at SSRN.

As the Reporter primarily responsible for the chapter defining the employment relationship in the recently completed Restatement of Employment Law, I thought I had fully considered and taken account of the origins and various instances of judicial confusion in distinguishing employees from independent contractors. Thus, I was especially surprised to have my understanding of the confusion substantially enhanced by Julia Tomassetti's recent conceptually deep article. Tomassetti argues that an understanding of the unusual and contradictory nature of employment contracts and their development is necessary to explain judicial confusion when defining employment, and that it is not sufficient simply to highlight the challenges posed for courts by the nontraditional work relationships in the modern economy and the many multifactor indeterminate tests that have been developed to supplement the traditional but inadequate "right to control the means and manner of work" test.

Tomassetti contends that the principal source of judicial confusion derives from the law's presumption that the traditional master-servant relationship is incorporated into employment-at-will relationships. These relationships entail the employer's ongoing discretionary control over the employee's means of production, while concomitantly providing the non-indentured "free labor" servant with the leverage of a right of exit at any time. This atypical type of indefinite contract has seemed to courts different than service contracts containing work specifications even when those specifications seem to cover not only what is produced (the ends) but also how production is to be accomplished (the means). Tomassetti provides many examples of courts rejecting employment status for service relationships defined by what she terms "upfront contractual specifications" (UCS) that would entail employment status if the specifications were imposed by employers through the ongoing exercise of their contractually presumed discretionary control. The courts, viewing contracts as the products of bilateral negotiations, assert that the specifications express a bargain between businesses, regardless of how bad a bargain the terms express for the service provider.

Tomassetti's argument has two main components: first, a historical analysis of the unusual and contradictory nature of employment contracts; and second, a demonstration of how courts have been confused by this nature when denying employee status to workers whose means of work is controlled by their contracting partners through "upfront contractual specifications". For her historical analysis, Tomassetti, who has a doctorate in sociology as well as a law degree, draws heavily from the work of other scholars, notably the great institutional labor economist, John R. Commons, and the labor law historian, Christopher Tomlins. Tomassetti explains that employment is both a "contract between civic equals," as is any contract, and also "a relationship between a subordinate and superior" deriving from the historical choice of the master-servant template. Relying on Commons, she stresses that employers and employees are "continuously" and "simultaneously" bargaining and producing as the employees work and the employers direct. Control through contractual specifications, rather than only through continuing bargaining, however, highlights the contract part of the relationship, and thus provides courts with a rationale for accepting the subordinate-superior relationship as one between independent "civic equals."

Tomassetti's article provides many examples of how courts use contractual specifications, including ones that control the means and manner of production, as justifications for denying employment status. Some of these examples are from cases challenging FedEx's classifications of its drivers as employees despite the contractual specification of work time, compensation, routes, and work details. Other examples provide even more blatant examples of judicial confusion, with courts making assertions such as: "setting out in detail…obligations…is nothing more than the freedom of contract" that "is significantly different than the discretionary control an employer exercises daily over its employees' conduct." Tomassetti, moreover, notes further examples of what she terms "meso formalism" where courts reject as evidence of employment status even contractual terms that require workers to obey or cooperate with the discretionary orders of the agents of putative employers.

Tomassetti's project is only to explain the "unintelligibility" of the law defining the employment relationship. She does not offer alternative intelligible doctrine or tests or even express views on what should determine the scope of laws protecting or securing rights for employees. She does no more than introduce the concept of "capitalist exploitation," ascribed to both Weber and Marx, and then note that it can be based on definite contractual terms as well as on the imposition of an employer's superior bargaining power in production.

I believe, however, that her explanation can be used to support a reformist agenda, like that embodied in the Restatement of Employment Law, to articulate more determinate doctrine that does not founder on the distinction between contractual and production control her examples highlight. The unintelligibility of legal doctrine is not inevitable, even if the misuse of the doctrine by elite-sympathetic judges is. Despite Tomassetti's conclusions, even the inadequate means versus ends distinction, so important to the traditional doctrine, is not rendered unintelligible by its misuse by judges using contract law to protect the discretion of employers. Distinctions can be made and should be made. Some service contractual relationships, even when bargaining leverage is not equal, are less likely than others to benefit from protections fashioned for employees. At least, whether such protections should apply may require different policy balances.

Tomassetti's unwillingness to offer a route around doctrinal confusion or the contradictions of the employment contract does not detract from her contributions in this article. The article's unusually creative and deep analysis demanded my attention, and I think should demand that of all concerned about this increasingly important issue in employment law.

Cite as: Michael C. Harper, *Explaining the Blurred Line Between Employment and Independent Contracting*, JOTWELL (September 16, 2015) (reviewing Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 **S.C. L. Rev.** 315 (2014), available at SSRN), https://worklaw.jotwell.com/explaining-the-blurred-line-between-employment-and-independent-contracting/.