

## Who Names the Price?

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Naomi R. Sunshine, *Employees as Price-Takers*, 22 **Lewis & Clark L. Rev.** 105 (2018).

In [Employees as Price-Takers](#), Naomi Sunshine defines employees as workers who lack “significant input into the prices charged to customers and their own pay rates.” (P. 110.) Sunshine’s proposal comes amidst a blizzard of articles, court cases, tribunal opinions, legal briefs, and white papers all examining this critical issue. It stands out amidst the snow drifts because of its simplicity, and because it provides a creative and intuitive insight. Her price-setting definition of employment has the potential to reorient current debates around this new metric.

There are several competing definitions of “employee,” and Sunshine carefully surveys the landscape. She discusses the dominant “control” test with its different variations, as well as the “economic realities” test, the “entrepreneurial opportunities” test, and the relatively new “ABC” test used in California and elsewhere. She illustrates these tests with the example of an HVAC worker as the paradigmatic independent contractor and examines how the test would categorize such a worker. Sunshine’s quiet unpacking of the entrepreneurial opportunities test is particularly deft, as she works her way down to the test’s foundational focus on the opportunity for profit or loss. She shows how the test renders the most vulnerable workers even more vulnerable, as it leaves them bereft of employment protections even when the potential for profits is merely illusory.

*Employees as Price-Takers* also examines the idea of an intermediate category between employee and independent contractor. The article looks at academic and policy proposals like Harris and Krueger’s “independent worker” delineation,<sup>1</sup> as well as laws such as Canada’s “dependent contractor” statutes. She questions whether a third category is necessary if such workers could appropriately be defined as employees. Her analysis raises important questions, such as: What would the purpose of this third category be? Which “employment” protections would be extended, and which would be withheld? As Sunshine points out, the Fair Labor Standards Act has an expansive definition of employee similar to the Canadian dependent contractor—and thereby may sneakily cover the intermediate category itself. And yet many of these “third way” proposals do not extend minimum wage or hour protection to this middle category.

The primary innovation of the article is its new definition of employment. Sunshine nicely sets out the case for making control over price and pay the critical component of employment—the one that renders employees economically vulnerable. She contends: “If the company controls prices vis-à-vis the customer . . . the worker is really just a representative of the company—the customer has sought a service from the company, and the worker is the one fulfilling that service.” (P. 149.) Sunshine here keys in on the critical difference between working independently and working as part of a firm. Employees work for an economic firm, and the firm is the economic actor within the relevant marketplace. As Ronald Coase recognized in *The Nature of the Firm*,<sup>2</sup> firms replace markets when they can operate more efficiently as a collective outside of the market. Independent contractors, on the other hand, are not part of the alleged employer—they work as sole proprietors, or as part of a different firm. In the words of the Restatement of Employment Law, “individuals provide services as independent businesspersons if they are able to serve their own economic interests through entrepreneurial control over a significant part of their costs or opportunities for profit.”<sup>3</sup> This differentiation is a fairly basic

economic one, and it should be a basic legal one, as well. However, reducing the differences between markets and firms to easily discernible factors has proven quite difficult. This is where Sunshine's ingeniously simple test comes in: who sets the price? A worker who controls the price ultimately charged to consumers for an end-product or service is an independent contractor; a worker who does not is an employee.

Sunshine does not resolve every theoretical and doctrinal issue related to this new test, nor would one expect her to do as much in a single article. She makes clear from the beginning that her test is best addressed to workers who interact directly with the customers, forming a triangular relationship between firm, worker, and customer. (Pp. 111-12.) In a bilateral relationship, the employee will always have a say over her pay, as it is (in theory) negotiated between the two parties. This distinction is why I initially found her reference to price and pay, rather than just price, to be confusing. However, her insights into the nature of control over contracting might also apply, in some ways, to bilateral relationships. Sunshine should go back to her HVAC example and think through how her insights on price might apply there.

One other wrinkle for Sunshine's "price-pay" test is the algorithm used by Uber and other platform companies. Uber claims that it is not a transportation company, but rather an information services company that connects riders with drivers. The argument has some intuitive appeal: no one argues that eBay is a retailer when it provides a marketplace for goods. But Sunshine's new test resolves this nicely, because the eBay sellers and buyers set their own prices. Uber, on the other hand, has established a metric for price-setting that drivers and customers do not control. If Uber were truly a marketplace, it would allow the drivers and riders to individually "bid" for rides using their own prices. But Uber's control over prices means that it acts as the employer.

In creating a new price-oriented test for triangular employment relationships, Sunshine offers a more straightforward path through rocky terrain for judges, advocates, and workers themselves than now exists. As she recognizes, there may be a category of non-employees who nevertheless are dependent enough and vulnerable enough to deserve certain employment protections. But we harm the coherence of the "employee" category if we try to jam these workers in there. Employment is a category relating to the legal and economic context in which the worker labors. Sunshine's article goes a long way in helping us conceptualize and define this category.

1. Seth D. Harris & Alan B. Krueger, **A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"** (2015).
2. Ronald H. Coase, *The Nature of the Firm*, 4 **Economica** 386 (1937).
3. Restatement of Employment Law § 1.01 cmt. f (2015).

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