Unemployment Insurance: The Definition of Employee

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AN IMPORTANT issue to those who engage labor is whether the persons who render the services are deemed employees or independent contractors. The consequence of a finding of employee status is the employer’s liability to contribute to an unemployment insurance fund.

The tests presently used in the various states to determine whether a person is an employee or independent contractor are well known. These tests may be described as follows:

1. The control test prescribed by the common-law definition of master and servant.
2. The “ABC” tests.
3. The common-law tests in combination with the statutory “ABC” tests.
4. The control test “realistically” applied by the federal courts.

It is the purpose of this paper to examine the various tests used to determine employee status and to evaluate the benefits and the problems resulting from New York’s use of the common-law definition of master and servant.

The Common-law Test in New York

The New York Unemployment Insurance Law never contained the “ABC” tests or other guidelines for the administrative determination of who is an employee. The

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1 N.Y. LAB. LAW §§ 560-63.
criteria have been established principally through judicial review of the Unemployment Insurance Appeals Board decisions and by cases dealing with other statutes.

When Judge Cardozo sat on the New York Court of Appeals, he attempted to define the master-servant relationship in terms of an engagement to obey:

On the one side there is an intimacy of control and on the other a fullness of submission that imports the presence of a 'sovereign,' as the master, we are reminded, was sometimes called in the old books.\(^2\)

The application of Cardozo's definition proved to be as troublesome as the attempts to apply the countless definitions which his predecessors had enunciated. Many decisions quoted a lower court's feeling of frustration: "There is no neat device by which a person may be catalogued as an employee or an independent contractor."\(^3\)

The Court of Appeals thereafter once more essayed a general definition in Matter of Morton.\(^4\) Since then most full-dress decisions dealing with the employee-independent contractor question set forth this language from the Morton case:

What then is the test of this distinction between a servant and an independent contractor? The test is the existence of the right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract but not by his employer's orders . . . .

From the nature of the problem the degree of control which must be reserved by an employer in order to create the employer-employee relationship, cannot be stated in terms of mathematical precision and various aspects of the relationship may be considered


\(^4\) 284 N.Y. 167, 30 N.E.2d 369 (1940).
in arriving at the conclusion in a particular case. Therefore we must examine the facts in the case at bar to determine whether the arrangement between claimant and respondent was so altogether lacking in those marks which ordinarily characterize the relationship of employer and employee, that claimant must be deemed, as a matter of law, to have been an independent contractor. . . .

Under the common law, the actual exercise of direction and control is not required where the employer by virtue of contract, has the right of direction and control.

The "ABC" Tests

A discussion of this subject requires brief reference to the "ABC" tests which are contained in many state statutes. Such statutes have been used only in the unemployment insurance program.

The Committee on Legal Affairs of the Interstate Conference in 1936 concluded that the term "employee" should not be limited by the technical legal relationship of master and servant. The Committee recommended that the several states adopt the "ABC" tests patterned on the Wisconsin statute. The Social Security Board drafted a model statute which contained the "ABC" tests. The draftsmen of the model statute felt that unemployment insurance coverage should be extended to persons not engaged in an independently established business of their own who perform services for others.

The "ABC" tests originally adopted by most of the states took the following form:

Employment . . . means service . . . performed for wages or under any contract of hire, written or oral, express or implied. . . . Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of commissioner that—

(a) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

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5 Id. at 172-73, 30 N.E.2d at 371.
(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession or business.7

In some jurisdictions the courts superimposed the control test contained in the common-law definition of master and servant upon the "ABC" tests. These courts failed to give full application to the "ABC" tests and held that such tests did not extend coverage beyond that afforded by common law.

The Common-law Test Realistically Applied

The Supreme Court of the United States attempted by "judicial legislation" to broaden the common-law definition of master and servant and sought to mandate by judge-made law what the "ABC" tests were designed to accomplish. The Court rejected the common-law standards and defined the term "employee" as used in social insurance statutes so that the protection afforded by such laws would be broadened. It evolved the theory of economic reality and pointed to some of the obvious defects of the doctrine of respondeat superior.

In United States v. Silk,8 the Court held that the common-law test of master and servant was not the sole factor to be considered where social legislation was involved. The Court held that the term "employee" used in this type of statute should include all those not engaged in their own enterprises who as a matter of economic reality perform services for, and are dependent for their livelihood on the employer for whom their services are rendered.


8 331 U.S. 704 (1947).
The Court’s decisions in the *Silk* and *Bartels v. Birmingham* cases contained broad language which could have created anomalous situations. Many persons felt that legislation was necessary to curtail their effect. Congressmen Gearhart described this feeling as follows:

However, there crept into these decisions a little of what lawyers call *obiter dicta*; that is, some words which were quite unnecessary to the result. These words were to the effect that for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage by the ancient common-law definition of master and servant, or employer and employee, as you may choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.

After the Court evolved its economic reality doctrine in the *Silk* case, Congress hastened to adopt the Gearhart Resolution which in effect provided that the term "employee" as used in the Social Security Law and the Federal Unemployment Insurance Tax Act should be defined in accordance with the common-law definition of master and servant.

The federal courts, after some vacillation, appear to have come to the conclusion that it was the intent of Congress that the existence or absence of an employment relationship is to be ascertained not by the use of the economic reality test but rather by the realistic application of common-law rules. These decisions rely upon congressional intent as expressed by the minutes of the congressional committees which were responsible for the drafting of the Gearhart Resolution.

The Internal Revenue Service, however, has refused to acquiesce in any decision which it believes to be in conflict

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9 332 U.S. 126 (1947).
with the *Silk* case. In a recent announcement that it would not follow a decision holding unloaders to be independent contractors,\(^4\) it reiterated that it would continue to rely upon a "realistic" approach to the problem.

Economic reality is evidently a persuasive factor in the decisions on this subject, even where the courts may not allude to the doctrine, and the decisions are ostensibly predicated on common-law factors. In weighing the effect of the various factors in a given case, economic reality plays a subtle but decisive part. Even in New York, where the courts have consistently and zealously adhered to the common-law rule of master and servant, economic reality appears to be a persuasive factor. For example, in *Matter of Electrolux*,\(^5\) the Court appeared to have been persuaded by the fact that the employer's business depended solely upon the sales efforts of commission salesmen, and that under such circumstances reality would not permit the employer to refrain from exercising control over its representatives. The Court stated:

In weighing this evidence one basic consideration is the sales methods used by respondent in marketing its product. Respondent does not rely upon national advertising in order to create a market nor depend upon the ordinary retail outlets to distribute its product. It depends entirely upon the canvassing conducted by its representatives, both to publicize and to sell the vacuum cleaners it manufactures. Consequently it is a little difficult to believe the protestations of respondent that it has not the slightest interest, or wish to interfere, in the selling activities of its representatives. With this consideration in mind we proceed to an examination of the evidence in these cases solely to see if there is sufficient contained therein to support the findings of the Appeal Board, including the finding that respondent's practices are not in accord with the terms of its sales representatives' agreements.\(^6\)

Similarly, in *Matter of Daugherty*,\(^7\) the reality principle was a controlling factor. The factual situation pre-

\(^5\) 288 N.Y. 440, 43 N.E.2d 480 (1942).
\(^6\) Id. at 444, 43 N.E.2d at 482.
\(^7\) 24 App. Div. 2d 919, 264 N.Y.S.2d 684 (3d Dep't 1965).
sented was whether "hot walkers," who, for a flat sum, cooled off race horses which had been heavily exercised, were employees or independent contractors. The court, moved by the realities of the situation, pointed out that:

[It] seems hardly likely, however, that a horse trainer charged with the responsibility of conditioning valuable thoroughbreds for large purse racing would relinquish, without variation or exception, his right to exercise control over itinerant stable hands engaged in the performance of work which seems to have been regarded as an important feature of the training program. Moreover, the simple character of the work performed as generally viewed would be more consistent with the existence of a master and servant relationship than that of independent contractorship.18

Administrative and Legal Difficulties Presented by the Common-law Test

The uncertainties of the common-law test present difficulties to claimants, to administrative agencies, and especially to employers. Successful operation of a business requires that an employer be reasonably certain as to tax liability so that provision may be made to meet the resultant obligation. An employer can, of course, obtain an advisory determination from a state unemployment compensation agency. However, in New York such determination affords little protection, for if the determination is eventually set aside in a benefit claim proceeding, the employer is not relieved of the obligation to pay contributions. If he has made a full and fair disclosure of all of the facts, the sole effect of the advisory determination is the avoidance of penalties.

In doubtful employee status cases, the agency is required under the common-law rule to make a searching and painstaking investigation of all the facts and circumstances of the relationship. Investigations of this nature are time-consuming and expensive. Determinations or rulings made without the benefit of investigation rest upon weak foundations and may not stand the test of adminis-

18 Id. at 920, 264 N.Y.S.2d at 686.
trative review or judicial scrutiny. These investigations are irksome to employers, expensive to the administrative agency and they delay payments to the benefit claimant. An unemployed benefit claimant can hardly be expected to comprehend the legal niceties of the common-law definition of master and servant or to understand the time lag which must ensue in order to ascertain the facts which must be fed to the legal gristmill before his claim can be disposed of.

Inconsistent adjudications often result from inadequate investigations rather than judicial error. One often wonders whether apparently conflicting decisions in the same or other jurisdictions are a result of the difficulty of assembling and presenting evidence. For example, in New York, salesmen of brushes for an organization operating on a nationwide scale were held to be employees. The marshalling and presentation of evidence required several months of intensive work. It was only through the testimony of persons who had severed their relationship with the employer that all the facts were placed in the record. Over one thousand pages of testimony were taken. Evidence of direction and control was so complete that the employer accepted the decision of the Appeal Board without further appeal. In New Jersey, a court similarly held the brush salesmen to be employees. In Utah, however, the appellate court held the salesmen of the same organization to be independent persons.

Although the Utah decision has been criticized severely for its interpretation of the "ABC" provisions of the Utah statute, it could be argued that an exhaustive investigation would have produced a record, as it did in New York and New Jersey, which would have induced a finding of an employee-employer relationship under any test. One writer

29 New York Unemployment Insurance Appeal Board 6,080 (1941).
31 Fuller Brush Co. v. Industrial Comm'n, 99 Utah 97, 104 P.2d 201 (1940).
32 Asia, Employment Relations: Common-Law Concept and Legislative Definition, 55 Yale L.J. 76 (1945). It should be noted that although the
on the problem has pointed out that "the list of conflicting decisions is too long and the factual similarities are too great to permit the decisions to be harmonized. . . ." 23

Even in a single jurisdiction it is sometimes difficult to reconcile opposite decisions in cases strikingly similar on their facts. In 1940 in Matter of Morton,24 the New York Court of Appeals held that corsetieres were employees and not independent persons. Two years later, in Matter of NuBone Co.,25 the same Court, without opinion, affirmed a holding that corsetieres who worked under similar circumstances were independent persons. The distinguishing factor may have been that the earlier case concerned a claim for benefits while the latter case involved an assessment for contributions.

It is of interest to examine the application of the common-law rule of master and servant to particular cases. Several occupational categories have recurrently received judicial attention.

Commission Salesmen

In order to determine whether a commission salesman is an employee or an independent person, it is necessary, as in all unemployment insurance coverage cases, to examine carefully the acts of the parties and their conduct during the period of the relationship. The elements of direction and control present in any given situation depend, of course, on the nature of the business and on the facts and circumstances surrounding the relationship.

If the contract under which the services are performed vests in the employer the right of direction and control, an employee-employer relationship is deemed to have been

statutes of New Jersey and Utah provided for the "ABC" tests, in both instances the court required the establishment of the common-law relationship of master and servant before the "ABC" tests became applicable.

24 284 N.Y. 167, 30 N.E.2d 369 (1940).
created, and the fact that the employer may not have exercised the right is considered to be immaterial. If, on the other hand, the contract attempts to establish an independent contractor status for the commission salesman, the contract is not binding upon the administrator nor the adjudicator. The agency may, by other evidence, establish the true relationship of the parties.\(^\text{26}\)

The relationship must be examined in greatest detail; all elements which bespeak direction or control must be marshalled and placed in the record. Some of the elements which tend to show the presence or absence of direction and control are as follows:

1. The nature of the application for the position.
2. Whether the employer must approve orders.
3. Whether the commission salesman has a choice of placing business either with the employer or others.
4. Whether the salesman is required to collect accounts and is required to guarantee credit of customers.
5. Whether the employer establishes a sales quota.
6. Whether the salesman is required to carry a public liability policy in favor of the employer.
7. Whether the salesman is required to attend a training course or take training from time to time.
8. Whether the salesman is required to supply a fidelity bond for the faithful performance of his duties.
9. Whether the employer furnishes leads to the salesman.
10. Whether the list of customers whom the salesman services is the property of the salesman or the employer.
11. Whether the salesman is required to report to the employer.
12. Whether the salesman is required to attend meetings.
13. Whether the employer fixes the price of the merchandise to be offered for sale.

14. Whether the salesman or the employer fixes the credit terms.
15. Whether or not the salesman enjoys Workmen's Compensation Insurance coverage.
16. Whether or not the salesman is afforded fringe benefits such as vacation pay, hospital, medical and other group insurance furnished to admitted employees.
17. Whether or not the employer makes income tax withholding deductions.
18. Whether the salesman is required to train other personnel.
19. Whether or not the salesman is required to work in conjunction with salaried employees in connection with his various duties.
20. Whether business cards and forms are furnished by the employer to the salesman.
21. Whether the employer furnishes sales literature and samples.
22. Whether or not the employer censors correspondence written by the salesman.
23. Whether travel, entertainment and similar expenses are borne by the salesman or the employer.
24. Whether the salesman is given a fixed territory or can sell wherever he chooses.
25. Whether the salesman is permitted to carry other products, especially competitive products.
26. Whether the employer has the right to hire and fire the salesman.
27. Whether the salesman receives a fixed wage, drawing account or advances against future commissions.
28. In states where an unorganized business tax is imposed the payment or non-payment of such tax is material. Only persons in business are required to pay such tax. In such states the relationship of employee-employer is advantageous not only for unemployment compensation benefits but also to avoid tax burdens. The unincorporated business tax in New York State and the gross receipts tax in New
York City have been potent factors in convincing many whose status was not clear that they were employees rather than independent contractors. The fact that the Social Security tax rate for self-employed persons is higher than that imposed upon wage earners may also be persuasive.

Great importance has been placed by the courts on whether the commission salesman was subject to summary discharge, was required to devote fixed hours to his work, and whether he received regular remuneration, a drawing account or advances against commissions. All of the elements of direction and control are then placed, so to speak, in the judicial cauldron and from such brew a conclusion of law is distilled.

It is not surprising, therefore, that the common-law test has conspicuously failed to achieve uniformity or certainty in its application. A writer on the subject observed:

The ultimate issue is whether enough control is vested in the employer to meet an ill-defined standard; and in view of the multiplicity of ways in which control or its absence may be evidenced, and the subtlety of the influences which in any continuing relationship make for autonomy or for subservience, it is small wonder that judges should differ widely in their appraisal of similar situations.

After 1969, many of the problems in this area may be eliminated. Proposed amendments to the Federal Unemployment Tax Act provide that certain commission salesmen, routemen, traveling salesmen, and similar persons are to be considered as employees under that Act even though the common-law test of a master-servant relationship is not met. Undoubtedly most states will conform their statutes if the Federal Act is changed. In New York,

28 Wilcox, supra note 23.
legislation has already been drafted to adopt the proposed federal definition.

Entertainers

The status of actors in legitimate shows, motion picture productions, and dramatic radio and television shows usually does not present a coverage problem. The problem arises in connection with variety artists, night club entertainers and performers who have their own specialty acts.

In the first court decision on the subject in New York, the appellate division held that entertainers who performed in a stage show at Radio City Music Hall were not employees even though the management had the right to approve changes in the personnel of the acts, to prescribe the number of shows to be performed, to order revisions in the script, and to vary the duration of performance time. These actors furnished their own equipment, costumes and music. They were engaged through booking agents and, unlike permanent personnel used by the theatre in its stage shows, did not receive the benefit of Workmen's Compensation, hospital or other group insurance benefits. The court held that the actors who had their own specialty acts were actually engaged in independent callings and were not employees.30

Variety actors in night clubs were held to be independent persons and not employees.31 However, a bit actor in a radio serial who was required to attend rehearsals, who performed his services subject to the supervision of a director, who could be discharged at will or pursuant to union agreement, and who received union scale wages was held to be an employee.32

A hotel which did not furnish an integrated show but hired several specialty acts which furnished their own elaborate costumes, props and equipment was held not to

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be the employer in spite of the fact that the specialty actors were labeled as employees in their engagement contracts.33

Employers are not alone in attempting by means of a contract to color or mask a relationship. The unions or guilds of which the specialty actors were members sought to extend the benefits of the unemployment insurance program to their members. These contracts, however, were not drawn as ingeniously as the "Form B" contract of the Musician's Union and the courts held that the use of such contracts did not vest the purchaser of the act with the right of direction and control but merely designated the purchaser as an employer and the specialty actors as employees. These labels were held to be of no significance. Since the contracts did not vest the employer with the right of direction and control, they did not create an employee-employer relationship.34

**Musicians**

The strict application of the common-law master and servant doctrine by the New York courts resulted in the creation of anomalous situations in musician cases. The issue in these cases is not whether the musicians are employees, but whether their employer is the leader of the orchestra or the purchaser of the music. Musicians who are members of bands or orchestras are subjected to the minutest type of direction and control. Without such direction and control by the leader, the result would be discord and not harmony. The issue in such cases is whether the leader exercises the control on his own behalf or as an employee of the purchaser of the music.

Despite the economic realities of the situation, the New York courts have held the purchaser of the music to

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be the employer of both the leader and musicians if the parties entered into the standard union (American Federation of Musicians) musician's contract,\footnote{Matter of Basin Street, 6 N.Y.2d 276, 160 N.E.2d 517, 189 N.Y.S.2d 640 (1959), reversing, 6 App. Div. 2d 922, 175 N.Y.S.2d 889 (3d Dep't 1958); Matter of American Legion, Inc., 10 App. Div. 2d 400, 199 N.Y.S.2d 1000 (3d Dep't 1960).} which provides as follows:

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. . . . On behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. . . .

In the absence of conclusive evidence to the contrary, this contractual provision has been held by the New York courts to create an employer-employee relationship between the leader and the purchaser of the music. The leader is deemed to be an employee of the purchaser of the music and any direction and control which he exercises over the musicians is done as agent of the purchaser of the music and on his behalf. That the purchaser of the music may, in fact, not exercise any control over the leader and the musicians is legally immaterial; the contractual reservation of the right of direction and control is almost always decisive.

Unlike the Supreme Court of the United States in \textit{Bartels v. Birmingham},\footnote{332 U.S. 126 (1947).} the New York courts have refused to consider the economic realities of the situation. The fact that the band was an organized unit and that the
leader maintained a more or less permanently organized group did not impress the New York tribunals, nor did the fact that the leader maintained an office and hired arrangers, office personnel, booking agents, band managers and band boys and provided the music, transportation and uniforms. By an application of an ancient doctrine and the acceptance of a contractual fiction, the court found an employer-employee relationship where, if viewed in the light of economic reality, such relationship simply did not exist.

The anomalous tax situation brought about by the conflict between the state and federal decisions was ignored by the New York courts. By virtue of the Bartels case, the leader of a name band is deemed to be the employer and is liable for the entire tax under the Federal Unemployment Insurance Tax Act. The New York agency will not knowingly accept the payment of contributions by the leader, as an employer; and the purchaser of the music, who is not liable for taxes under the Federal Act, must pay all contributions due on the earnings of the leader and the members of the orchestra to New York State. No employer, therefore, receives credit under the Federal Unemployment Insurance Tax Act for the payment of contributions to New York State.

The New York administration was faced with the unpleasant task of insisting upon the payment of contributions by the "father of the bride" who, on the occasion of his daughter's wedding, signed a "Form B" contract in order to obtain the services of an organized group of musicians. However, this situation has now been remedied. The union's new single engagement contract form provides that the leader is deemed to be the employer of the musicians and the purchaser is no longer, by virtue of such contract, vested with the right of control.

The purchaser under a "Form B" contract will not be relieved of the effects of the contract by establishing that he did not in fact exercise direction and control, by urging that it was a fiction, or by showing that if he did not execute the form contract he would not have been able to
obtain musicians. The burden of proof rests with the pur-
chaser to establish that the contract provision concerning
direction and control was in fact a fiction or induced by
fraud. In order to be successful he must show, for ex-
ample, that when he attempted to exercise control, such
control or direction was not accepted by the leader. A
rider to the agreement will relieve the purchaser of the
music of liability only if it expressly provides that he is
not vested with the right of direction and control over the
leader and revokes the appointment of the leader as his
agent.

Homeworkers

Industrial homeworkers in New York were held to be
employees for many years prior to the adoption of the
Unemployment Insurance Law. Thus, in cases involving
industrial homeworkers under the New York law, the
courts had little difficulty in applying these precedents
and in finding that the homeworkers were employees with-
in the meaning of the Unemployment Insurance Law.
Little attention was paid to the argument that since the
work was not performed in the employer's establishment
but in the worker's home, their work could not be con-
stantly supervised.

Curiously, the very court which held industrial home-
workers to be employees, held clerical homeworkers who
worked under similar circumstances to be independent
persons.37 However, in a later case the appellate division
came to the conclusion that a clerical homeworker, who
obtained her employment through a help-wanted advertise-
ment, was required to call upon the employer daily to
obtain and return work, was paid at a fixed rate on Friday
of each week, was responsible for spoilage, was required to
correct any errors which the employer discovered, and re-
ceived detailed instructions as to the manner in which she

337 (3d Dep't 1944).
was to perform the work, was indeed an employee and not an independent person.38

**Truck Drivers**

The owner-driver presents a problem which has facets not often found in the usual master and servant cases. The courts in New York have not hesitated to find a master and servant relationship where common-law direction and control is present even though the contract of hire requires the driver to furnish a truck or tractor.39 The furnishing of the truck has been compared to the furnishing of hand-tools by carpenters or plumbers. The fact that the owner-operator might work for other employers when his services were not required by the employer in issue was held not inconsistent with an employer-employee relationship.40

As in other occupations, a contract of hire which vested the employer with the right of direction and control over the owner as the driver was held to create an employer-employee relationship.41 Even where the contract labeled the owner-driver an independent contractor, the courts have looked beyond the contract and found that the employer exercised sufficient direction and control to satisfy the requirements of the common-law rules of master and servant.42

The New York Unemployment Insurance Appeal Board had no difficulty in finding a school bus driver who furnished his own station wagon to be an employee. The Board there stated:

In certain occupations, it is not unusual to find that workmen furnish their own tools and equipment. The fact, therefore, that claimant furnished his own vehicle is not conclusive. . . .

The evidence fails to support the employer's contention that claimant was an independent contractor. While claimant owned his own station wagon, he did not hold himself out to the general public as being in the school transportation business, nor did he hold himself out to the general public as a taxi driver or as engaged in any phase of the public transportation business. Claimant had a job with the employer, nothing more. The fact that he furnished his own vehicle did not, in and of itself, make claimant an independent contractor.\footnote{New York Unemployment Insurance Appeal Board 127, 405 (1965).}

In truck driver cases an important element of control is the employer's right to designate routes and to insist, in the case of a public carrier, on strict adherence to the rules of the supervising governmental agency. The employer's requirement that the driver wear a uniform with the employer's name or trademark, make collections, issue bills of lading, and handle products of the employer exclusively are also important elements.

In those few cases where a truck driver or owner-driver was held to be an independent contractor, the employer did not exercise direction and control and the contract of hire did not vest the right of control in the employer.

\textit{Barbershop Chair Lessees}

Whether a chair or booth lessee in a beauty salon or barbershop is an employee or independent contractor depends upon the rental agreement: is it a subterfuge to mask the true relationship or a legitimate reflection of the status of the person who rents the chair?

A chair lessee was held to be an employee where the owner of the shop was present at all times and worked alongside. The employer paid for advertising and business cards, provided each operator with an appointment sheet on which was kept a record of daily cash receipts, and settled accounts with the barber daily. The employer could cancel the so-called lease at any time and he furnished light, heat and all supplies. The so-called written lease under such circumstances was held to be a nullity and
a subterfuge and the relationship between the parties was found to be one of employer-employee.44

However, in instances where the chair lessee was free to come and go as he pleased, where he purchased his own supplies, arranged his own appointments with customers, fixed his own service fees and had established credit with supply houses, the barber was held to be in an independently established business and not an employee.45

Professional Persons

Many decisions have considered the status of attorneys, doctors, nurses, engineers and architects.46 The common-law control test was applied to these cases in the same fashion as in other occupations. Where the right to direct and control was established, the professional man was held to be an employee. The cases, however, are often difficult due to the absence of supervision and direction because of the competence of the professional and the fact that his independent judgment is frequently the service for which the employer has contracted.

A referee's decision recently dealt with the status of doctors who worked for a physician and held that in one aspect of the relationship the doctors were employees and in another that they were independent contractors. The employee relationship was found to exist when the doctors worked in the employer's office subject to his overall supervision. Where they voluntarily accepted assignments from the employer outside his office and were free of all control, they were not employees.47

CONCLUSION

The common-law control test is sometimes difficult to apply and it may not furnish the absolute certainty and

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45 New York Unemployment Insurance Appeal Board 9065 (1943).
guidelines welcomed by the administrator. However, after thirty years of decisions in New York, the administrators and adjudicators under the unemployment insurance program are satisfied that they have evolved an arrangement which works. The definitions, standards and precedents now cover the overwhelming majority of situations and the areas of doubt are constantly narrowed. There is no clamor in New York for the adoption of the "ABC" tests and no prospect of the enactment of such legislation.