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Present Status of Industrial Homeworkers as Employees Under the Social Security Act

Joseph P. Muscarella

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ernment. This trend has influenced the attitudes of the courts and nowhere is this more clearly shown than in the choice of language presenting the *Kane* majority and minority opinions. The majority spoke equity, the minority talked law. One looked for an escape from what was considered a disadvantageous contract, the other stressed the necessity for exactness and stability in commercial law. Each possessed merit and had the decision presented its conclusion in a more exact form so as to allay the fears of the dissent a more serviceable future standard would have resulted. However, in its present condition the case will provide just more fuel for the old conflict of form versus substance, which despite the merger of Law and Equity under the code pleadings still rears its head from time to time. While the problem persists and certainly so long as the *Kane* case is law an alternative demand for equitable relief (absent in the instant case) is indicated.

From a less theoretical standpoint there can be little doubt that the practical result of this decision will be a great increase of cases of this type. No longer will complainants be deterred from presenting what had heretofore seemed hopeless pleas. By the same token, however, these suits will force the courts to enunciate more definitive limits to this type of relief. In short order then a more concrete standard should appear. Meanwhile and even after these clarifications appear much litigation can be avoided by including in all brokers' contracts clear cut provisions anticipating possible defaults.

HAROLD MCCOY.

PRESENT STATUS OF INDUSTRIAL HOMEWORKERS AS EMPLOYEES UNDER THE SOCIAL SECURITY ACT

I. *Introduction*

During the past few years there has existed a conflict as to the coverage of certain individuals, such as industrial homeworkers,[1] under the Old-Age and Survivors Insurance Program of the Social Security Act.[2] This conflict concerned the interpretation and definition to be given to the word "employee" in said Act, and was finally settled on June 14, 1948 by Congressional amendment to the Social Security Act.[3] A chronological approach is used herein to show how the conflict arose over a period of years and how it was settled in the second session of the 80th Congress.

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[1] See *Hearings before Committee on Finance* on H. J. R. 296, 80th Cong., 2d Sess. 128 (1948).

[2] 49 STAT. 620 (1935), as amended, 42 U. S. C. §§ 301-1307 (1946).

[3] Pub. L. No. 642, 80th Cong., 2d Sess., § 2(a) (June 14, 1948).

II. *The Social Security Act in General*

During the year 1934, at a time when ten million workers were without employment and when some eighteen million people were dependent for subsistence on relief, President Roosevelt set up the Committee on Economic Security to study the problem of economic security for the wage earner.

In 1935, Congress, after having studied the recommendations of the Committee on Economic Security, passed the Social Security Act,[4] which today consists of eight programs.[5]

Although the Social Security Act is a federal law, the Federal Government only operates the program of Old-Age and Survivors Insurance. The other seven programs are operated by the states, with the Federal Government cooperating and contributing funds.

Two federal agencies participate in administering Old-Age and Survivors Insurance: the Social Security Administration and the United States Treasury Department.

The Social Security Administration, through its Bureau of Old-Age and Survivors Insurance, keeps a record of the wages received by all workers on jobs that are covered by the program; examines and decides upon all claims and benefits; and after approving claims certifies them for payment to the United States Treasury.[6]

The United States Treasury Department through the Bureau of Internal Revenue, collects the Social Security taxes from the employees and an equal amount from the employer; puts them in the Federal Old-Age and Survivors Insurance trust fund; and when claims for benefits have been certified by the Social Security Administration, the Treasury Department mails out the checks directly to the claimant.[7]

The Social Security Administration has no power to assess or collect taxes.[8] In legal theory there is no connection between the benefits payable by the Social Security Administration and taxes collectable by the Bureau of Internal Revenue.[9]

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[4] 49 STAT. 620 (1935), as amended, 42 U. S. C. §§ 301-1307 (1946).

[5] The eight programs are grouped under three heads. The first heading provides for social insurance which included unemployment insurance and old-age and survivors insurance. Under the second heading public assistance is provided for the needy, consisting of old-age assistance, aid to the blind, and aid to dependent children. The third heading pertains to child services, including maternal and child-health services, service for crippled children, and child welfare services. For further information concerning these services see 1 CCH UNEMPLOYMENT INSURANCE SERVICE ¶¶ 1900-2050, 2200, 2210, 2220, 2230.

[6] See 1 CCH UNEMPLOYMENT INSURANCE SERVICE ¶ 2201.21 (1947) for a more comprehensive statement of the functions and duties of the Social Security Administration.

[7] *Id.* at ¶ 2201.22.

[8] ATT'Y GEN. COMM. AD. PROC., Social Security Board 25 (Monograph 16, 1940); 49 STAT. 620 (1935), 42 U. S. C. §§ 301-1307 (1946).

[9] This results from the fact that the Social Security Act was originally set up with thirteen separate and distinct titles. Title II originally dealing with "Federal Old-Age Benefits" and its administration; titles VIII and IX dealing

The Social Security Act does not cover all jobs and consequently many workers are not benefited by this legislation.[10] Among the groups not covered are those individuals who are self employed, including independent contractors. That the problem of ascertaining where an employer-employee relationship exists or whether the relationship is that of an independent contractor as covered by the Social Security Act has been a perplexing one is evidenced by the numerous court decisions [11] on the subject as well as by recent Congressional legislation.[12]

III. *Industrial Homework as Authorized by Federal and New York Statutes*

Under the Fair Labor Standards Act of 1938,[13] Congress, in the exercise of its power to regulate interstate commerce among the states, attempted to eliminate labor conditions detrimental to the maintenance of a minimum standard of living necessary for health, efficiency and general well being of workers engaged in commerce,[14] or in the production of goods for commerce. Since the Act contained no prescription as to the place the employee must work such omission was interpreted to mean that employees otherwise coming within the terms of the Act are entitled to its benefits, whether they perform their work at home, in the factory or elsewhere.[15]

Pursuant to sections of the Act,[16] the Wage and Hour Division was established under the Department of Labor under the direction of an administrator.[17] Exercising his powers under the Act the administrator has permitted firms to employ homeworkers in the following industries: buttons and buckles;[18] embroideries;[19] handker-

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with taxing provisions on employers and employment. Titles VIII and IX were subsequently embodied in the Internal Revenue Code, and title II was amended so as to include survivors insurance benefits. 49 STAT. 620 (1935).

[10] See 26 CODE FED. REGS. §§ 402.201-402.226 (Cum. Supp. 1943).

[11] Bartels v. Birmingham, 332 U. S. 126, 91 L. ed. 1947 (1947); United States v. Silk, 331 U. S. 704, 91 L. ed. 1757 (1947); Harrison v. Greyvan Lines, 331 U. S. 704, 91 L. ed. 1757 (1947).

[12] Pub. L. No. 642, 80th Cong., 2d Sess., § 2(a) (June 14, 1948).

[13] 52 STAT. 1060-1069 (1938), as amended, 29 U. S. C. §§ 201-219 (1946).

[14] 52 STAT. 1060 (1938), as amended, 20 U. S. C. § 202 (1946).

[15] 29 CODE FED. REGS. § 776.3 (Cum. Supp. 1943).

[16] 52 STAT. 1061 (1938), as amended, 29 U. S. C. § 204 (1946).

[17] 52 STAT. 1065, 1066 (1938), as amended, 29 U. S. C. §§ 208(f), 211(c) (1946).

[18] 29 CODE FED. REGS. §§ 625.100-625.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,345 (1946).

[19] 29 CODE FED. REGS. §§ 633.100-633.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,355 (1946).

chiefs;[20] gloves;[21] jewelry;[22] knitted outerwear;[23] and women's apparel.[24]

However, before homework is allowed in these industries the homeworker must first obtain a special homework certificate.[25] These certificates are only available to those individuals who because of age or mental or physical disability are unable to adjust themselves to factory work; or in other situations where there are extenuating circumstances resulting in undue hardship for the individual to work in a factory or shop.[26] The employer must also obtain a certificate authorizing the employment of homeworkers.[27] Therefore, in the seven (7) named industries, pursuant to federal statutes and regulations, we have homeworkers who have been certified chiefly upon hardship principles.

In New York State the Industrial Commissioner, pursuant to provisions of the New York Labor Law,[28] has issued orders whereby homeworkers must obtain certificates, and their employers must obtain permits in order to engage in permitted homework industries.[29] On June 27, 1945, Edward Corsi, the Industrial Commissioner of New York, issued a general order[30] restricting homework in all industries except as provided in such order. The general order did not apply to those industries covered by the Fair Labor Standards Act or by special homeworker orders issued prior to June 27, 1945. Prior to this date four orders had been issued relating to the following four industries: men's and boys' outer clothing industry;[31] men's and boys' neckwear industry;[32] artificial flower and feather industry;[33] and the glove industry.[34] Certificates under these four orders were

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[20] 29 CODE FED. REGS. §§ 628.100-628.112 (Cum. Supp. 1943) 2 CCH LAB. LAW SERV. ¶ 31,350 (1946).

[21] 29 CODE FED. REGS. §§ 621.100-621.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,340 (1946).

[22] 29 CODE FED. REGS. §§ 607.100-607.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,325 (1946).

[23] 29 CODE FED. REGS. §§ 617.100-617.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,330 (1946).

[24] 29 CODE FED. REGS. §§ 605.100-605.112 (Cum. Supp. 1943), 2 CCH LAB. LAW SERV. ¶ 31,335 (1946).

[25] See notes 18-24 *supra*.

[26] *Ibid.*

[27] *Ibid.*

[28] N. Y. LABOR LAW § 351.

[29] N. Y. LABOR LAW § 352.

[30] Industrial Commissioner's Order. General Order Restricting Industrial Homework in all Industries, effective July 16, 1945. Filed in the Dep't of Labor June 27, 1945.

[31] Industrial Commissioner's Order. Homework Order No. 1, issued April 25, 1936 (amended August 27, 1936).

[32] Industrial Commissioner's Order. Homework Order No. 2, effective May 1, 1937.

[33] Industrial Commissioner's Order. Homework Order No. 3, effective May 2, 1938 (revised Oct. 30, 1939).

[34] Industrial Commissioner's Order. Homework Order No. 4, effective August 15, 1941 (amended May 15, 1942).

issued on the basis of hardship cases similar to those under the Fair Labor Standards Act of 1938.[35]

Thus, at the present time in New York homework is permitted in ten industries: seven under the federal provisions and four under state provisions. (It is to be noted that the glove industry is approved by the Federal Government and the State of New York—hence homework is only permitted in ten industries.) Under both federal and state provisions employers may not permit homework to be performed in these ten industries except by certified homeworkers; certificates being issued only in hardship cases.

IV. *Origin of the Administrative Conflict*

The original Social Security Act did not adequately define the terms "employer" or "employee," nor the employment relationship. This resulted in administrative interpretation of the Act by rules and regulations of the Treasury Department and the Social Security Administration. However, both agencies issued virtually identical regulations on coverage since the inception of the Social Security Act.[36] Article 13, Section 361a, of the New York State Labor Law provides that, "All industrial homeworkers shall be presumed to be employees of their employers and not independent contractors."

Under the interpretation of both agencies it had been held that homeworkers were employees under the Social Security Act.[37] The decision of the United States Circuit Court of Appeals in *Glenn v. Beard* [38] effected a change in the agency rulings. In that case the court concluded that the homeworkers were not subject to the right of control except as to the work done and, therefore, were independent contractors. The Supreme Court refused certiorari to review

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[35] Based upon old age; physical or mental disability; care of an invalid; and other conditions. See orders cited notes 30-34 *supra.*

[36] See 26 CODE FED. REGS. §§ 402.201-403.228 (Supp. 1940); 20 CODE FED. REGS. §§ 403.801-403.828 (Supp. 1940); ATT'Y GEN. COMM. AD. PROC., Social Security Board 25 (Monograph 16, 1940).

[37] S. S. T. 137, C. B. 1937-1, 378; Treasury Department A & C Mimeograph Coll. No. 5763 (1944); Social Security Claims Manual § 1210(g).

[38] 141 F. 2d 376 (C. C. A. 6th 1944). At that time the court held that certain individuals performing services in their homes in the manufacture of articles for a Mrs. Beard were not her employees for federal employment tax purposes. In that case Mrs. Beard povided materials and specifications for the manufacture of comforters and quilts to various homeworkers. A contract was signed stipulating that within a designated period the work was to be done, however, the work might be done at such times and at such places as was agreeable to the worker. The work could have been done personally or by agents of the worker. Upon delivery of the completed articles to Mrs. Beard the workers were paid the stipulated price. There was no supervision of the work while it was being done and no inspections were made. In fact, Mrs. Beard had no right to withdraw the work while it was being worked upon and within the time designated by the contract. The homeworkers were free to work only when they wanted to and at such times as their household and farm duties permitted them to engage in such labor.

this decision.[39] Thus the test of employment as to the industrial homeworker was made the common law test of control, *i.e.*, that one was an employer if he had the right to direct what should be done and how it should be done. A few months later the Treasury Department issued a mimeograph wherein the decision of *Glenn v. Beard* [40] was held, "controlling in all cases involving the status of individuals performing services in their own homes or workshop in connection with the manufacture or assembly of articles from materials supplied by the person engaging their services, under oral or written contracts, where the circumstances surrounding the performance of the work do not differ materially from those present in the Beard case." [41] From that point on the Treasury Department generally held homeworkers to be independent contractors. Thereafter homework employers began to file for refunds of social security taxes already paid in, and also stopped paying further taxes. Homework employees were generally instructed by their employers to file for refunds for paid taxes on the theory that said employees were no longer covered under the Old-Age and Survivors Benefits of the Social Security Act.

However, the Social Security Administration did not alter its rules and regulations after the decision of *Glenn v. Beard*.[42] The Administration's position was evidenced by Section 1210(g) of Social Security Claims Manual [43] whereby the Social Security Administration continued to treat industrial homeworkers as employees.

Thus the separate administration of the taxing and benefit provisions of the Social Security Act resulted in a conflict between the Treasury Department and the Social Security Administration as to

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[39] 323 U. S. 724, 89 L. ed. 582 (1944).

[40] See note 38 *supra*.

[41] Treasury Department A & C Mimeograph Coll. No. 5763 (1944).

[42] See note 38 *supra*.

[43] "Services performed by industrial homeworkers generally constitutes employment. Unless it appears that there is a departure from the rules applicable to the employment relationship, such cases will be adjudicated on this basis. Cases in which a novel or unusual arrangement is shown should be fully developed and forwarded to the Claims Policy Division for a determination.

"It now appears that the Bureau of Internal Revenue will adhere to its view expressed in A & C Mimeograph Collector No. 5763 dated October 28, 1944, which gave national application to the decision in Glenn v. Beard, 141 F. 2d 376 (C. C. A. 6th), holding that individuals performing this type of services for the employer are not employees.

"If claims involving Beard homeworkers arise, wages should be established for non-barred periods by means of secondary evidence, the case should be forwarded prior to any employer contract to the Claims Policy Division via the appropriate area office.

"In cases involving homeworkers for employers other than Beard an attempt should be made in the first instance to secure the necessary wage information from the employer. If this is not possible, an effort should be made to establish the wages by means of secondary evidence."

coverage of industrial homeworkers. What was once considered a potential peril of conflicting administration became an actuality.[44]

The Treasury Department deals primarily with the alleged employer in getting the information and facts upon which that department determines whether he is taxable under the Social Security Act. Alleged employers want to be excluded from the Act so that they will not be assessed for taxes and because they do not want to be burdened with the bookkeeping tasks involved in the quarterly submission of wage reports to the Social Security Administration. Furthermore the power of the Treasury Department to interpret its own taxing authority is usually strictly construed.[45] Thus the Treasury Department does not care to run the risk of an adverse ruling to the taxpayer on borderline cases which may involve the department in litigation in order to collect relatively small sums assessed in Social Security matters. On the other hand the Social Security Administration gets the facts or the allegations of the facts primarily from the persons who allege themselves to be employees and who naturally want to be included under the various benefits of the Social Security Act. Furthermore the Social Security Administration is dealing with social and remedial legislation and therefore is reluctant to exclude from its coverage any groups of employees to whom its benefits might be extended. Consequently in borderline cases such as the industrial homeworker the Treasury Department usually favored exclusion from coverage of the Act while the Social Security Administration usually favored inclusion.

Thus we had a situation where industrial homeworkers were generally considered as covered by the Social Security Administration and not covered by the Treasury Department. This would have ultimately resulted in paying benefits without taxing, since the Social Security trust fund is set up to pay benefits regardless of contributions into the Social Security trust fund.[46]

In New York, as elsewhere, when homeworkers were notified by their employers or the Treasury Department that they were no longer covered under Social Security benefits and to apply for monies already paid, they could not understand the sudden reversal.

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[44] ATT'Y GEN. COMM. AD. PROC., Social Security Board 25 (Monograph 16, 1940).

[45] Social Security Board v. Nierotko, 327 U. S. 358, 90 L. ed. 718 (1946) (by implication).

[46] Payment of benefits is not conditioned upon the amount of taxes collected from the employer and employee but upon the workers' wages from jobs covered under the Social Security Act. Actual court decisions in cases involving Social Security controversies have directed the payment of benefits by the Social Security Administration on wages for which no taxes have been paid. Social Security Board v. Nierotko, 327 U. S. 358, 90 L. ed. 718 (1946); Miller v. Burger, 161 F. 2d 992 (C. C. A. 9th 1947); Miller v. Bettencourt, 161 F. 2d 995 (C. C. A. 9th 1947); Patton v. Federal Security Agency, Social Security Bd., 69 F. Supp. 282 (E. D. N. Y. 1946).

At this point it is necessary to reiterate the fact that these home-workers were issued certificates because of advancing years, physical disability, or were required to stay at home in order to take care of an invalid; and in other hardship cases. Individually they went from office to office; from the State Department of Labor to the Federal Department of Labor; but none of these agencies could help them or give them any satisfaction since these Government agencies had nothing to do with the Social Security Act. If they went to the Treasury Department they were told that they were no longer covered under the Social Security Act and to file for refunds. When they went to the Social Security Administration they were told that they were still covered and were asked to fill out forms to have their eligibility expressly established by determination and to continually supply evidence to establish the wage records for future working years in order to establish future benefits. But how could they be covered when they weren't being taxed? Besides, the Treasury Department had told them they were not covered. To try to explain that there is no connection between benefits payable and taxes collectable was futile since both were naturally linked together in their minds as parts of a single scheme of social insurance.

V. *Solution of the Administrative Conflict*

On June 16, 1947 the United States Supreme Court in *United States v. Silk* [47] and *Harrison v. Greyvan Lines, Inc.*,[48] considered the problem of coverage under the Social Security Act. In deciding these cases the court stated:

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[49]
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> . . . The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty

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[47] 331 U. S. 704, 91 L. ed. 1757 (1947). The court resolved two separate actions in one opinion. Both actions were brought to recover taxes alleged to have been illegally assessed and collected from the employer. If the individuals were employees the taxes were properly assessed upon the employer; if the individuals were independent contractors then a refund would have to be made. The first case (*Silk* case) presented the issue as to whether certain workmen engaged in unloading coal cars and others in making deliveries of coal by trucks were independent contractors or employees. The court concluded that they were employees. The second case (*Greyvan* case) concerned truckmen who performed the actual service of carrying goods shipped by the public in a trucking business. The court ruled that these individuals were independent contractors.

[48] *Ibid.*

[49] United States v. Silk, 331 U .S. 704, 712, 91 L. ed. 1757, 1767 (1947).

through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act,[50] we pointed out that the legal standards to fix responsibility for acts of servants, employees, or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. . . . We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. . . . We approve the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individuals the rights guaranteed and protection afforded by the Act." . . . Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case.[51]

. . . Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.[52]

In applying these factors in the *Silk* case the court concluded that the individuals were employees. However, in the *Greyvan* case the court held that the truckmen were independent contractors. In the dissenting opinion Mr. Justice Rutledge joined in the court's opinion as to the applicable principles of law, but disagreed as to the actual disposition of the cases, stating:

. . . the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constrict construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy purposes *pro tanto*. . . . Here the District Courts and the Circuit Courts of Appeal determined the cases largely if not indeed exclusively by applying the so-called "common law control" test as the criterion. This was clearly wrong, in view of the Court's present ruling.[53]

In the case of *Bartels v. Birmingham*,[54] decided on June 23, 1947, the Supreme Court was afforded another opportunity to con-

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[50] National Labor Relations Bd. v. Hearst Publications, 322 U. S. 111, 88 L. ed. 1170 (1944).

[51] United States v. Silk, 331 U. S. 704, 712, 91 L. ed. 1757, 1767 (1947).

[52] *Id.* at 716, 91 L. ed. at 1769.

[53] United States v. Silk, 331 U. S. 704, 721, 91 L. ed. 1757, 1772 (1947).

[54] 322 U. S. 126, 91 L. ed. 1947 (1947). In that case the issue was presented as to whether bandleaders and musicians engaged to play limited engagements in dance halls were employees of the dance hall proprietor, or whether band-

sider the problem of coverage under the Social Security Act. The Supreme Court reiterated in part its previous opinion in the *Silk* and *Greyvan* cases [55] and made more emphatic the test to be used in ascertaining whether an employer-employee relationship existed under the Social Security Act.[56]

Thus for the purpose of coverage under the Social Security Act the Supreme Court no longer considered the common law rules, of which the factor of control was paramount, as applicable in determining if an employer-employee relationship existed.

The Social Security Administration hailed these decisions as completely in line with their interpretation and application of the Social Security Act.

Shortly thereafter the Treasury Department and the Social Security Administration set up a joint drafting committee to establish new rules and regulations which would incorporate and express the results of the Supreme Court decisions. On November 27, 1947 the Treasury Department's proposed regulations concerning coverage were published in the Federal Register.[57]

These regulations embodied a complete new test for the employer-employee relationship under the Social Security Act. The status of individuals under the Fair Labor Standards Act was to be afforded persuasive weight. These regulations, if passed, would have solved the problem of the industrial homeworker.

However, the proposed rules and regulations never went into effect. On February 27, 1948, a joint resolution [58] was introduced in Congress to maintain the *status quo* in respect to employment taxes pending further Congressional legislation. Hearings were conducted before the Committee on Finance, wherein the administrative problems and conflicts as to coverage under the Social Security Act were

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leaders were independent contractors and the employers of the musicians. The court held that the bandleaders were independent contractors and therefore the employers of the individual musicians who played in the band.

[55] See note 47 *supra*.

[56] In deciding the *Bartel* case the court stated: "In *United States v. Silk* . . . we held that the relationship of employer-employee, which determined the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship but in application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk*, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the entertainment field as we have just said, in *Silk*, that they were in that of distribution and transportation." 322 U. S. 126, 130, 91 L. ed. 1947, 1953 (1947).

[57] 12 FED. REG. 7966 (1947).

[58] H. J. R. 296, 80th Cong., 2d Sess. (1948).

brought to the attention of Congress.[59] On June 14, 1948 Congress passed, over the President's veto, an amendment to the Social Security Act which redefined the term employee, so as not to include: "(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual . . . who is not an employee under such common law rules." [60] The underlying reasons for the passage of the amendment were: It sustained the original intent of Congress in 1935; corrected judicial misinterpretation of the Social Security Act by the *Silk, Greyvan* and *Bartel* cases; and prevented from going into effect vague and unworkable administrative regulations concerning the employer-employee relationship.

President Truman in his veto message stated:

> In June, 1947, the Supreme Court held that these employes have been justly and legally entitled to Social Security protection since the beginning of the program in 1935. I cannot approve legislation which would deprive many hundreds of thousands of employees, as well as their families, of Social Security benefits when the need for expanding our social insurance system is so great.[61]

The President further declared that passage of the measure would:

> . . . overturn the present sound principle that employment relationships under the Social Security laws should be determined in the light of realities rather than on the basis of technical legal forms. . . . it would make the Social Security rights of the employes directly excluded, and many thousands of additional employes depend almost entirely upon the manner in which their employers might choose to cast their employment arrangements. . . . I cannot approve legislation which would permit employers at their own discretion to avoid payment of social security taxes and to deny social security protection to employes and their families.[62]

VI. *Conclusion*

The present test for ascertaining whether an employer-employee relationship exists under the Social Security Act is by express Congressional mandate, the common law control test (*i.e.,* whether the employer has the right to control the employee or not).

In the past, industrial homeworkers problems were generally borderline cases, the workers were usually considered as employees by the Social Security Administration under its liberal interpretation of the term employee, and generally considered as independent contractors by the Treasury Department under the sole or dominant criterion of the control test. The conflict between the two adminis-

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[59] *Hearings before Committee on Finance* on H. J. R. 296, 80th Cong., 2d Sess. (1948).
[60] Pub. L. No. 642, 80th Cong., 2d Sess., § 2(a) (June 14, 1948).
[61] N. Y. Times, June 15, 1948, p. 11, col. 1.
[62] *Ibid.*

trative agencies which in June, 1947, had been resolved in favor of the Social Security Administration by the Supreme Court, has now been reversed and resolved in favor of the interpretation of the Treasury Department. The past policy of the Social Security Administration in looking at the realities of the situation in borderline cases rather than adhering to the strict common law test of control can no longer be followed. Realism is not to be the criterion, but instead a technical concept is to prevail, which since it is subject to easy manipulation by the employer many groups will be excluded from Social Security benefits.[63]

The Social Security Act is social, remedial legislation. It was and still is ". . . an attack on recognized evils in our national economy." [64] Such legislation should be liberally construed so as to achieve in some degree its ultimate aim and purpose, *i.e.*, to provide economic security to the wage earner. No statute passed today can adequately achieve this goal for both this, and future generations. Our economic society has been, is, and will continue to change and evolve with the passing of the years. As economic conditions change so must the Social Security Act. However, the latest Congressional amendment, herein discussed, re-establishing an outdated concept of law as the basis for ascertaining whether an employer-employee relationship exists under the Social Security Act, is retrogressive in nature. It will most likely result in a denial of some measure of economic security to the industrial homeworkers; a group of wage earners who because of extenuating hardship circumstances, advancing years, or physical or mental disability, are unable to adjust themselves to factory work and who have been permitted to work at home. It is this type of worker, handicapped in some manner, but forced by economic necessity to work, who needs Old-Age and Survivors Insurance benefits most in later years. No doubt Congress will in the future continue to amend the Social Security Act. This retrogressive amendment should be stricken from the Act and in its stead there should be enacted an amendment expressly including industrial homeworkers and similar wage earners under Old-Age and Survivors Benefits of the Social Security Act.

JOSEPH P. MUSCARELLA.

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[63] Not only will the industrial homeworker be affected but also such groups as outside salesmen, taxicab operators, insurance salesmen, private duty nurses, owner-operators of leased trucks, entertainers, newspaper vendors and distributors, journeymen, tailors, and other groups totaling from 500,000 to 750,000 workers. See *Hearings before Committee on Finance* on H. J. R. 296, 80th Cong., 2d Sess. 153 (1948).

[64] United States v. Silk, 331 U. S. 704, 712, 91 L. ed. 1757, 1767 (1948).