

# Turning the Tables

The Immigration Reform and Control Act  
& How the Common Law and Non-Employee  
Status Can Protect Immigrant Entrepreneurs

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# ABOUT THIS REPORT

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## About the Center for Law and Work

The Center for Law and Work (CLAW) at UC Berkeley School of Law fosters cross-disciplinary scholarship, student engagement, and community involvement to address pressing and emerging labor and employment issues faced by our most vulnerable working populations. With a focus on race, class, gender, and immigration status, CLAW combines robust legal, policy, and empirical research and analysis to develop solutions to what is broken in our current structures of work, and to chart a path toward a just and equitable economy.

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# Introduction

To be, or not to be an employee, that is the question. Employee status, after all, opens the door to a spectrum of basic rights under various laws like wage and hour or antidiscrimination statutes that are aimed at protecting workers—while it also triggers certain obligations under other statutory regimes like tax or immigration laws that are directed at very different purposes. The fact that there can be more than one answer to the question of a person’s employee status—since a worker can simultaneously be an employee according to one law but not an employee under another—has generated much understandable confusion, in part because this inconsistency seems rather counter-intuitive. But it is actually the legal result of how each respective statute may define, or not define, the term “employment,” “employee” or “employer.”

Definitional differences between statutes can mean that a different legal test (such as the ABC test, the economic realities test, or a common law test) governs the determination of an individual's employee status under each statute.<sup>1</sup> A worker's status as an employee (or non-employee) under one law does not dictate the legal outcome under a separate law containing different definitions and requiring a different legal test, while the opposite is also possible—the same legal test could pertain to various laws, resulting in the same legal outcome as to employee status under each law, if they utilize similar definitions concerning what it means to be an employee.

Compounding this complexity, it's not only the statute at hand and its definitions that can matter to the analysis but also the particular question about employee status being asked.<sup>2</sup> *Is a worker an employee or independent contractor of an entity that has hired the worker? Is a worker an employee of multiple entities jointly employing the worker? **Is a worker who works for a business, but also owns and controls it, an employee of the business?***

The latter question, though it might seem anomalous, can indeed be pivotal in some circumstances. It has not only been central when courts have addressed whether the protections of federal antidiscrimination laws can be claimed by certain workers, but understanding how to answer this question under the federal Immigration Reform and Control Act (IRCA)<sup>3</sup> can also be significant for immigrant workers who start their own businesses.

Passed by Congress in 1986, IRCA generally prohibits the “employment” of individuals who lack work authorization and created the I-9 process, in which employers must verify the identity and work authorization of all new employees.<sup>4</sup> Persons or entities that violate IRCA by employing “unauthorized” workers or failing to comply with its I-9 requirements are subject to a range of civil and criminal penalties, which can be substantial.<sup>5</sup>

IRCA sanctions can be especially devastating for low-wage workers who have invested what little resources they have into building model workplaces—such as worker cooperatives<sup>6</sup> or other business entities in which workers aspire together to create good jobs as co-owners of the enterprise—as a compelling alternative to traditional employment in industries where labor exploitation is pervasive.<sup>7</sup> High-road models of business ownership, while involving their own set of entrepreneurial challenges and risks, have the potential to offer many advantages for low-wage workers—a pathway out of dead-end jobs, a meaningful chance to improve quality of life, and development of leadership skills and agency.<sup>8</sup>

And importantly, for individuals without work authorization, **working for a business that the individual also owns and controls may not trigger IRCA obligations.** This is because such “worker-owners”<sup>9</sup> might not be considered “employees” of the business under IRCA—and *if they are not employees*, there is no legal requirement that the business verify their work authorization or prepare I-9 forms for them, and accordingly, no associated IRCA sanctions against the business that could be legitimately imposed.<sup>10</sup>

Whether a worker-owner of a business is or is not an “employee” under IRCA ultimately turns on what IRCA means when it refers to “employment” and what legal test should be used to determine employee status for purposes of the statute. In this publication, we explain that the common law applies to answer this question under IRCA.<sup>11</sup>

- In **Part 1**, we discuss the absence of a definition for “employment” in the IRCA statute, and the unhelpful circular definitions of this term and related terms like “employer” or “employee” in IRCA’s implementing regulations.
- In **Part 2**, we examine U.S. Supreme Court cases firmly establishing that the common law decides the question of employee status when a statute does not define or provides only a nominal definition of “employee” and its associated terms.
- In **Part 3**, we provide an overview of decisions by federal circuit courts that have relied on the common law, and the Supreme Court’s articulation of it in *Clackamas Gastroenterology Associates, P.C. v. Wells*, in holding that certain shareholders or partners of a business are **not** employees under various employment discrimination statutes. Although no federal circuit court has addressed the precise question of how to determine whether a worker-owner of a business is an employee of the business under the IRCA statute, the same reasoning that federal courts have consistently utilized in the context of antidiscrimination laws would seem equally applicable to IRCA and drive an analogous conclusion: when worker-owners have the right to control the business such as through the right to vote on business matters and governance, among other indicators of their right of control, they will most likely not be considered its employees.
- In **Part 4**, we summarize administrative opinions of the Office of the Chief Administrative Hearing Officer (“OCAHO”) in the Executive Office for Immigration Review of the U.S. Department of Justice. In IRCA enforcement actions by ICE,<sup>12</sup> OCAHO has found in various cases that individuals are not employees of a business, and I-9 requirements therefore do not apply to them, if the individual has an ownership interest in and control over all or part of the business. These administrative cases, in which OCAHO has relied on *Clackamas* in some form and drawn from common law principles, are currently the most authoritative view of this issue under IRCA, given the absence of federal court decisions directly addressing the subject.

Through our discussion, we show how application of the common law, even while it has resulted in the denial by courts of antidiscrimination protections for workers, can actually help to protect worker-owners and their businesses when it comes to federal immigration law. Our purpose is not to critique caselaw or assess the correctness of case outcomes, their underlying reasoning, or the legal test utilized. Rather, we take at face value what judicial and administrative decisions have said with striking uniformity over the past two decades, in order to identify the considerations that have been relevant, if not determinative, in answering the question of whether worker-owners of a business are, or are not, its employees.

# The Immigration Reform and Control Act

## The Statute's Silence on What "Employment" Means

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), amending and adding to the body of existing federal immigration law (known as the Immigration and Nationality Act, or the INA).<sup>13</sup> The IRCA statute prohibits the "employment" of "unauthorized aliens"—defined as individuals who are not lawfully admitted for permanent residence in the U.S., or not lawfully authorized to work in the country.<sup>14</sup>

Specifically, the federal law makes it unlawful for “a person or other entity” to do any of the following:

- “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien...with respect to such employment;”<sup>15</sup>
- “to hire for employment in the United States an individual without complying” with the I-9 “employment verification system”;<sup>16</sup> or
- “to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.”<sup>17</sup>

IRCA’s I-9 system is “an extensive employment verification system” that is “designed to deny employment” to “unauthorized” individuals.<sup>18</sup> To that end, IRCA requires employers to examine specified employment authorization and identity documents before all new employees begin work, and to fill out an “I-9” form attesting under penalty of perjury that the foregoing has been “verified” for each new employee.<sup>19</sup> Employers who violate IRCA, including its I-9 “paperwork” requirements, are subject to civil penalties.<sup>20</sup> However, while IRCA’s prohibitions hinge on the existence of an employment relationship, IRCA itself (and the INA as a whole) is silent as to the meaning of the term “employment” and its related terms (such as “employ,” “employer,” or “employee”), which are nowhere defined in the statute.<sup>21</sup>

In 1987, the U.S. Department of Homeland Security (formerly the Immigration and Nationality Service, or INS) issued implementing regulations for IRCA, which included the following definitions:

- “Employment” means “any service or labor performed by an employee for an employer within the United States....However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.”<sup>22</sup>
- “Employee” means “an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in...this section or those engaged in casual domestic employment as stated in...this section.”<sup>23</sup>
- “Employer” means “a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term *employer* shall mean the independent contractor or contractor and not the person or entity using the contract labor.”<sup>24</sup>

Thus, while specifying carve-outs for certain domestic workers and independent contractors, the definitions set forth in the regulations are circular. “Employment” is defined using the terms “employee” and “employer.” And the terms “employee” and “employer” simply mirror each other; “employee” is defined in relation to providing services or labor for an “employer,” while “employer” is defined in relation to engaging the services or labor of an “employee.” As a result, neither the IRCA statute nor its implementing regulations provide guidance on how to answer the specific question of whether a worker-owner of a business is its employee under the statute.<sup>25</sup>

# U.S. Supreme Court Cases

## Application of the Common Law When the Statute Does Not Define “Employee”

No federal court has analyzed the precise question *under IRCA* of what legal test governs to determine whether an individual who works for a business that the individual also owns and controls is an “employee” of the business.<sup>26</sup> But based on U.S. Supreme Court precedent construing other federal statutes, there should be no doubt that the common law provides the answer to this question because IRCA does not define or give guidance on what “employment” means.

## *Nationwide Mutual Insurance Company v. Darden*

In 1992, the Supreme Court issued its opinion in *Nationwide Mutual Insurance Company v. Darden*.<sup>27</sup> The question in *Darden* was whether the plaintiff, who had filed an action for benefits under the Employee Retirement Income Security Act (ERISA), was an “employee” entitled to enforce the substantive provisions of the federal law or whether he was an independent contractor without such a right, and which test applied to answer this question.<sup>28</sup> In the underlying case, the Fourth Circuit had rejected use of the common law as “inconsistent” with ERISA’s purpose and crafted a test of employee status to accord with this purpose. The district court then applied this test to determine the plaintiff was an employee, a ruling which the Fourth Circuit affirmed.<sup>29</sup>

The Supreme Court began its analysis in *Darden* by discussing its prior decision in *Community for Creative Non-Violence v. Reid*,<sup>30</sup> a case that addressed whether a statue that was the subject of a copyright dispute had been “prepared by an employee within the scope of his or her employment” under the Copyright Act, which does not define the term “employee.”<sup>31</sup> The Court explained that in *Reid*, it “unanimously applied the well established principle” that courts must infer Congress meant to incorporate the common law when it uses statutory terms that have “settled meaning” under the common law, “unless the statute otherwise dictates”—and thus, “when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>32</sup> This result under the Copyright Act, the Court stated in *Darden*, should also be the outcome under ERISA because its “nominal definition of ‘employee’ as ‘any individual employed by an employer[]’...is completely circular and explains nothing.”<sup>33</sup> The Court further remarked that the plaintiff “does not cite, and we do not find, any provision [of ERISA] either giving specific guidance on the term’s meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results.”<sup>34</sup> Concluding that the general common law of agency therefore applied to determine who qualifies as an “employee” (versus an independent contractor) under ERISA,<sup>35</sup> the Court reversed the judgment that the plaintiff was an employee and remanded the case.<sup>36</sup>

## *Clackamas Gastroenterology Associates, P.C. v. Wells*

In 2003, the Supreme Court decided *Clackamas Gastroenterology Associates, P.C. v. Wells*,<sup>37</sup> which concerned whether a professional corporation had the minimum number of “employees” during the relevant time period as required under the Americans with Disabilities Act (ADA) to sustain a claim of unlawful discrimination against the company.<sup>38</sup> The resolution of the dispute depended on whether four physician-shareholders who owned the business and constituted its board of directors counted as “employees” of the company under the ADA.<sup>39</sup>

In the underlying case before the Ninth Circuit, the corporation had contended that based on the “economic realities” test, the four physician-shareholders should be considered “partners” and not “employees.”<sup>40</sup> Dismissing that argument and underscoring the “broad purpose of the ADA,” the Ninth Circuit held that *any* examination as to the physician-shareholders’ alleged status as non-employee partners was “irrelevant” under the ADA; rather, “there [was] no reason to permit a professional corporation to secure the best of both possible worlds by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.”<sup>41</sup> Accordingly, the Ninth Circuit ruled that under the ADA, the physician-shareholders should be counted as “employees of the corporation, not partners in it.”<sup>42</sup> The Supreme Court subsequently stepped in to resolve a circuit court split on this issue, which the Court noted was “not confined to the particulars of the ADA.”<sup>43</sup>

To decide the matter, the Court invoked *Darden* and the common law. First, remarking that the “definition...in the ADA simply states that an ‘employee’ is ‘an individual employed by an employer,’” the Court declared, “That surely qualifies as a mere ‘nominal definition’ that is ‘completely circular and explains nothing.’”<sup>44</sup> Further commenting that “[t]he question whether a shareholder-director is an employee...cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner,” the Court expounded that “[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as ‘employees’ because control is concentrated in a small number of managing partners.”<sup>45</sup>

The Ninth Circuit’s approach, which “paid particular attention to ‘the broad purpose of the ADA,’” the Court added, did not “fare any better.”<sup>46</sup> Rather, “as *Darden* reminds us,” the Court explained, “congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law.”<sup>47</sup> Thus, the Court held that **“the common-law element of control is the principal guidepost that should be followed in this case.”**<sup>48</sup> This was so even though the case involved “a new type of business entity that has no exact precedent in the common law” and that was a “relatively young participant[] in the market,” with “features vary[ing] from State to State.”<sup>49</sup>

In its analysis, the Court looked to the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the ADA and other federal antidiscrimination statutes, and adopted guidelines developed by the EEOC on the question of “when partners, officers, members of boards of directors, and major shareholders qualify as employees.”<sup>50</sup> The Court explained that “[t]he [EEOC] guidelines list six factors to be considered in answering [this] question, which they frame as ‘whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control.’”<sup>51</sup> The EEOC had argued before the Court that shareholder-directors who “operate independently and manage the business...are proprietors and not employees” but that “if they are subject to the firm’s control, they are employees.”<sup>52</sup>

The Court concluded that it was “persuaded by the EEOC’s focus on the common-law touchstone of control...and specifically by its submission that each of...six factors is relevant to the inquiry whether a shareholder-director is an employee.”<sup>53</sup> The Court proceeded to identify the six factors as follows:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work;
- Whether and, if so, to what extent the organization supervises the individual’s work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- Whether the individual shares in the profits, losses, and liabilities of the organization.<sup>54</sup>

Summing up that “[a]s the EEOC’s standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise,” the Court elaborated that “[t]he employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed.”<sup>55</sup> The Court added that “[t]he mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor,” and neither “should the mere existence of a document styled ‘employment agreement’ lead inexorably to the conclusion that either party is an employee.”<sup>56</sup> Instead, the Court stated that as was the case in *Darden* when answering the employee versus independent contractor question, answering whether a shareholder-director is an employee “depends on all of the incidents of the relationship...with no one factor being decisive.”<sup>57</sup>

The Court ended its opinion by commenting that when viewed in light of the six-factor test, some of the lower court findings “appear to weigh in favor of a conclusion that the four director-shareholder physicians in this case are not employees of the clinic.”<sup>58</sup> As examples, the Court highlighted the shareholder-doctors “apparently control the operation of their clinic, they share the profits, and they are personally liable for malpractice claims.”<sup>59</sup> The fact that the doctors received salaries, must comply with the standards established by the clinic, and report to a personnel manager, however, were noted by the Court as potential contrary evidence of employee status.<sup>60</sup> Reversing the judgment of the Ninth Circuit, the Court remanded the case for further proceedings consistent with the Court’s endorsement of the EEOC’s six-factor test.<sup>61</sup>

## *Darden, Clackamas*, and The Common Law Through Line to IRCA

*Clackamas*, which drew heavily from *Darden*, establishes the framework for answering the question of whether an individual who works for a business, but also owns and controls it, is an “employee” of the business for purposes of IRCA. In *Clackamas*, the Supreme Court held that the common law applied to determine whether the shareholder-directors were employees of their company because the ADA contains a “nominal” definition of “employee” that “explains nothing.”<sup>62</sup> Pointing to *Darden*, which involved ERISA, and *Reid*, which involved the Copyright Act, the Court

observed that looking to the common law to interpret the meaning of “employee” in the ADA reflected the “same general approach” it had previously utilized to construe other statutes.<sup>63</sup> As the Court had explained in *Darden*, its decision in *Reid* expressed the “presumption that Congress means [the common law] definition for ‘employee’ unless it clearly indicates otherwise.”<sup>64</sup> Like the various statutes at issue in *Clackamas*, *Darden*, and *Reid*, IRCA does not indicate what it means to be an “employee” under the statute. Given IRCA’s silence on this point and the unhelpful circular definitions in implementing regulations,<sup>65</sup> the term “employment” in IRCA must be read according to its common law meaning.<sup>66</sup>

Indeed, this was the conclusion of the Eleventh Circuit in *Garcia-Celestino v. Ruiz Harvesting, Inc.*,<sup>67</sup> in which the court held that the common law determines the meaning of “employer” under the federal H-2A visa program that was created as part of IRCA along with its other provisions.<sup>68</sup> In *Garcia-Celestino*, plaintiff farmworkers who came to the U.S. as temporary workers under the H-2A program alleged as one of their claims that the defendant citrus grower was their “joint employer” liable for breaching their H-2A work contracts.<sup>69</sup> The grower’s liability for this claim “turn[ed] on the meaning of ‘employer’ and other related terms as they are used in the INA as amended by the IRCA.”<sup>70</sup>

The Eleventh Circuit began its examination of this issue by emphasizing that “[t]he INA, as amended by the IRCA in 1986, uses the term ‘employer’ over forty times in relation to the H-2A program,” but the INA “does not explicitly define ‘employer’... [and] also does not define the related terms ‘employ,’ ‘employee,’ or ‘joint employer.’”<sup>71</sup> The appellate court then examined the H-2A statutory provisions “in context, giving due consideration to the provision’s place in the overall legislative scheme.”<sup>72</sup> The court explained that when Congress enacted IRCA, “there were two different standards available for defining the employer-employee relationship” under the H-2A program: the broad “suffer or permit” standard under the Fair Labor Standards Act (FLSA), and the common law principles of agency.<sup>73</sup> But “Congress declined to incorporate the FLSA’s statutory ‘suffer or permit to work’ standard” and “[i]nstead...chose not to define the common term ‘employer’ in the IRCA amendments at all.”<sup>74</sup>

Discussing Supreme Court precedent, the court observed that “at the time when Congress enacted the IRCA amendments to the INA, it was well-settled that statutory silence on the meaning of ‘employer’ would trigger statutory interpretation consistent with that term’s common law meaning.”<sup>75</sup> The court stated that the “reasoning of *Darden* confirms” that when Congress did not adopt the FLSA standard and “provided no clear statutory definition of the term ‘employer,’ it intended the common law principles of agency to dictate the parameters of the employment relationship under the H-2A program.”<sup>76</sup> And *Darden*, the court noted, “derived this concept from *Reid*, which in turn relied on a rule of statutory construction” from another Supreme Court decision “which was issued years before Congress enacted the IRCA amendments to the INA.”<sup>77</sup> The court stressed that this well-established rule of statutory construction and the reasoning of *Darden* were not limited to the distinction between employees versus independent contractors that was at issue in *Darden*.<sup>78</sup> Rather, this “broad principle of statutory interpretation,” the court commented, expresses the “generic rule” that “any statutory term with established meaning under the common law is to be construed in a manner consistent with that common law meaning unless the statute says otherwise.”<sup>79</sup> Accordingly, the court held that the common law provided the proper standard for determining whether the grower was a joint employer for purposes of plaintiffs’ breach of contract claims.<sup>80</sup>

While the Eleventh Circuit's decision in *Garcia-Celestino* addressed the issue of joint employment under the H-2A program, the court's ruling turns on the lack of statutory definitions relating to what it means to be an "employer" or "employee" in the INA and IRCA.<sup>81</sup> The reasoning of the case, rooted in Supreme Court precedent and longstanding rules of statutory interpretation that these undefined terms should be understood according to their common law meaning,<sup>82</sup> is therefore just as applicable to other sections of IRCA.<sup>83</sup> If asked to resolve what IRCA means when it refers to "employment" in provisions prohibiting the "employment" of "unauthorized" workers and instituting I-9 requirements, courts should come to the same conclusion that the common law supplies the answer.<sup>84</sup>

Moreover, this conclusion should not be limited in application to situations involving particular business entities, nor overridden by any argument as to IRCA's statutory purpose. In *Clackamas*, the Supreme Court underscored that the common law governed the determination of employee status raised in the case even though it involved "a new type of business entity that has no exact precedent in the common law."<sup>85</sup> In addition, both *Darden* and *Clackamas* counsel against reading the term "employee" through the lens of statutory purpose when the statute does not define the term. Rejecting the Fourth Circuit's reliance on ERISA's statutory purpose, the Supreme Court in *Darden* remarked that it had already "signaled [the Court's] abandonment" of its previous "emphasis on construing [the] term ['employee'] in the light of the mischief to be corrected and the end to be attained."<sup>86</sup> Later, in *Clackamas*, the Supreme Court reiterated this view when it reversed the judgment of the Ninth Circuit, which had "paid particular attention to 'the broad purpose of the ADA'" in its determination that the shareholder-directors were employees.<sup>87</sup> Although the Supreme Court gave a nod in *Clackamas* to the ADA's purpose of "ridding the Nation of the evil of discrimination,"<sup>88</sup> the Court nevertheless ruled that the common law applied in the absence of a statutory definition for "employee."<sup>89</sup>

Thus, if the "end to be attained" by other federal laws does not function to broaden the meaning of "employee" beyond its common law understanding when Congress does not clearly indicate otherwise, as *Darden* and *Clackamas* emphasize, then there is no principled argument that interpreting IRCA's provisions should result in a different outcome. But even if consideration of statutory purpose were decisive to the analysis, there is nothing in IRCA to suggest that confining who is an "employee" according to its common law meaning "would thwart the congressional design or lead to absurd results."<sup>90</sup> This is because Congress "carefully crafted [IRCA] to limit the burden and the risk placed on employers."<sup>91</sup> A reading of IRCA's I-9 requirements and prohibition on the "employment" of "unauthorized" workers that takes an expansive view of what "employment" means, despite the statute's silence on this point, would only serve to increase the burden and risk placed on employers and thus run counter to IRCA's carefully crafted goal.

# Decisions of Federal Circuit Courts

## When Worker-Owners Are Not Employees Under Employment Discrimination Statutes

In the context of federal antidiscrimination statutes, federal circuit courts have consistently held that the common law, as articulated in *Clackamas*, provides the test for determining whether a worker with an ownership interest in a business (such as a shareholder or equity partner) is or is not an employee of the business.<sup>92</sup> **In every case where a circuit court has applied *Clackamas* to answer this question of employee status, worker-owners have *not* been deemed employees under the federal statute.**

These decisions exhibit some common themes that indicate how courts may continue to rely on and apply *Clackamas*. Significantly, they show that courts have not limited *Clackamas* to its specific facts—as not confined to the ADA, professional corporations, or shareholder-directors. And while *Clackamas* cautions that no single factor alone is dispositive under the common law test, these cases have demonstrated the centrality of the individual's **right** to have a say in business decisions, rules, and policies (typically through a right to vote on them that is equal to the right of other shareholders or partners), thus signifying the individual's right to control the business rather than be subject to its control, regardless of whether someone else in the business may have exercised greater influence over business matters. When an individual has possessed such a right of control over business decisions and rules, other *Clackamas* factors have also typically aligned in these cases to point toward the individual's non-employee status.

In this Part, we provide an overview of what these decisions from various federal circuits have said, as a lens on how the question of employee status of worker-owners of a business may be judicially resolved under IRCA.<sup>93</sup> Indeed, the Supreme Court's reasoning in *Clackamas* is not analytically restricted by the fact that the Court drew from guidelines of the EEOC, the federal agency with enforcement responsibilities over antidiscrimination statutes. Rather, after concluding that it was "persuaded" by the EEOC's "focus on the common-law touchstone of control," the Court specifically identified and adopted each of the six factors from the EEOC test as relevant to the common law analysis of this question of employee status.<sup>94</sup> The Court's determination that these six factors are relevant to the common law inquiry is not rendered inapplicable just because the statute being examined is not an antidiscrimination law. Hence, from the decades-long uniformity of federal court decisions applying *Clackamas* in the interpretation of employment discrimination statutes, we can deduce an analogous approach and reliance on the six-factor *Clackamas* test if courts are presented with the same question under IRCA of whether worker-owners of a business are its employees.

# FIRST CIRCUIT

## *De Jesus v. LTT Card Services, Inc.*<sup>95</sup>

### Question

What test applied to determine if shareholder-directors of a close corporation were its “employees” for purposes of establishing “employer” liability under Title VII and the ADA?<sup>96</sup>

### Answer

The proper test for resolving the question of employee status in this case was the non-exhaustive six-factor EEOC test adopted in *Clackamas*.<sup>97</sup> The court explained that the definition of “employee” under both Title VII and the ADA is circular.<sup>98</sup> While recognizing that *Clackamas* involved a professional corporation and the ADA, the First Circuit held that the *Clackamas* approach applies to close corporations and to Title VII claims.<sup>99</sup> The court listed the *Clackamas* factors but did not have occasion to analyze their application because there was no evidence relating to the factors in the underlying case.<sup>100</sup> However, the appellate court made the following observations:

- An individual “may appear on the payroll but nevertheless not be an ‘employee’ under traditional principles of agency law.”<sup>101</sup>
- Under *Clackamas*, managers or supervisors may not be deemed non-employees “merely on the basis that they have managerial or supervisory authority.”<sup>102</sup> Management authority “does not necessarily entail a *right* to control.”<sup>103</sup>

# SECOND CIRCUIT

## *Rodal v. Anesthesia Group of Onondaga, P.C.*<sup>104</sup>

### Question

Did Rodal, a physician-shareholder of a professional corporation, qualify as an “employee” of the corporation who was entitled to pursue relief under the ADA?<sup>105</sup>

### Answer

The Second Circuit explained that at the time this case was pending before the district court, the question of Rodal’s employee status had not been raised or briefed by the parties, but the Supreme Court’s subsequent decision in *Clackamas* provided the proper standard for resolving this question.<sup>106</sup> The Second Circuit listed the *Clackamas* factors but did not apply them due to the lack of any record in the case on this issue. The case was remanded to the district court, which was ordered to take appropriate steps to determine if Rodal was an employee entitled to the ADA’s protections in light of *Clackamas*.<sup>107</sup>

# THIRD CIRCUIT

## *Mariotti v. Mariotti Building Products, Inc.*<sup>108</sup>

### Question

Was Mariotti, a founder, shareholder, corporate officer, and board member of a “closely held family business,” an “employee” of the business under Title VII who was entitled to invoke its protections, and did the *Clackamas* test apply to answer this question?<sup>109</sup>

### Answer

*Clackamas* applied to the case.<sup>110</sup> The Third Circuit observed that “Title VII’s definition of employee is the same as the ADA’s definition” (which was at issue in *Clackamas*) and that the EEOC guidelines (which *Clackamas* endorsed) are not limited to the ADA but also relate to other antidiscrimination statutes.<sup>111</sup> Furthermore, the court “agree[d] with [its] sister Courts of Appeals that *Clackamas*’s application is not limited to professional corporations.”<sup>112</sup> In addition to noting that “[t]he EEOC Manual on which the Court relied in *Clackamas* considered multiple business enterprises,” the court explained that “the Supreme Court’s analysis pointed out that the form of the business entity was not the key element.”<sup>113</sup> The court concluded that “the nature of the business entity is simply an attribute of the employment relationship that must be considered in applying the *Clackamas* test to determine whether an individual is an employee or an employer.”<sup>114</sup> Focusing its analysis under *Clackamas* on the element of control, the court held that Mariotti did not establish in his complaint that he was an employee under Title VII, and he was therefore not entitled to its protections.<sup>115</sup>

#### **Indicators of non-employee status**

- As a shareholder, director, and corporate officer of the business, Mariotti had both substantial authority and the right to control the business.<sup>116</sup> He was “entitled to participate in the management, development, and governance” of the business, and specifically, as a board member and corporate officer, he possessed the “ability to participate in the fundamental decisions of the business.”<sup>117</sup> This exercise of authority by right, which weighs in favor of non-employee status, is different from the exercise of authority by delegation only, “at the pleasure of others who ultimately do possess the right to control” the business.<sup>118</sup> Moreover, the absence of an *exclusive* right to control “does not compel a conclusion that an individual who lacks [exclusive control] is an employee.”<sup>119</sup> Requiring an exclusive right of control “would ignore that the EEOC guidelines, which the [Supreme] Court embraced in *Clackamas*, pertained to business entities that do not vest exclusive control in any one individual.”<sup>120</sup>

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## *Ziegler v. Anesthesia Associates of Lancaster, Ltd.*<sup>121</sup>

### Question

Were the 19 shareholder-physicians of a professional corporation “employees” of the business for purposes of Title VII?<sup>122</sup>

### Answer

In an unpublished decision, the Third Circuit ruled that *Clackamas* applied to answer this question.<sup>123</sup> The court commented that Title VII uses the same circular definition of “employee” as the ADA (which was at issue in *Clackamas*).<sup>124</sup> Although the district court had rendered its underlying opinion in the case before *Clackamas* was decided, the Third Circuit found that the district court engaged in “an analysis which closely tracks the analysis articulated by the Supreme Court in *Clackamas* and correctly concluded that the 19 shareholder-physicians in this case owned and managed [the corporation] and were, therefore, employers and not employees for purposes of Title VII.”<sup>125</sup>

#### **Indicators of non-employee status**

- The shareholder-physicians “share ownership and are accorded equal voting rights in virtually all matters including hiring, termination, offers of partnership and contracting with outside parties.”<sup>126</sup>
- Each shareholder-physician made a capital contribution to the business.<sup>127</sup>
- The compensation of the shareholder-physicians was “not tied to their performance” and their work was not evaluated or supervised by anyone.<sup>128</sup>
- Each shareholder-physician except for one received compensation based on the corporation’s profits.<sup>129</sup>
- Although the shareholder-physicians executed “employment agreements,” they were referred to as “partners” amongst themselves, within the healthcare community, and by office personnel, and the employment agreements did “not obviate the manner in which the shareholders actually functioned.”<sup>130</sup> Moreover, the employment agreement executed by the shareholder-physicians provided for “compensation as determined by a board comprised of all shareholders” and not a “fixed specified annual salary.”<sup>131</sup>

# FOURTH CIRCUIT

## *Lemon v. Bigel*<sup>132</sup>

### Question

Did Lemon, a partner at a law firm, allege sufficient facts to demonstrate that she was an “employee” of the firm and therefore covered by Title VII’s protections?<sup>133</sup>

### Answer

The Fourth Circuit ruled that Lemon was “a partner and equal owner of the firm, not an employee” covered by Title VII and that *Clackamas* applied to the case.<sup>134</sup> Commenting that the definition of “employee” under Title VII “is short on substance,” the court observed that in such cases where a statute’s definition of the term is “completely circular and explains nothing,” the Supreme Court has stated that the common law dictates its meaning.<sup>135</sup> The appellate court declared that “circuits relying on *Clackamas* to resolve disputes similar to the present one have not deviated from the principal guidepost of common-law control” and that “[t]his is unsurprising, because the foundational principles in this area of law are well-settled and the *Clackamas* factors are manifestly well-suited to their expression.”<sup>136</sup> *Clackamas*, the Fourth Circuit elaborated, “represents the smooth and coherent development of familiar doctrinal principles regarding control and its indicia.”<sup>137</sup>

#### Indicators of non-employee status

- As a partner and co-equal owner of her firm, Lemon had an equal vote on all matters substantially impacting the firm.<sup>138</sup> “No one owned a greater share of the firm, or had greater voting power” than Lemon.<sup>139</sup> She was a full member of the Board of Directors, the body with primary decision-making authority over the firm, and “[n]o one had more of a right to run” for the Management Committee on which she actually served.<sup>140</sup> Thus, Lemon “was as fully integrated into [the firm’s] management structure as anyone could possibly be” and it was “not plausible to suggest that such an individual, with rights second-to-none in [the firm’s] only policy-setting circle, should exercise so little control as to be considered an employee.”<sup>141</sup>

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- Lemon had “as much control over the rules and regulations governing the work at [the firm], and as much ability to influence the organization as any other partner.”<sup>142</sup> As a co-owner, she was collectively responsible with the other equity partners for “setting the firm’s rules and standards, and for making the decisions necessary to secure its short- and long-term interests.”<sup>143</sup> This pointed to Lemon’s non-employee status even though some equity partners “exert[ed] greater influence than others” and some formed “controlling factions,” while other partners (like Lemon) “despite their best efforts, [were] more often in the minority.”<sup>144</sup> Such “inevitable differences in personal influence do not negate a partner’s basic standing in the firm” and are “the inescapable realities whenever people assemble in groups or elect to form organizations.”<sup>145</sup> It would not “provide any remotely workable standard for determining employer/employee status” to “sift[] through” differences in personal influence.<sup>146</sup>
- Although Lemon’s work was “subject to review by other partners,”<sup>147</sup> this review policy applied equally to all shareholders, was only for quality control purposes, and was ultimately “purely advisory in nature.”<sup>148</sup> The reviewing shareholders did not have the power to order any specific revisions to Lemon’s work.<sup>149</sup> Thus, the fact that Lemon’s work was supervised in this manner did not detract from her “high degree of independence” in performing her duties at the firm.<sup>150</sup>
- Lemon reported to no one and was not “outranked” by anyone.<sup>151</sup> Thus, “[i]t would contradict the image of control and agency that the Supreme Court handed down in *Clackamas* to treat an individual with so much freedom and so little oversight as an employee.”<sup>152</sup>
- No one at the firm had the “unilateral authority” to fire Lemon.<sup>153</sup> Instead, she “could only be fired by a majority vote of the full Board, of which she was...a voting member.”<sup>154</sup>
- Lemon was compensated “according to a formula that varied with the profits and losses of the firm, as befitted a co-owner and employer.”<sup>155</sup> She “was not salaried or paid a wage, the typical form of remuneration for employees.”<sup>156</sup>
- The shareholder agreement—which the Board voted to amend to remove every reference that a signatory to the agreement was an “employee”—stood as “a clear, written expression of the intention” that associates like Lemon “shed their employee status” when they were promoted to partners.<sup>157</sup> This “neutraliz[ed]” the fact that when she first joined the firm as an associate, Lemon signed an employment agreement subjecting her as an “employee” to the general control of the firm.<sup>158</sup>

# FIFTH CIRCUIT

## *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Association*<sup>159</sup>

### Question

Were pilot associations—“long-standing, peculiarly conducted institutions recognized by [state] statute, owned and governed by their member pilots, and serving as a sort of clearinghouse and dispatching service” for member pilots—“employers” of the pilots for the purposes of the Age Discrimination in Employment Act (ADEA)?<sup>160</sup>

### Answer

Noting the “circular” language defining “employer” under the ADEA that “provides little guidance in determining whether a particular entity is in fact an employer,”<sup>161</sup> the Fifth Circuit applied *Clackamas* and held that the pilots were not employees of the associations, which in turn, were not employers within the definition of the ADEA.<sup>162</sup> The court found “the central characteristics of employer control over the pilot are lacking.”<sup>163</sup> This was so even though the pilot associations “obviously are the most important and determinative factor in the work life of a pilot,”<sup>164</sup> “play an almost monopolistic gate-keeper role in determining who will ultimately work as a pilot,” and through their member pilots, “set rules and regulations directly affecting the daily work of each pilot.”<sup>165</sup> Emphasizing that “the touchstone of our analysis centers around the common-law notion of control of the individual,”<sup>166</sup> the court concluded that the six factors endorsed in *Clackamas* “though not necessarily exhaustive, are decisive here.”<sup>167</sup>

#### Indicators of non-employee status

- The pilot associations do not hire or fire their member pilots.<sup>168</sup> While the pilot associations could admit pilots into their membership, the associations could not grant commissions allowing pilots to work in the profession or decommission a pilot.<sup>169</sup>
- The pilot associations do not supervise the member pilots in their work, and there is no chain of command in the performance of the pilots’ work.<sup>170</sup> Rather, the pilot associations’ primary role was to receive requests for pilots, dispatch pilots to vessels, and collect and disburse pilotage fees.<sup>171</sup> Member pilots work independently according to their own professional judgment.<sup>172</sup>
- Member pilots have “ultimate control over the associations’ rules and regulations that bind them.”<sup>173</sup> Pilots “constitute the entire body of shareholders of their respective associations.”<sup>174</sup> Because “[e]ach pilot holds an equal share and participates in the election of directors of the association and in shareholder-approval votes,” the pilots “exert substantial influence over the general management of the association as well as the promulgation of association rules and regulations specifically.”<sup>175</sup>
- The charters of the pilot associations “make[] unequivocal that no employment relationship is intended.”<sup>176</sup> The charters “expressly define the relationship between the pilots and the association as an association for the mutual benefit of the member pilots.”<sup>177</sup>
- Member pilots receive a share of collected pilotage fees according to a set formula agreed upon by the pilots themselves, and in this way share in the “profits” of the association as well as its “losses” when business is not good.<sup>178</sup> Additionally, “[c]onsistent with the fact that pilots act independently according to their own professional judgment in piloting a vessel, pilots remain personally liable for their own negligence.”<sup>179</sup> The charters also expressly state the associations are not responsible for debts or faults of their member pilots.<sup>180</sup>

# SIXTH CIRCUIT

## *Bowers v. Ophthalmology Group, LLP*<sup>181</sup>

### Question

Was Bowers, one of six partners of an ophthalmology practice, an “employee” of the business who was entitled to bring a claim under Title VII?<sup>182</sup>

### Answer

In an unpublished decision, the Sixth Circuit ruled that Bowers was a “partner” and not an employee of the ophthalmology partnership.<sup>183</sup> Stating that the definition of “employee” under Title VII is “completely circular and explains nothing,”<sup>184</sup> the court relied on the *Clackamas* factors as well as overlapping common law agency factors announced by the circuit in a pre-*Clackamas* case.<sup>185</sup> Bowers had argued that she was a partner of the business in name only and had no real control or influence over the business, but the court ruled that the record in the case indicated the opposite.<sup>186</sup>

#### Indicators of non-employee status

- Bowers bought into the partnership and signed a partnership agreement.<sup>187</sup>
- Bowers signed the business’s statement of registration with the state.<sup>188</sup>
- Bowers shared in the business’s profits and received additional compensation based on her own production.<sup>189</sup>
- For tax purposes, Bowers received a K-1 instead of a W-2.<sup>190</sup>
- Bowers received payments when two physicians bought into the partnership.<sup>191</sup>
- Bowers attended partnership meetings and partnership meetings were held upon her request.<sup>192</sup>
- Bowers participated in equipment purchases.<sup>193</sup>
- Bowers participated in the business decision to change the formula for dividing profits.<sup>194</sup>
- Bowers requested and received the business’s confidential financial information.<sup>195</sup>
- Bowers had the ability to make scheduling demands such as requests not to schedule certain patients with her, and requested and received her own “pod” of specific employees with whom to work.<sup>196</sup>
- No partner, including Bowers, had unilateral authority over hiring or firing.<sup>197</sup>

# SEVENTH CIRCUIT

## *Solon v. Kaplan*<sup>198</sup>

### Question

Was Solon, one of four general partners at a law firm, an “employee” of the firm who was entitled to retaliation protections under Title VII?<sup>199</sup>

### Answer

Discussing Title VII’s circular definition of “employee” and applying *Clackamas*, the Seventh Circuit held that Solon was an employer, and not an employee entitled to sue for retaliation under Title VII.<sup>200</sup> The court stated that Title VII defines “employee” in “nearly identical” language to that of the ADA (the statute at issue in *Clackamas*), and *Clackamas* “signaled that its analysis would extend to Title VII cases by noting that it was resolving a conflict among the Circuits that was ‘not confined to the particulars of the ADA.’”<sup>201</sup> The court also observed that the *Clackamas* framework “is not limited to the narrow question of whether a shareholder-director is an employee,” and explained that the six factors in *Clackamas* “were selected because they provided guidance in resolving the more general issue of whether an individual ‘is an employee or, alternatively, the kind of person that the common law would consider an employer.’”<sup>202</sup>

#### Indicators of non-employee status

- As one of only four general partners with one quarter of the voting power, Solon had the right to exert and did in fact exert “substantial control” over the firm.<sup>203</sup> With his voting power, Solon “exercised substantial control over how to allocate the firm’s profits, and whether to require additional capital contributions, make financial commitments, amend the partnership agreement, and dissolve the firm.”<sup>204</sup> He also “possessed a unilateral veto power over new admissions” to the firm because partners could be added only by a unanimous vote of the existing general partners.<sup>205</sup> In addition, he could only be involuntarily terminated from the firm by a two-thirds vote of all the general partners.<sup>206</sup> In sum, “by virtue of his voting rights, [Solon] substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others.”<sup>207</sup>
- Solon’s contention that he was “outvoted” did not undermine the conclusion that he was not an employee.<sup>208</sup> Solon had the opportunity to call for and participate in partnership meetings where certain business decisions were made.<sup>209</sup> Even if Solon was “passive” and “could not persuade the [other partners] to change their minds,” he was not “powerless.”<sup>210</sup>
- Solon held an equity interest in the firm, shared in its profits, and had access to the firm’s private financial information.<sup>211</sup>
- As trustee of the firm’s 401(k) account and managing partner, Solon had “broad authority”<sup>212</sup> and “played an active role in the operation of the firm.”<sup>213</sup> He was the only general partner with authority to draw on all of the firm’s bank accounts<sup>214</sup> and continued to handle the firm’s banking needs even after he stepped down as managing partner.<sup>215</sup>

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## *Bluestein v. Central Wisconsin Anesthesiology, S.C.*<sup>216</sup>

### Question

Was Bluestein, a physician who was a full partner, shareholder, and member of the board of directors of a small medical service corporation, an “employee” of the corporation under Title VII, the ADA, and the Rehabilitation Act?<sup>217</sup>

### Answer

Observing that the definition of “employee” under each statute at issue is “vague and circular,” the Seventh Circuit applied *Clackamas’s* common law test and held that Bluestein was not an employee of the corporation but was instead an employer.<sup>218</sup>

#### Indicators of non-employee status

- As a shareholder and board member of the corporation, Bluestein “enjoyed the same right of control that every other physician-shareholder possessed.”<sup>219</sup> She was entitled to an equal vote “on all issues coming before the board and subject to the same board-and committee-approved policies as every other physician-shareholder” of the business.<sup>220</sup>
- Bluestein had the “opportunity” to control the business through her right to an equal vote on business matters, even if she voted in the minority.<sup>221</sup> It was Bluestein’s “right of control that matters to the analysis.”<sup>222</sup> It did not make a difference for purposes of determining her non-employee status that Bluestein was “in the minority position on how her colleagues decided to run the business”<sup>223</sup> This was because “[n]ot winning the vote is not the same as not having a vote...and it is [Bluestein’s] opportunity for shared control that counts when determining whether she was an employer or employee.”<sup>224</sup> With this shared right of control, she had “no more or less of a right to influence the organization than any other partner.”<sup>225</sup> Even if “some functions or control may have been delegated to the board chair,” who in contrast to Bluestein “appeared to have great influence with his colleagues,” this fact was also “irrelevant” because Bluestein had an equal vote in the delegation.<sup>226</sup>
- Hiring and firing decisions were made collectively by the shareholder-board members, including Bluestein.<sup>227</sup> Bluestein “even voted on her own termination.”<sup>228</sup> Her “right to cast a vote equal to that of any other board member unequivocally indicates that [she] was an employer rather than an employee for the purposes of hiring and firing.”<sup>229</sup>
- As a full board member, Bluestein was “one of the decisionmakers who determined the rules and regulations that governed her own work and the work of others at the organization.”<sup>230</sup> She participated in board and committee meetings where she voted on workplace issues including compensation and vacation policy.<sup>231</sup> Moreover, even though Bluestein “was subject to general workplace policies regarding her hours, vacation, scheduling and patient assignments, all the physician-shareholders were subject to the same policies, and all had an equal right to influence those policies.”<sup>232</sup> Thus, it did not matter if pursuant to those policies adopted by the board, she did not possess “sole authority” over her employment conditions<sup>233</sup> and could not “unilaterally” take vacation, determine her own work schedule, assign cases to herself, or decide when to take breaks.<sup>234</sup>

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- Bluestein could not point to a supervisor who dictated how she performed her work.<sup>235</sup> There was no evidence “that anyone at [the corporation] had a right to control the details of her work.”<sup>236</sup> Rather, she determined how to complete specific work tasks<sup>237</sup> and reported to no one.<sup>238</sup>
- The fact that Bluestein signed an employment contract referring to her as an “employee” or that she received a W-2 form did not “overcome the reality of her position” of control over the business—and thus did not change the conclusion that Bluestein was not an employee.<sup>239</sup>
- The business was organized so that the physician-shareholders including Bluestein shared profits and losses equally, and there was no evidence that this was not actually the case.<sup>240</sup>

## EIGHTH CIRCUIT

### *von Kaenel v. Armstrong Teasdale, LLP*<sup>241</sup>

#### Question

Was von Kaenel, an equity partner of a law firm, an “employee” of the firm for purposes of the Age Discrimination in Employment Act (ADEA)?<sup>242</sup>

#### Answer

The Eighth Circuit noted that the ADEA “unhelpfully” defines the term “employee.”<sup>243</sup> Guided by the *Clackamas* factors, the court held that von Kaenel was not an employee of the firm and therefore was not covered by the ADEA.<sup>244</sup>

#### Indicators of non-employee status

- When von Kaenel became an equity partner, he was required to make a capital contribution and sign the partnership agreement.<sup>245</sup>
- von Kaenel had the right to vote on proposed changes to the firm’s policies in the partnership agreement, including its mandatory retirement provision, and on admission of new partners to the partnership.<sup>246</sup>
- von Kaenel shared in the firm’s profits and losses, “albeit through a complicated calculation.”<sup>247</sup>
- von Kaenel’s health insurance premiums and 401k contributions were deducted from partner distributions.<sup>248</sup>
- von Kaenel’s substantive work was not reviewed or supervised.<sup>249</sup>
- von Kaenel had influence over lowering his hourly rate for a client (even though he was not given “unfettered discretion to set his hourly rate” and other members of the firm set and reviewed attorneys’ hourly rates).<sup>250</sup>
- Once he became an equity partner, von Kaenel could only be expelled from the firm in “limited ways” (by a vote of the partners or operation of the mandatory retirement provision in the partnership agreement).<sup>251</sup>

## TABLE 1

### The *Clackamas* Factors

This table presents an overview of the six *Clackamas* factors as they have been considered by federal circuit courts in cases addressing the question of whether an individual who works for a business and also possesses an ownership and controlling interest in it (a “worker-owner” as we term it) is an “employee” entitled to protections under employment discrimination laws. Drawing from these judicial opinions, we sketch out some sample scenarios which may weigh in favor of non-employee or employee status. Under these scenarios, we provide snapshots of court cases that are illustrative. Recall that in every circuit court decision that has applied *Clackamas* to resolve this question, the worker-owners were found not to be employees of the business. The scenarios that we postulate as potentially weighing in favor of the opposite determination—a finding of employee status—are inferred from the reasoning of these cases. No single factor alone will dictate the answer to this question, nor must all factors point to the same conclusion. Finally, although the *Clackamas* factors are not the only ones that courts may examine, they are at least relevant if not decisive considerations, based on how courts have consistently ruled.

**FACTOR 1:****Whether the organization can hire or fire the worker or set the rules and regulations of the worker's work**

*This factor and the fourth factor (whether the worker is able to influence the organization) have involved overlapping considerations. In court decisions, a common thread through both factors has been the worker's right to vote on, and therefore ability to influence, business matters including personnel decisions and workplace policies.*

Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker has some control over hiring and firing decisions through a right to vote on these decisions, which may include the worker's own termination.</li> </ul>	<ul style="list-style-type: none"> <li>■ Another member or members of the company, and not the worker, have unilateral authority over hiring and firing decisions.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit</b>, <i>Lemon v. Bigel</i>: That Lemon could only be fired by a majority vote of her law firm's full board of directors, of which she was a voting member, was a factor indicating her non-employee status. No one in Lemon's law firm had the "unilateral authority" to fire her.<sup>252</sup></li> <li>▪ <b>Sixth Circuit</b>, <i>Bowers v. Ophthalmology Group, LLP</i>: Bowers, one of six partners of the Group, did not have unilateral authority over hiring or firing, but neither did any other partner of the Group. This was one of the indications that Bowers was not an employee of the Group.<sup>253</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Bluestein v. Central Wisconsin Anesthesiology, S.C.</i>: Bluestein, one of the shareholder-board members of the company, possessed an equal right to vote on hiring and firing decisions, which "unequivocally indicate[d]" that she was not an employee. Bluestein participated in the vote in which the majority of the shareholder-board members agreed to terminate her.<sup>254</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Solon v. Kaplan</i>: By virtue of his voting rights, Solon, one of only four general partners in his firm, "substantially controlled" the firm including its hiring and firing decisions, which indicated his non-employee status. Because the partnership agreement allowed for his involuntary termination only by a two-thirds vote of the partners, the other three partners had to unanimously agree to fire him. Further, because new partners could be admitted only through unanimous vote of the existing general partners, Solon had control (a "unilateral veto") over new admissions.<sup>255</sup></li> <li>▪ <b>Eighth Circuit</b>, <i>von Kaenel v. Armstrong Teasdale, LLP</i>: The non-employee status of von Kaenel, an equity partner of his firm, was indicated by his right to vote on the admission of new partners, and the fact that he could only be expelled from the firm by a majority vote of the partners or by operation of a mandatory retirement provision contained in the partnership agreement over which he had the right to vote on proposed changes.<sup>256</sup></li> </ul>	

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Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker has some control over the company's policies and rules governing the terms and conditions of work, through the right to vote on them.</li> </ul>	<ul style="list-style-type: none"> <li>■ The worker must follow the company's policies and rules over which the worker has no right to provide any form of input.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit, <i>Lemon v. Bigel</i>:</b> As an equity partner and co-equal owner of her firm, Lemon had an equal vote on all matters substantially affecting the firm and shared collective responsibility with the other equity partners for setting the firm's rules, regulations, and standards and for making business decisions in the firm's interests. This indicated she was not an employee of the firm.<sup>257</sup></li> <li>▪ <b>Fifth Circuit, <i>Coleman v. New Orleans &amp; Baton Rouge Steamship Pilots' Association</i>:</b> Individual pilots were not employees of their pilots' associations, even though the associations were the "most important and determinative factor in the work life of a pilot." As one indicator of their non-employee status, member pilots possessed "ultimate control over the associations' rules and regulations that bind them." Because each pilot held an equal share of the association's stock and participated in the election of the association's directors, as well as in shareholder-approval votes, the pilots "exert[ed] substantial influence over the general management of the association as well as the promulgation of association rules and regulations."<sup>258</sup></li> <li>▪ <b>Seventh Circuit, <i>Bluestein v. Central Wisconsin Anesthesiology, S.C.</i>:</b> Even though Bluestein could not "unilaterally" take a vacation day, set her own schedule, assign cases to herself, or decide when she could take lunch or a break, Bluestein was not an employee of the practice. The fact that she had the right to vote at board meetings to determine the rules and regulations that governed all the staff at the organization, and that Bluestein herself voted on these policies, pointed toward her non-employee status.<sup>259</sup></li> <li>▪ <b>Seventh Circuit, <i>Solon v. Kaplan</i>:</b> As one of only four general partners with one-quarter of the voting power, Solon "substantially controlled the direction of the firm, his employment and compensation," including decisions on how to allocate profits and whether to require additional capital contributions, make financial commitments, amend the partnership agreement, and dissolve the firm. This indicated his non-employee status.<sup>260</sup></li> </ul>	

**FACTOR 2:****Whether and, if so, to what extent the organization supervises the worker's work**

*Under this factor, courts have considered whether a worker's day-to-day work is closely monitored or controlled by someone else.*

Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker's performance of work is not supervised by anyone in the company.</li> <li>■ Even if the worker's performance of work is subject to some level of review, the worker is able to work independently and no other member of the company has authority to dictate the details of their work.</li> </ul>	<ul style="list-style-type: none"> <li>■ The worker is not able to work independently because someone else ultimately dictates how the work is performed or can require revisions to the work.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit</b>, <i>Lemon v. Bigel</i>: Lemon was not an employee, despite the fact that her work product was subject to review by other partners. Such review was pursuant to a policy that applied equally to all other shareholder-partners and was "purely advisory in nature" since the reviewing partners did not have any authority to mandate revisions to her work. This kind of "supervision" did not detract from Lemon's "high degree of independence as a partner."<sup>261</sup></li> <li>▪ <b>Fifth Circuit</b>, <i>Coleman v. New Orleans &amp; Baton Rouge Steamship Pilots' Association</i>: The work of the pilots was not supervised by the pilots' associations. Instead, individual pilots worked "independently according to [their] own professional judgment." This indicated that pilots were not employees of the associations.<sup>262</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Bluestein v. Central Wisconsin Anesthesiology, S.C.</i>: The fact that Bluestein "determined how to complete the specific tasks of her work" indicated she was not an employee. Bluestein could not point to a supervisor at the company "who dictated how Bluestein practiced anesthesiology" nor did Bluestein show that anyone had a "right to control the details of her work."<sup>263</sup></li> <li>▪ <b>Eighth Circuit</b>, <i>von Kaenel v. Armstrong Teasdale, LLP.</i>: The absence of supervision over von Kaenel's work indicated his non-employee status.<sup>264</sup></li> </ul>	

**FACTOR 3:****Whether the worker reports to someone higher in the organization**

*This factor is closely related to the supervision (second) factor, because under both, courts have looked at whether the worker and their work product are subject to some form of oversight. However, under the third factor, courts have also considered organizational structure and the worker's position of authority within it.*

Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker is not formally “outranked” by another member of the company, even if other members exert more power or influence over business matters.</li> </ul>	<ul style="list-style-type: none"> <li>■ The worker is required to report to a higher-ranking member of the company who has the authority to issue orders that the worker must follow, to supervise and discipline the worker, or to evaluate work performance.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit</b>, <i>Lemon v. Bigel</i>: Lemon was not an employee, even though another shareholder-partner of the firm allegedly exercised more power over the firm. There was no concrete evidence that Lemon was “compelled to report” to the partner or “obey orders that [the partner] issue[d] solely on his own authority.” As a full partner at the firm with equal voting power on its board, Lemon was “not outranked” by anyone.<sup>265</sup></li> <li>▪ <b>Fifth Circuit</b>, <i>Coleman v. New Orleans &amp; Baton Rouge Steamship Pilots’ Association</i>: The fact that the pilots did not report to someone “higher” in the pilots’ associations, and there was no chain of command in the pilots’ performance of their work, weighed against a finding that the pilots were employees of their associations.<sup>266</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Bluestein v. Central Wisconsin Anesthesiology, S.C.</i>: Bluestein’s claim that she was required to seek approval from the board chair or another physician at her company in order to get days off, and that a committee of which she was not a member determined her schedule and patient assignments, did not demonstrate that she reported to someone higher in the organization. Bluestein had an equal vote in matters affecting the company. It was irrelevant if some functions or control may have been delegated to the board chair because Bluestein had an equal vote in such delegation.<sup>267</sup></li> </ul>	

**FACTOR 4:****Whether and, if so, to what extent the worker is able to influence the organization**

*While no single factor alone is dispositive, this factor (together with overlapping considerations under the first factor) has been salient in various circuit court decisions, which have often emphasized the worker's right and opportunity to influence business matters through an equal right to vote on them. Such a right has weighed heavily in favor of finding that the worker is not an employee, even if others in the business may have exerted greater influence over the business.*

**Weighs in favor of NON-EMPLOYEE status**

- The worker has a right to vote on business matters (such as the company's rules and regulations, admission or discharge of other members, determination of compensation, profit allocation, election of committee or board members) that is equal to the right of other members, even if the worker has not actually influenced the outcome of business decisions or is less influential than other members of the company.

**Weighs in favor of EMPLOYEE status**

- The worker has no ultimate right of control over the company (such as through a right to vote on major business decisions), even if the worker has management or supervisory responsibilities in the business.
- The company is run exclusively by an executive or management committee and the worker has no right to participate in or elect the members of the committee.

- **First Circuit**, *De Jesus v. LTT Card Services, Inc.*: Merely having managerial or supervisory authority “does not necessarily entail a right to control” and therefore does not determine non-employee status.<sup>268</sup>
- **Third Circuit**, *Mariotti v. Mariotti Building Products, Inc.*: Assessing the individual's ability to influence the organization under *Clackamas* “implicitly” entails “examin[ing] the source” of the individual's authority within the business. Non-employees exercise “authority by right,” while employees serve “at the pleasure of others who ultimately do possess the right to control the enterprise.”<sup>269</sup>
- **Fourth Circuit**, *Lemon v. Bigel*: A co-equal owner of her firm, Lemon had an equal vote as a full member of its board of directors, which was the “primary decision-making authority over all matters substantially affecting the firm.” She also participated on the Management Committee and was Vice President and Secretary of the firm. Sharing collective responsibility with the other equity partners “for setting the firm's rules and standards, and for making the decisions necessary to secure its short- and long-term interests,” she had “as much ability” to influence the company as any other partner, despite the “inevitable differences in personal influence” among partners. This weighed in favor of concluding that Lemon was not an employee.<sup>270</sup>

## CONTINUED FROM PREVIOUS PAGE

- **Fifth Circuit**, *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Association*: Individual pilots were not employees of their pilots' associations. Each association was owned by its member pilots, who each held one equal share of the association's stock and "constitute[d] the entire body of shareholders of their respective associations." Participating in the election of the association's directors, as well as in shareholder-approval votes, gave the pilots "substantial influence over the general management of the association as well as the promulgation of association rules and regulations."<sup>271</sup>
- **Sixth Circuit**, *Bowers v. Ophthalmology Group, LLP*: Bowers contended that she had no real influence over the Group. But Bowers, who had bought into the partnership, called for and attended partnership meetings, and had the ability to make and participate in business decisions (including employment decisions and profit distribution). Such facts weighed in favor of her non-employee status. Bowers failed to prove her case was analogous to a prior Sixth Circuit case, in which a law firm partner was deemed an employee because he was subject to the "virtually absolute, unilateral control" of a management committee that exclusively directed the "firm's business, assets, and affairs."<sup>272</sup>
- **Seventh Circuit**, *Bluestein v. Central Wisconsin Anesthesiology, S.C.*: Like the other physician-shareholders of the "small" medical corporation, Bluestein was an equal shareholder and full member of the company's 16-person board. She had an equal right to vote on all matters coming before the board, and had an "equal right to influence" the company's general workplace policies concerning work hours, vacation, scheduling and patient assignments that applied to all physician-shareholders. Being in the minority vote and less influential than the board chair did not diminish her right of control over the company. It was Bluestein's "opportunity for shared control that count[ed]" in determining that she was not an employee.<sup>273</sup> Her situation was "markedly different" from another case (pre-*Clackamas*) in which the Seventh Circuit found that, in a law firm with more than 500 partners, being a partner did not necessarily mean the partner was not an employee because the firm was controlled by a "small, self-perpetuating [unelected] executive committee that held the power to hire, fire, promote and determine the compensation" of other partners who were not members of the committee.<sup>274</sup>
- **Seventh Circuit**, *Solon v. Kaplan*: As one of only four general partners with an equity interest in the firm and one-quarter of the voting power, Solon "substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others." He had the right to exert such substantial control over the firm by virtue of the partnership agreement and in fact exercised this control as a managing partner. Even if he was outvoted or "passive" because he consulted with the other partners before making major decisions, this did not show he was "powerless" or detract from the conclusion that he was not an employee.<sup>275</sup>
- **Eighth Circuit**, *von Kaenel v. Armstrong Teasdale, LLP*: As an equity partner, von Kaenel had the ability to vote on changes to the firm's policies and admission of new partners. Although other members of his firm determined the attorneys' hourly rates for particular clients, von Kaenel exercised influence in lowering his hourly rate for a client. These facts were among the indicators of his non-employee status.<sup>276</sup>

# Whether the parties intended that the worker be an employee, as expressed in written agreements or contracts

*This is arguably one of the least important factors. The Supreme Court cautioned in Clackamas that the “mere existence” of a document called an “employment agreement” does not “lead inexorably to the conclusion” that a worker is an employee.<sup>277</sup> Circuit courts applying this factor have considered whether business or tax documents reflect the worker’s control over the business.*

Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker signed an agreement (such as a partnership agreement) indicating the worker is not considered an employee.</li> <li>■ The worker signed the company’s business registration or financial documents for the company.</li> <li>■ The worker received a Schedule K-1 tax form.</li> </ul>	<ul style="list-style-type: none"> <li>■ The worker signed an employment agreement identifying the worker as an employee.</li> <li>■ The worker received a W-2 tax form.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit</b>, <i>Lemon v. Bigel</i>: Lemon argued that she was an employee of her firm because when she first joined as an associate, she signed an employment agreement that subjected her to the general control of the firm, and this agreement was never formally superseded by the shareholder agreement she later signed when she became a partner. However, the board of directors, of which Lemon was a full member, voted to amend the shareholder agreement to remove every reference to a signatory as a firm “employee.” This modification “represent[ed] a clear, written expression of the intention that associates promoted to partners shed their employee status” and militated against concluding that Lemon was an employee.<sup>278</sup></li> <li>▪ <b>Fifth Circuit</b>, <i>Coleman v. New Orleans &amp; Baton Rouge Steamship Pilots’ Association</i>: The charters of the pilot associations “unequivocal[ly]” expressed that no employment relationship was intended by “expressly defin[ing] the relationship between the pilots and the association as an association for the mutual benefit of the member pilots.” This weighed against finding the pilots were employees.<sup>279</sup></li> <li>▪ <b>Sixth Circuit</b>, <i>Bowers v. Ophthalmology Group, LLP</i>: Bowers signed a partnership agreement with the Group as well as the business’s statement of registration with the Kentucky Secretary of State. She also received a K-1 instead of a W-2 tax form. These documents were among the various indicia of her non-employee status.<sup>280</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Bluestein v. Central Wisconsin Anesthesiology, S.C.</i>: Bluestein was not an employee even though she received W-2 tax forms and had signed a contract with the company before she became a shareholder that referred to Bluestein as an employee. The language in the contract could not “overcome the reality of her position” in the company, in which Bluestein “enjoyed the same right of control that every other physician-shareholder” of the company possessed.<sup>281</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Solon v. Kaplan</i>: Solon was the only general partner authorized to draw on all of the firm’s bank accounts and signed the firm’s checks to pay rent and distribute profits, and applied for and signed financing agreements as managing partner of the firm. Even when he stepped down as managing partner before being voted out of the firm, Solon continued to handle the firm’s banking needs and landlord/tenant issues. This supported the conclusion that he was not an employee of the firm.<sup>282</sup></li> <li>▪ <b>Eighth Circuit</b>, <i>von Kaenel v. Armstrong Teasdale, LLP</i>: von Kaenel’s role as an equity partner at his firm “was not simply a title that carried no legal significance.” Rather, when von Kaenel became a partner, he made the required capital contribution to the firm and signed the partnership agreement, which among other factors indicated his non-employee status.<sup>283</sup></li> </ul>	

**FACTOR 6:****Whether the worker shares in the profits, losses, and liabilities of the organization**

*Under this factor, courts have made a distinction between receiving a salary, which the Supreme Court noted in Clackamas may indicate employee status,<sup>284</sup> versus receiving compensation that reflects the profits and losses of the company.*

Weighs in favor of NON-EMPLOYEE status	Weighs in favor of EMPLOYEE status
<ul style="list-style-type: none"> <li>■ The worker is paid compensation from the company that varies with the business's profits and losses.</li> </ul>	<ul style="list-style-type: none"> <li>■ The worker is paid a fixed salary or wages and does not receive compensation based on the profits and losses of the company.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <b>Fourth Circuit</b>, <i>Lemon v. Bigel</i>: Lemon was compensated “according to a formula that varied with the profits and losses of the firm, as befitted a co-owner and employer,” and “was not salaried or paid a wage, the typical form of remuneration for employees.” This indicated her non-employee status.<sup>285</sup></li> <li>▪ <b>Sixth Circuit</b>, <i>Bowers v. Ophthalmology Group, LLP</i>: Bowers shared in the company's profits, was paid additional compensation based on her own production, received payments when two physicians bought into the partnership, and received a K-1 instead of a W-2. These facts among others indicated she was a non-employee.<sup>286</sup></li> <li>▪ <b>Seventh Circuit</b>, <i>Solon v. Kaplan</i>: The fact that Solon shared in the profits of the firm weighed in favor of his non-employee status.<sup>287</sup></li> <li>▪ <b>Eighth Circuit</b>, <i>von Kaenel v. Armstrong Teasdale, LLP</i>: von Kaenel shared in the profits and losses of the firm, even though this was through a “complicated calculation.” This was one of the factors that pointed to his non-employee status.<sup>288</sup></li> </ul>	

# OCAHO

## Administrative Decisions

### When Worker-Owners Are Not Employees Under the Immigration Reform and Control Act

U.S. Supreme Court cases as well as the decisions of federal circuit courts construing antidiscrimination laws and applying the common law test as set forth in *Clackamas* signal how the issue of employee status under IRCA would likely be approached by courts. However, it is also important to understand the views of the federal Office of the Chief Administrative Hearing Officer (“OCAHO”) in the Executive Office for Immigration Review of the U.S. Department of Justice.

Actions by Immigration and Customs Enforcement (ICE) to enforce employer sanctions under IRCA are initially heard by Administrative Law Judges (ALJs) in OCAHO, which issues orders that are the first and often final word (if there is no appeal) on how the employer penalty provisions under IRCA are to be interpreted.<sup>289</sup> In several decisions, OCAHO has examined the question of whether a worker with an ownership interest in a business is an employee for whom the business is required under IRCA to verify work authorization and prepare an I-9 form. These administrative decisions currently provide the most definitive interpretation of this particular issue, since no federal appeals court has issued an opinion on this subject.

Like federal circuit courts answering the question of whether worker-owners qualify as employees under employment discrimination statutes, **OCAHO decisions addressing this issue under IRCA have uniformly relied on the common law and *Clackamas* in some form**, even though the *Clackamas* factors have typically not been set forth or methodically applied by OCAHO. These decisions have either expressly raised *Clackamas* or followed other OCAHO decisions invoking *Clackamas*, and have recognized the “general rule” discussed in the Restatement (Third) of Employment Law (which draws from *Clackamas*) that “[a]n individual is not an employee of an enterprise if the individual through an ownership interest controls all or a part of the enterprise.”<sup>290</sup> Almost all these decisions have also cited *Clackamas* to note that neither the form of the business entity nor the individual’s title in the business is determinative.

Accordingly, as we summarize below,<sup>291</sup> these decisions reveal OCAHO’s primary focus on some evidence of the individual’s ownership and control over the business. When OCAHO has found such evidence, even if scant, it has typically ruled the individual was not an employee for whom an I-9 was required under IRCA, regardless of facts such as the payment of wages that might otherwise weigh in favor of employee status.



## *U.S. v. Santiago's Repacking, Inc.*<sup>292</sup>

### Background

- Santiago's Repacking, which was formed as a general partnership, contended that an I-9 was not required for Santiago Moreno, one of three partners in the business. ICE asserted that Moreno was "not just an owner, but also an employee of the business."<sup>293</sup>
- The company paid wages to Moreno and withheld employment taxes.<sup>294</sup>

### Ruling

- Moreno was not an employee for whom an I-9 form was required and the business was therefore not liable for any failure to properly complete an I-9 for him.<sup>295</sup>

### Discussion of common law test

- "The general rule is that an individual is not an employee of an enterprise if the individual has an ownership interest and controls all or part of the enterprise."<sup>296</sup> [citing Restatement (Third) of Employment Law]
- The regulatory definitions of "employee" and "employer" are "unhelpful[ly] circular[.]" But nothing in the definitions "suggests that an individual may simultaneously be both an employer and an employee in the same work setting."<sup>297</sup>
- The Supreme Court has observed that "the particular title a person has is not necessarily determinative of whether he or she is an employee or a proprietor" and that "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners."<sup>298</sup> [discussing and quoting *Clackamas*]
- The Seventh Circuit "applied the *Clackamas* rationale to find that where the plaintiff was one of only four general partners and substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others, he was an employer as a matter of law."<sup>299</sup> [citing *Solon v. Kaplan*]

### Basis for non-employee status

- The record in the case was "relatively undeveloped," but Moreno's situation appeared more like the situation discussed by the Seventh Circuit in *Solon*, and the preponderance of the evidence indicated "Moreno's status is that of a working partner, not an employee."<sup>300</sup>
- How the individual is compensated is one factor that may be considered in determining the individual's employment status, but "that one factor cannot be assigned a determinative role."<sup>301</sup>
- The business was not a large national firm with "hundreds of so-called partners" in which partners "lacked meaningful control or voting rights."<sup>302</sup>
- Moreno was one of only three original partners of the business, and had a one-third interest in the business.<sup>303</sup>
- Moreno "shares equally in profits and losses as well as in the management of the partnership business."<sup>304</sup>
- There was "no suggestion that Moreno is subject to supervision, discipline, or performance evaluations, or that, apart from the appearance of his name on the unemployment tax and wage reports, there are any other indicia of employee status."<sup>305</sup>

## *U.S. v. Jalisco's Bar & Grill, Inc.*<sup>306</sup>

### Background

- The restaurant argued that it was not obligated to prepare an I-9 for Francisco Gutierrez, the restaurant's owner and president.<sup>307</sup>

### Ruling

- An I-9 form was not required for Gutierrez, who was not an employee. Thus, the company was not liable for any failure to complete an I-9 for him.<sup>308</sup> [citing *Santiago's Repacking*]

### Discussion of common law test

- "Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls *all or a part of* the enterprise."<sup>309</sup> [citing Restatement (Third) of Employment Law]
- "Common law agency principles, in particular those for assessing the level of control a person has within a business entity, inform the analysis used for determining when a major shareholder of a corporation is an employee."<sup>310</sup> [citing *Clackamas*]
- "Neither the form of the business entity nor the individual's title is determinative."<sup>311</sup> [citing *Clackamas*]
- "It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered."<sup>312</sup> [citing *Clackamas*]

### Basis for non-employee status

- Gutierrez represented the restaurant in the OCAHO proceeding, as the company's owner and president.<sup>313</sup>
- The record did not indicate "that any other person [besides Gutierrez] has had a significant economic role in managing the company since its inception."<sup>314</sup>
- The restaurant's business license was issued in his name, d.b.a. Jalisco's Grill.<sup>315</sup>
- Gutierrez was in charge of hiring and firing.<sup>316</sup>
- Gutierrez "exercises control over the company's business decisions and daily activity."<sup>317</sup>

## *U.S. v. Two for Seven, LLC (dba Black & Blue Restaurant)*<sup>318</sup>

### Background

- The restaurant argued that Samuel Carey was not considered an employee requiring an I-9 form and provided its payroll spreadsheet and another company list indicating that Carey was a “manager.”<sup>319</sup>

### Ruling

- The restaurant was liable for its failure to properly complete an I-9 form for Carey. The company’s “mere assertion” that it did not consider Carey to be an employee was not enough.<sup>320</sup>

### Discussion of common law test

- “As a general rule, an individual is not an employee of an enterprise if he has ownership and [sic] interest and controls all or part of the enterprise.”<sup>321</sup> [citing Restatement (Third) of Employment Law]
- “OCAHO has observed that whether partners, officers, members of boards of directors, and major shareholders could qualify as employees is not necessarily determined simply by the individual’s title.”<sup>322</sup> [citing *Santiago’s Repacking* and *Clackamas*]

### Basis for employee status

- “[I]t was clear” that the partner in *Santiago’s Repacking* “was in a position to control the direction of the company, including the hiring and firing of others, and his own compensation.” In contrast, “there is not a scintilla of evidence that Carey has any ownership share in the company, nor are there any other indicia of ownership and control.”<sup>323</sup>
- There was no evidence that Carey “bears any risk of loss or liability for the company’s debt,” or that Carey “has voting power, policy making authority, or any other attributes of proprietorship.”<sup>324</sup>
- Instead, Carey was listed on the payroll and an I-9 was partially prepared for him.<sup>325</sup>
- ICE made a *prima facie* showing that Carey was an employee of the company, which offered no contrary evidence beyond its “mere assertion” that it did not consider him an employee.<sup>326</sup>

## *U.S. v. Speedy Gonzalez Construction, Inc.*<sup>327</sup>

### Background

- Speedy Gonzalez Construction did not complete I-9 forms for Salvador and Mary Gonzalez, the company's only shareholders and officers.
- The company's Annual Report and Certificate of Disclosure identified Salvador as its president and the owner of forty-nine percent of the shares, and Mary as the company's vice-president and owner of fifty-one percent of the shares.<sup>328</sup>

### Ruling

- Salvador and Mary Gonzalez were not employees for whom I-9 forms were required, and the company was not liable for failing to complete forms for them.<sup>329</sup>

### Discussion of common law test

- "OCAHO case law has recognized that, as a general rule, an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise."<sup>330</sup> [citing *Two for Seven*, which cited the Restatement (Third) of Employment Law]

### Basis for non-employee status

- "As the only two shareholders in this closely held corporation, each appears to have substantial ownership interests and substantial control over the enterprise."<sup>331</sup> [citing *Jalisco's Bar & Grill* and its application of *Clackamas*]

## *U.S. v. Homestead Metal Recycling Corp.*<sup>332</sup>

### Background

- Homestead Metal Recycling contended that two individuals, Alejandro Morua and Teresa Rabassa, who were in charge of Homestead's "day-to-day operations" and ran the company's "administrative functions," were not employees for whom I-9 forms were required.<sup>333</sup>

### Ruling

- Morua and Rabassa were employees for whom Homestead was required to prepare I-9s.<sup>334</sup>

### Discussion of common law test

- "An individual is not an employee of an enterprise if he or she, through an ownership interest, controls all or part of the enterprise."<sup>335</sup> [citing Restatement (Third) of Employment Law]
- "Neither the form of the business nor the individual's title is determinative."<sup>336</sup> [citing *Clackamas*]
- "Common law agency principles inform the analysis, the principal factor being that of control."<sup>337</sup> [citing *Clackamas* and *Jalisco's Bar & Grill*]

### Basis for employee status

- Morua and Rabassa were on Homestead's employee roster and payroll registry and received W-2s during the relevant time period.<sup>338</sup>
- Another individual, Otto San Roman, was the "majority owner" of the company, even under Homestead's claim that Morua and Rabassa each held an ownership interest in the business.<sup>339</sup> The Schedule K-1 of the company's tax return for the relevant time period showed that San Roman owned 100% of the company's shares and was entitled to deduct all the losses that year.<sup>340</sup> In addition, San Roman was "the only individual having the power of the purse in that he is the only one authorized to conduct transactions from Homestead's bank account."<sup>341</sup>
- Even though Morua was in charge of Homestead's "day-to-day operations" and Rabassa ran the company's "administrative functions," this did not indicate enough control over the business to establish they were not employees.<sup>342</sup>

## *U.S. v. Alpine Staffing, Inc.*<sup>343</sup>

### Background

- Alpine argued that Richard Donnelly, the company's "President and Manager," was one of only two stockholders and executives of the company, which ICE did not dispute.<sup>344</sup>
- The record showed that Donnelly was paid wages.<sup>345</sup>

### Ruling

- Although Alpine did not assert that Donnelly was not an employee, ICE did not submit sufficient evidence to meet its burden of proof that Donnelly was an employee for whom an I-9 was required, and Alpine was thus not liable for any violation with respect to his I-9.<sup>346</sup> [citing *Speedy Gonzalez Construction* and *Jalisco's Bar & Grill*, which cited *Clackamas*]

### Discussion of common law test

- "As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise."<sup>347</sup> [citing *Speedy Gonzalez Construction* and *Two for Seven*, which cited *Clackamas*]
- "Neither the form of the business entity nor the individual's title is determinative. It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered."<sup>348</sup> [quoting *Clackamas*]

### Basis for non-employee status

- Donnelly was identified as Alpine's "President and Manager," signed numerous I-9 forms as the company's "manager," and was named in corporate documents as the company's CEO. Because Donnelly was one of two shareholders of Alpine and acted on behalf of the company during ICE's investigation, "it is evident that he has substantial ownership interests and substantial control over Alpine."<sup>349</sup>

## *U.S. v. Intelli Transport Services, Inc.*<sup>350</sup>

### Background

- The company argued it was not liable for failing to complete an I-9 form for Taewon Park because he was “100% owner,” President, and CEO of the company.<sup>351</sup>
- ICE asserted Park was an employee because the company included him on its employee list and the quarterly wage report showed that he received wages.<sup>352</sup>

### Ruling

- ICE failed to establish by a preponderance of the evidence that Park was an employee of the company for I-9 purposes, and the company was therefore not liable for any I-9 violation with respect to him.<sup>353</sup>

### Discussion of common law test

- “As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise.”<sup>354</sup> [citing *Alpine Staffing* and *Speedy Gonzalez Construction*, which cited *Clackamas*]
- “Neither the form of the business entity nor the individual’s title is determinative. It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered.”<sup>355</sup> [citing *Alpine Staffing* and *Clackamas*]
- “[T]o determine an individual’s status as an employee, remuneration may be considered, but it is not a determinative factor.”<sup>356</sup> [citing *Santiago’s Repacking*, which cited *Clackamas*]

### Basis for non-employee status

- Park, who was identified as the company’s “President” and “CEO,” signed all of the I-9 forms as “President.” Since Park acted on behalf of the company during the ICE investigation and the OCAHO proceedings, “it is evident that he has substantial ownership interests in and substantial control over” the company.<sup>357</sup>

## *U.S. v. Visiontron, Corp.*<sup>358</sup>

### Background

- Visiontron argued that it was not liable for I-9 violations relating to Joseph Torsiello Jr., as well as his two sons Anthony Torsiello and Bryan Torsiello, because all three individuals were shareholders of the company.<sup>359</sup>

### Ruling

- The Torsiellos were owners, not employees, of the company, which was therefore not liable for any violations related to their I-9s.<sup>360</sup>

### Discussion of common law test

- “As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise.”<sup>361</sup> [citing *Intelli Transport Services*, *Alpine Staffing*, and *Speedy Gonzales Construction*, which cited *Clackamas*]

### Basis for non-employee status

- The three individuals were owners and shareholders of Visiontron. Joseph Torsiello Jr.’s affidavit stated that he was a shareholder and the president of the company and his two sons were also shareholders and owners. The company provided the stock certificates showing that all three were shareholders of the company.<sup>362</sup>
- Anthony Torsiello signed many of the company’s I-9s as the Vice President of the company.<sup>363</sup>

## *U.S. v. El Camino, LLC*<sup>364</sup>

### Background

- ICE alleged that the company failed to comply with its I-9 obligations for Wanita Jones, the owner of the company. The company did not assert that Jones was not an employee.<sup>365</sup>

### Ruling

- ICE did not meet its burden of establishing that Jones was an employee for whom the company was required to prepare an I-9 form, and therefore ICE's claim with respect to Jones was subject to dismissal.<sup>366</sup>

### Discussion of common law test

- “[E]mployers cannot be held liable under [IRCA] for failing to timely prepare or present a Form I-9 for an owner of the company.”<sup>367</sup> [citing *Visiontron* and *Intelli Transport Services*]
- “As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise.”<sup>368</sup> [citing *Alpine Staffing* and *Speedy Gonzalez Construction*, which cited *Clackamas*]
- “[An] individual’s title is [not] determinative.”<sup>369</sup> [citing *Alpine Staffing*, which cited *Clackamas*]

### Basis for non-employee status

- “[T]he evidence from both parties indicates that Wanita Jones was an owner” of the company at the time of the ICE investigation, and that she acted on behalf of the company during the investigation.<sup>370</sup>

## TABLE 2

### OCAHO Decisions

This table provides an overview of facts that have been considered in various OCAHO determinations of whether individuals who own a business are its employees for whom I-9 forms are required under IRCA. OCAHO decisions have invoked *Clackamas* in some form but have not enumerated or run through the *Clackamas* six-factor test. Instead, these decisions have tended to briefly discuss the worker's ownership and controlling interest in the business as the focal point for a finding of non-employee status.

*[Note: Boxes left blank in the table indicate that the OCAHO decision does not discuss the subject.]*

Case & ruling	Ownership interest in business	Control over business	Hiring/firing	Shares in profits/ losses of business, or paid wages	Independent work	Documents
<i>U.S. v. Santiago's Repacking</i> Moreno = NOT employee	Moreno was 1 of 3 original partners with 1/3 ownership interest. <sup>371</sup>	Moreno shared in management of the partnership. <sup>372</sup>		Moreno was paid wages but "share[d] equally" in profits & losses. <sup>373</sup>	Moreno was not subject to supervision, discipline, or evaluations. <sup>374</sup>	Unemployment tax & wage reports named Moreno but were only indicators of employee status. <sup>375</sup>
<i>U.S. v. Jalisco's Bar &amp; Grill</i> Gutierrez = NOT employee	Gutierrez was owner & president. <sup>376</sup>	Gutierrez exercised control over business decisions & daily activity, & represented company in OCAHO proceeding. Only he had "significant economic role." <sup>377</sup>	Gutierrez did the hiring/ firing. <sup>378</sup>			Business license was issued in Gutierrez's name (d.b.a. the restaurant). <sup>379</sup>
<i>U.S. v. Two for Seven dba Black &amp; Blue Restaurant</i> Carey = Employee	No evidence Carey had ownership interest. <sup>380</sup>	Some business documents indicated Carey was a manager, but there were no indicia of his control (e.g., voting power or policymaking authority). <sup>381</sup>		No evidence Carey bore risk of loss or liability for company's debt. <sup>382</sup>		Carey was listed on payroll & an incomplete I-9 form. This evidence was not contradicted beyond mere assertion he was not an employee. <sup>383</sup>
<i>U.S. v. Speedy Gonzalez Construction</i> Salvador & Mary Gonzalez = NOT employees	As the only 2 shareholder-owners, Salvador & Mary each "appear[ed] to have substantial ownership interests." <sup>384</sup>	As the only 2 shareholder-owners, Salvador & Mary each "appear[ed] to have substantial control." <sup>385</sup>				Company's Annual Report & Certificate of Disclosure identified Salvador & Mary as sole shareholder-owners and officers. <sup>386</sup>
<i>U.S. v. Homestead Metal Recycling</i> Morua & Rabassa = Employees	Morua & Rabassa were not majority owners. Another person, Otto San Roman, was. <sup>387</sup>	That Morua & Rabassa were in charge of daily operations & admin functions did not indicate sufficient control. San Roman was only one with power of purse. <sup>388</sup>				Morua & Rabassa were on employee roster & payroll and received W-2s. K-1 tax form showed San Roman held 100% of stock. <sup>389</sup>
<i>U.S. v. Alpine Staffing</i> Donnelly = NOT employee	Donnelly was 1 of 2 shareholders & acted on behalf of company during ICE investigation. This showed he had "substantial ownership interests." <sup>390</sup>	Donnelly was 1 of 2 shareholders & acted on behalf of company during ICE investigation, indicating he had "substantial control." <sup>391</sup>		Donnelly was paid wages. <sup>392</sup>		Donnelly was named in corporate documents as CEO, was identified as President & Manager, and signed I-9 forms as "manager." <sup>393</sup>
<i>U.S. v. Intelli Transport Services</i> Park = NOT employee	Company said Park was "100% owner." He acted on behalf of company during ICE investigation & OCAHO proceedings, indicating he had "substantial ownership interests." <sup>394</sup>	Park acted on behalf of company during ICE investigation & OCAHO proceedings, indicating he had "substantial control." <sup>395</sup>		Park was paid wages. <sup>396</sup>		Park was on employee list & wage reports, but was also identified as CEO & President and signed I-9 forms as "President." <sup>397</sup>
<i>U.S. v. Visiontron</i> Joseph Torsiello Jr., Anthony Torsiello & Bryan Torsiello = NOT employees	Torsiellos were owners and shareholders. <sup>398</sup>					Stock certificates showed Torsiellos were shareholders. One signed I-9 forms as "Vice President." <sup>399</sup>
<i>U.S. v. El Camino</i> Jones = NOT employee	Jones was owner at time of ICE investigation & acted on behalf of company during investigation. <sup>400</sup>					

# Conclusion

When we think about what it means to be an employee, we often contemplate basic rights, such as the right to minimum wage, that are generally accorded to workers who are employees and denied to workers who are not. In this critical sense, employee status protects and benefits workers. But this is not the case when it comes to the federal Immigration Reform and Control Act (IRCA), which prohibits the “employment” of workers lacking lawful status or work authorization. Under IRCA’s I-9 provisions that are designed to effectuate this prohibition, the obligation of employers to verify the worker’s identity and “authorization” to work—subject to penalties for the failure to do so—relates only to “employees.” The question of what “employment” means under IRCA and in turn, who is an employee for purposes of the statute and its I-9 requirements can be consequential for low-wage immigrant workers who are looking to high-road models of business ownership as a potential pathway to lawfully navigate through IRCA’s prohibitions on unauthorized “employment.”

While the question of what legal test properly applies to determine a worker's employee status has generated vigorous legal and policy debates around various federal and state laws, the IRCA front on this issue has been relatively quiet. Federal courts have not had occasion to interpret the meaning of IRCA's prohibition against unauthorized "employment" and have not grappled with the specific question of whether worker-owners—those who work for a business that they also own and control—are considered "employees" under IRCA.

However, courts have long held that the common law defines what "employee" means when a statute is silent and does not provide guidance on how the term should be understood. Over 20 years ago, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, the U.S. Supreme Court applied this well-established principle of statutory interpretation to the Americans with Disabilities Act. *Clackamas* set out a non-exhaustive six-factor test as the relevant framework for the common law inquiry into whether a shareholder-director of a company is an employee of the business, an inquiry that centers on the individual's control over the enterprise. For decades, federal circuit courts have relied on the common law test adopted in *Clackamas* to conclude that shareholders or partners of a business who have the right of control over it are not "employees" under various employment discrimination statutes with unhelpful, circular definitions of "employee."

The uniformity of these federal circuit court decisions augurs similar application of the common law, and the *Clackamas* factors, should a court be presented with the same question under IRCA of whether a worker-owner of a business is its "employee"—since the IRCA statute, too, does not define "employment." While no single *Clackamas* factor by itself is dispositive, the right of a worker-owner to influence the company's rules and business decisions (such as through a right to vote on them that is equal to the right of other worker-owners) would likely drive a finding of non-employee status under IRCA. Other evidence that the worker-owner is in control of the business (and is not controlled by it), such as sharing in the business's profits and losses, and performing the work of the business through the exercise of independent judgment and without supervision, would reinforce that the worker is not an employee for purposes of IRCA.

Also instructive on this issue are administrative decisions by the federal Office of the Chief Administrative Hearing Officer (“OCAHO”), in the Executive Office for Immigration Review of the U.S. Department of Justice. OCAHO, which adjudicates federal government actions by ICE to enforce employer penalties under IRCA, issues orders that currently serve as the most authoritative interpretation of the employer penalty provisions under IRCA (in the absence of court decisions on this subject). In various cases, OCAHO has examined the question of whether a worker with an ownership interest in a business is an employee for whom the business is required under IRCA to verify work authorization and prepare an I-9 form. OCAHO decisions have relied on the common law and *Clackamas* in some form and consistently announced the “general rule” that an individual is not an employee of a business if the individual owns and controls all or a part of the business. When OCAHO has found this to be the case, it has determined that IRCA’s I-9 requirements do not apply to the worker and associated penalties therefore cannot be imposed, even if other facts such as the payment of wages to the worker might otherwise weigh in favor of employee status.

As decisions by federal circuit courts and OCAHO have shown, utilizing the common law to resolve questions of employee status of worker-owners has typically resulted in the conclusion that they are not employees. Thus, although application of the common law has functioned to deny workers the protections of antidiscrimination statutes, it can serve a very different, salutary end under federal immigration law. For immigrant workers who have been increasingly scapegoated and targeted, advancing this proper understanding of what “employment” means under IRCA—while it does not stop the profound harms of mass deportations, unlawful detentions, and workplace raids—still has a role to play in larger, collective efforts to protect and defend the ability of immigrants to work and live as integral members of our communities.

# Endnotes

- 1 For one discussion of different legal tests of employee status, see generally *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal.5th 903, 927-57 (2018).
- 2 For example, see discussion in *Dynamex* examining the question of employee versus independent contractor status. *Id.*
- 3 See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. IRCA amended the Immigration and Nationality Act (INA), the larger federal statutory scheme regulating immigration.
- 4 See 8 U.S.C. §§ 1324a(a)(1), 1324a(b).
- 5 See 8 U.S.C. § 1324a(e); 8 C.F.R. § 274a.10(b). Criminal penalties may be sought against the employing person or entity if there is a pattern or practice of certain violations (but not including I-9 violations). See 8 U.S.C. § 1324a(f)(1).
- 6 With their potential to raise wages and improve working conditions, worker cooperatives in particular are in many ways the North Star of promising economic development strategies for workers. The hallmarks of these worker-owned and democratically-governed businesses include the right of workers to vote on and control business decisions and set workplace rules and policies, as well as the right to participate in the financial success of the business through distribution of profits based on the amount of labor contributed by the worker. See Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 208, 185-88 (1999); Carrie Hempel & Gowri J. Krishna, *Within the Law, Beyond Exploitation: The Evolution of Immigrant Worker Cooperatives*, 52 FORDHAM URB. L.J. 931, 954-63 (2025).
- 7 Labor violations are rampant in low-wage industries. See Alejandro Lazo, Jeanne Kuang, Lil Kalish & Erica Yee, *When Employers Steal Wages from Workers*, CALMATTERS (July 26, 2022), <https://calmatters.org/explainers/when-employers-steal-wages-from-workers/>; RUTH MILKMAN, ANA LUZ GONZÁLEZ & VICTOR NARRO, UNIV. OF CAL. L. A. INST. FOR RSCH. ON LAB. & EMP'T., WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS (2010), <https://irle.ucla.edu/old/publications/documents/LAwagetheft-Milkman-Narro-110.pdf>.
- 8 For example, see discussion of the advantages of worker ownership of businesses formed as worker cooperatives, in Cummings, *supra* note 6, and Hempel & Krishna, *supra* note 6.
- 9 Throughout this publication, we use the term “worker-owner” as shorthand, to signify an individual who works for a business and also possesses an ownership and controlling interest in it.
- 10 IRCA monetary penalties could be financially devastating for small businesses in particular, including worker cooperatives. Engaging as an “employee” in “unauthorized employment” can also have adverse immigration consequences for the individual worker under other provisions of the Immigration and Nationality Act (INA). See, e.g., 8 U.S.C. § 1255 (subject to certain exceptions, barring adjustment to lawful status if the individual has engaged in “unauthorized employment”). But it would appear that if a worker is not an “employee” who has engaged in prohibited “employment” under the IRCA provisions of the INA, then with respect to work performed for that business, neither has that worker engaged in “unauthorized employment” for purposes of other parts of the INA. See *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (“it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning” (internal quotation marks and citation omitted)).
- 11 We stress that this specific inquiry—whether an individual who works for a business, while also owning and controlling it, is an employee of that business—is *not* the same inquiry as whether an individual (including a sole proprietor) hired by a person or other entity to perform labor or services is an employee or independent contractor of that hiring person or entity.
- 12 ICE, or Immigration and Customs Enforcement, is the agency within the U.S. Department of Homeland Security that among other activities, conducts inspections of employers for compliance with IRCA’s I-9 provisions and initiates proceedings to assess penalties under IRCA if violations are found. See *Split Rail Fence Co., Inc. v. U.S.*, 852 F.3d 1228, 1233–34 (10th Cir. 2017) (discussing administrative enforcement and adjudication under IRCA). A person or entity may request a hearing on an I-9 enforcement action by ICE. Hearings are conducted before an OCAHO Administrative Law Judge (ALJ), who is charged with issuing an order setting forth findings of law and fact. See 8 U.S.C. § 1324a(e)(3)(A)-(C). The ALJ decision becomes the final agency decision and order, subject to administrative review. See 8 U.S.C. § 1324a(e)(7). A person or entity adversely affected by a final order may petition the appropriate federal circuit court for judicial review of the order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.
- 13 See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).
- 14 8 U.S.C. § 1324a(a), (h)(3).
- 15 8 U.S.C. § 1324a(a)(1)(A). Under IRCA, it also constitutes unlawful “employment” for a person or other entity to “use[] a contract, subcontract, or exchange...to obtain the labor” of an “unauthorized” worker if the person or entity “knows” the worker is “unauthorized.” See 8 U.S.C. § 1324a(a)(4).
- 16 See 8 U.S.C. § 1324a(a)(1)(B), (b). IRCA also specifies for a person or entity that is an agricultural association, agricultural employer, or farm labor contractor, it is unlawful to “hire, or to recruit or refer for a fee, for employment” an individual without complying with the I-9 requirements. See *id.* There is no obligation under IRCA to verify the identity of independent contractors or fill out an I-9 form for them, since the I-9 requirements apply only in the context of “employment.” See 8 U.S.C. § 1324a(a)(1)(B), (b). As discussed *infra*, IRCA’s implementing regulations also state that independent contractors are not “employees.” See 8 C.F.R. § 274a.1(f), (j). To the extent IRCA makes it unlawful for a person or other entity to use a contract or subcontract to obtain the labor of an “unauthorized” worker “knowing” that the worker is “unauthorized,” this provision does not subject such person or entity to the statute’s I-9 obligations. See 8 U.S.C. § 1324a(a)(4) (expressly stating such use of a contract for labor shall be considered unlawful “employment,” but not incorporating the I-9 provision of paragraph (a)(1)(B)).

- 17 8 U.S.C. § 1324a(a)(2).
- 18 *Hoffman*, 535 U.S. at 147.
- 19 See 8 U.S.C. § 1324a(b).
- 20 See 8 U.S.C. § 1324a(e)(4)(A), (e)(5).
- 21 See also discussion of the lack of statutory definitions for “employment” and its related terms in IRCA and the INA, in Part 2 of this publication, *infra*.
- 22 8 C.F.R. § 274a.1(h).
- 23 8 C.F.R. § 274a.1(f). The term “independent contractor” is defined in subsection (j) of the implementing regulations. See 8 C.F.R. § 274a.1(j).
- 24 8 C.F.R. § 274a.1(g) (emphasis in original).
- 25 We reiterate that this inquiry is different from the question of how to determine whether an individual hired by a person or entity to provide labor or services is an independent contractor or employee of that hiring person or entity.
- 26 One federal district court opinion, in the context of examining whether a state law was preempted by IRCA, discussed whether worker-owners of the limited liability company in the case fell within the scope of IRCA, but the court did not examine what “employment” means under IRCA or address what legal test governs this issue. See *infra* note 84.
- 27 503 U.S. 318 (1992).
- 28 *Id.* at 320-21.
- 29 *Id.* at 321-22.
- 30 490 U.S. 730 (1989).
- 31 See *Darden*, 503 U.S. at 322 (discussing *Reid*).
- 32 *Id.* at 322-23 (quoting *Reid*, 490 U.S. at 739-40 (citations and internal quotation marks omitted)).
- 33 *Id.* at 323.
- 34 *Id.* In contrast, the Supreme Court found “specific guidance” in ERISA that resolved a separate question in *Yates v. Hendon*, 541 U.S. 1, 11-12 (2004). In *Yates*, the Court examined whether a “working owner” may qualify as a plan “participant” in an employee benefit plan covered by ERISA, and observed that although ERISA’s definitions of “employee” and “participant” are “uninformative,” other provisions of “ERISA’s text contain[] multiple indications that Congress intended working owners to qualify as plan participants.” *Id.* Such “specific guidance” in ERISA as to this particular issue meant “there was no cause in [*Yates*] to resort to common law.” *Id.*
- 35 See *Darden*, 503 U.S. at 323. The Court noted that as was the case in *Reid*, it was reading the term “employee” to incorporate “the general common law of agency, rather than ... the law of any particular State.” *Id.* at 323, n.3 (quoting *Reid*, 490 U.S. at 740).
- 36 *Id.* at 328 (stating that “[w]hile the Court of Appeals noted that ‘Darden most probably would not qualify as an employee’ under traditional agency law principles...it did not actually decide that issue”).
- 37 538 U.S. 440 (2003).
- 38 See *id.* at 441-42.
- 39 See *id.* at 442.
- 40 See *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 904 (9th Cir. 2001), *rev’d*, 538 U.S. 440 (2003).
- 41 *Id.* at 905 (citations and internal quotation marks omitted).
- 42 *Id.* at 906.
- 43 538 U.S. at 444 & n.3 (noting the disagreement among Circuits took shape in cases examining, for example, Title VII and the Age Discrimination in Employment Act).
- 44 *Id.* at 444 (quoting *Darden*, 503 U.S. at 323).
- 45 *Id.* at 446 (citations omitted).
- 46 *Id.* (citation omitted).
- 47 *Id.* at 447.
- 48 *Id.* at 448 (emphasis added).
- 49 *Id.* at 447.
- 50 *Id.* at 448-49 (citing EEOC Compliance Manual). The Court distinguished this “narrower” question from the “broad” question that was addressed in *Darden* regarding what legal standard applied to determine whether the individual was an employee or an independent contractor. Concerning the latter question, the Court noted that the EEOC guidelines list 16 factors, taken from *Darden*, that may be relevant. *Id.*
- 51 *Id.* at 449 (quoting EEOC Compliance Manual).
- 52 *Id.* at 448.
- 53 *Id.* (citation omitted).

- 54 *Id.* at 449-50 (quoting EEOC Compliance Manual).
- 55 *Id.* at 450. In *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006), the Seventh Circuit stated that the purpose of the test adopted by the Supreme Court in *Clackamas* was to distinguish “employees” from “employers” whose “authority and interests are so aligned with the business as to render them the legal personification of the business.” *Id.* at 978 (emphasis in original) (citation omitted). The Seventh Circuit explained that “[t]hose who own an interest in and/or hold office with the business are the individuals who may amount to ‘employers’ in this sense, for they potentially have the right to dictate the decisions of the business and control the actions of its workers that a mere ‘employee’ would not have.” *Id.*
- 56 538 U.S. at 450.
- 57 *Id.* at 451 (quoting *Darden*, 503 U.S. at 324) (internal quotation marks omitted).
- 58 *Id.*
- 59 *Id.*
- 60 *Id.* at 451, n.11.
- 61 *Id.* at 451.
- 62 *Id.* at 444 (quoting *Darden*, 503 U.S. at 323).
- 63 *Id.* at 444-45.
- 64 *Darden*, 503 U.S. at 325.
- 65 See *supra* Part 1 of this publication.
- 66 The fact that the IRCA statute does not define “employment” or its associated terms stands in stark contrast to the statutory text of the federal Fair Labor Standards Act at issue in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961). In *Goldberg*, the Supreme Court relied on the “economic reality” test of employment, not the common law, and held that worker members of a cooperative business were its employees under the FLSA. The Court noted the statutory definition of the term “employ” in the FLSA includes the broad “suffer or permit to work” standard. See *id.* at 31-32; see also *Darden*, 503 U.S. at 326 (FLSA’s “suffer or permit to work” definition, “whose striking breadth we have previously noted... stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles” (internal citation omitted)). Unlike the FLSA, the IRCA statute contains no such definition relating to the term “employment.” See our discussion *infra* of *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276 (11th Cir. 2016). Neither does IRCA contain any textual indications in its other provisions (in contrast to such textual clues apparent in *Yates*, *supra* note 34, with respect to ERISA) that provide specific guidance as to what “employment” means so that resort to the common law would not be necessary.
- 67 843 F.3d 1276 (11th Cir. 2016).
- 68 See *id.* at 1284, 1289-90. Under the H-2A visa program, an employer seeking to hire temporary foreign agricultural workers must obtain a certification from the U.S. Department of Labor, which may grant the certification under specified circumstances. See *id.* at 1284-85 (describing the H-2A program).
- 69 *Id.* at 1282-84.
- 70 *Id.* at 1286.
- 71 *Id.*
- 72 *Id.* at 1289.
- 73 *Id.*
- 74 *Id.*
- 75 *Id.* at 1290.
- 76 *Id.* at 1289 (citing *Darden*, 503 U.S. at 322-24).
- 77 *Id.* at 1289-90 (citing *Reid*, 490 U.S. at 739 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981))).
- 78 See *id.* at 1291.
- 79 *Id.* (citing *Amax Coal*, 453 U.S. at 329, and *Darden*, 503 U.S. at 322-23).
- 80 *Id.* at 1292. *Clackamas* was not raised in this decision but was discussed by the Eleventh Circuit later in the same case. In a subsequent opinion, the appellate court explained that *Clackamas* involved the “very specific question” of whether shareholder-directors of a company were employees or employers—a different question from the employee versus independent contractor question in *Darden* as well as the joint employer question in the *Garcia-Celestino* case before the Eleventh Circuit—although all three questions were answered by the common law, with different sets of factors that may be relevant to each question. See 898 F.3d 1110, 1119-21 (11th Cir. 2018).
- 81 See 843 F.3d at 1286.
- 82 See *Darden*, 503 U.S. at 322-23 (quoting and discussing *Reid*, 490 U.S. at 739-40).
- 83 Additionally, we observe that in 2004—after the Supreme Court decided *Darden* and *Clackamas* and reiterated the general rule that Congressional silence on the meaning of “employer,” “employee,” and other terms relating to what “employment” means would trigger application of the common law to interpret these undefined terms—Congress amended IRCA’s I-9 employee verification provisions, see Pub. L. 108-390, § 1(a), 118 Stat. 2242, but remained silent as to the meaning of “employment” under IRCA. We note also that “it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” See *Taniguchi*, 566 U.S. at 571 (internal quotation marks and citation omitted).

- 84 In *Universal Contracting, LLC v. Utah Dep't of Commerce*, 69 F.Supp.3d 1225 (D. Utah 2014), a federal district court addressed the applicability of IRCA to worker-owners of a limited liability company, in the context of the company's argument that IRCA preempted certain immigration-related provisions of a Utah state law, but the court did not construe the meaning of the term "employment" in IRCA or discuss what test applies to determine questions of employee status under the statute. See *id.* at 1227, 1242-43. *Universal Contracting* involved a limited liability company with more than 900 members who worked in Utah's construction trade; each member was also a company owner, held an equity position in the company, enjoyed various ownership rights, and received K-1 forms from the company for tax purposes. *Id.* at 1227-28. The member-owners were responsible for finding their own construction jobs, deciding which ones to accept, negotiating their pay, and setting their work schedule, while the company provided administrative support such as payroll, bookkeeping and contract management, and paid for workers' compensation insurance, unemployment insurance premiums, and commercial general liability insurance for member-owners. *Id.* at 1228. The company contended that both IRCA and the state law provisions at issue applied to its business structure and that compliance with both IRCA and the state law was impossible, and therefore the state law was preempted by IRCA. *Id.* at 1240. As part of analyzing whether this was so, the district court focused on the company's member-owners. *Id.* at 1242-43. There was no evidence, the court ruled, that the company's relationship with its member-owners was even governed by IRCA. *Id.* The court stressed that the company offered no evidence that it had "ever formally or officially been treated as an employer of its member-owners under IRCA," that the company admitted it did not "hire" its member-owners "for employment" (per IRCA's terms) as a "traditional employer might," and that the company failed to show the member-owners were individuals for whom I-9 forms were required by IRCA. *Id.*
- 85 538 U.S. at 447.
- 86 503 U.S. at 325 (citation and internal quotation marks omitted).
- 87 538 U.S. at 446 (quoting underlying Ninth Circuit decision).
- 88 *Id.* (citing findings and purpose of the ADA).
- 89 *Id.* at 446-48.
- 90 See *Darden*, 503 U.S. at 319-20 (discussing ERISA).
- 91 *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (discussing legislative history of section 1324a and the I-9 verification process); accord *Lozano v. City of Hazleton*, 724 F.3d 297, 306-07 (3d Cir. 2013) (IRCA was crafted to minimize the burden placed on employers).
- 92 In these cases, courts and parties have utilized various terms, including "proprietor," "owner," "partner" or "employer," to signify non-employee status.
- 93 Most but not all federal circuits have issued opinions post-*Clackamas* addressing this question of employee versus non-employee status of worker-owners under federal antidiscrimination statutes. In this Part of our publication, our purpose is to present a general overview of higher court decisions across circuits; we do not cover any lower court cases touching this subject. We also note here that in *Castaways Family Diner* (referenced in note 55, *supra*), the Seventh Circuit discussed *Clackamas* in a different context: as part of examining the employee status of two individuals who had day-to-day authority over the restaurant's operations and managed the business on behalf of the restaurant's sole proprietor, but who did not possess an ownership interest in the restaurant or act as an officer or board member with the right to vote on business matters. See 453 F.3d at 972-73, 978. The Seventh Circuit ruled that the source of the individual's authority mattered—*i.e.*, whether such authority comes from the *right* to control the business or whether authority is *delegated* by others who have the ultimate right of control. See *id.* at 980-84. Since there was no evidence in the record suggesting that the two individuals had such a right (through some ownership interest or otherwise), the court concluded that the *Clackamas* test seemed inapplicable to the case, but explained its view that even if it applied, proper application of the test must take into account the source of a person's authority within the business. See *id.*
- 94 See *Clackamas*, 538 U.S. at 449-50 (citation omitted). The Court came to this conclusion as it noted that the EEOC guidelines are "not controlling" but may be resorted to for guidance. See *id.* at n.9.
- 95 474 F.3d 16 (1st Cir. 2007).
- 96 See *id.* at 21.
- 97 *Id.* at 22-24.
- 98 See *id.* at 21-22.
- 99 See *id.*
- 100 *Id.* at 24.
- 101 *Id.* at 22 (citation and internal quotation marks omitted).
- 102 *Id.* at 24 (citation omitted).
- 103 *Id.* (emphasis in original) (citation omitted).
- 104 369 F.3d 113 (2d Cir. 2004).
- 105 *Id.* at 116, 122-23.
- 106 *Id.* at 123.
- 107 *Id.*
- 108 714 F.3d 761 (3d Cir. 2013).
- 109 *Id.* at 763-64.
- 110 *Id.* at 763.

- 111 *Id.* at 766 (citations omitted).
- 112 *Id.* at 767.
- 113 *Id.* (citing *Clackamas*, 538 U.S. at 449-50).
- 114 *Id.*
- 115 *Id.* at 767-69.
- 116 *Id.* at 768.
- 117 *Id.*
- 118 *Id.* (quoting *Castaways Family Diner*, 453 F.3d at 984).
- 119 *Id.* at 768-69.
- 120 *Id.* at 769 (citing *Clackamas*, 538 U.S. at 448).
- 121 74 Fed.Appx. 197 (3d Cir. 2003) (unpublished opinion).
- 122 *Id.* at 198.
- 123 *Id.* at 198, 201.
- 124 *Id.* at 199.
- 125 *Id.* at 198, 201.
- 126 *Id.* at 200.
- 127 *Id.*
- 128 *Id.*
- 129 *Id.*
- 130 *Id.* at 200-01.
- 131 *Id.* at 201.
- 132 985 F.3d 392 (4th Cir. 2021).
- 133 *Id.* at 395.
- 134 *Id.* at 399.
- 135 *Id.* at 396 (citing *Darden*, 503 U.S. at 322-23, and *Clackamas*, 538 U.S. at 445).
- 136 *Id.* (citations and internal quotation marks omitted).
- 137 *Id.* at 397.
- 138 *Id.*
- 139 *Id.*
- 140 *Id.*
- 141 *Id.*
- 142 *Id.* (citing *Clackamas*, 538 U.S. at 449-50) (internal quotation marks omitted).
- 143 *Id.* at 398.
- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 *Id.* at 397.
- 148 *Id.* at 397-98.
- 149 *Id.* at 398.
- 150 *Id.* at 397.
- 151 *Id.* at 398.
- 152 *Id.*
- 153 *Id.*
- 154 *Id.*
- 155 *Id.* at 397 (citing *Clackamas*, 538 U.S. at 449-50) (internal quotation marks and parentheses omitted).
- 156 *Id.*

- 157 *Id.* at 398.
- 158 *Id.*
- 159 437 F.3d 471 (5th Cir. 2006).
- 160 *Id.* at 473.
- 161 *Id.* at 479.
- 162 *Id.* at 482.
- 163 *Id.*
- 164 *Id.* at 481-82.
- 165 *Id.* at 482.
- 166 *Id.* at 480.
- 167 *Id.* at 481.
- 168 *Id.*
- 169 *Id.*
- 170 *Id.*
- 171 *Id.*
- 172 *Id.*
- 173 *Id.* at 482.
- 174 *Id.* at 481.
- 175 *Id.*
- 176 *Id.*
- 177 *Id.*
- 178 *Id.*
- 179 *Id.* (citation omitted).
- 180 *Id.*
- 181 648 F. App'x 573 (6th Cir. 2016) (unpublished opinion).
- 182 *Id.* at 574, 578.
- 183 *Id.* at 579-80.
- 184 *Id.* at 578 (citing *Darden*, 503 U.S. at 323).
- 185 *Id.* at 578-81. In addition to discussing the six-factor test in *Clackamas*, the Sixth Circuit in *Bowers* discussed the overlapping common law agency test that it had previously set forth in *Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996), decided before *Clackamas*. In *Simpson*, the Sixth Circuit noted that “[a]lthough the conventional agency test is directed to the independent contractor/employee issue, neither this circuit nor the Supreme Court have, to date, considered the partner versus employee question.” *Id.* at 443. Without the benefit of *Clackamas*, the *Simpson* court applied “an analog of the Supreme Court’s pronouncements in *Darden*” to find that based on common law agency doctrine, the plaintiff was an employee for purposes of the ADEA and ERISA. *Id.* at 443-44. The court found that “the firm’s business, assets, and affairs were directed exclusively by a 10 to 14 member Management Committee [of which the plaintiff was not a member] and its chairman,” and that the plaintiff was only a “nominal” partner who had no power to vote for the chairman or Committee members. *Id.* at 441-42. In *Bowers*, the Sixth Circuit explained that these facts in *Simpson* distinguished the case from the situation in *Bowers*. See 648 F. App'x at 580.
- 186 648 F. App'x at 579-80.
- 187 *Id.* at 579.
- 188 *Id.*
- 189 *Id.*
- 190 *Id.*
- 191 *Id.*
- 192 *Id.*
- 193 *Id.*
- 194 *Id.*
- 195 *Id.*
- 196 *Id.* at 579-80.

- 197 *Id.* at 580.
- 198 398 F.3d 629 (7th Cir. 2005).
- 199 *Id.* at 630.
- 200 *Id.* at 632-34.
- 201 *Id.* at 632 (quoting *Clackamas*, 538 U.S. at 444, n.3).
- 202 *Id.* at 632-33 (quoting *Clackamas*, 538 U.S. at 445, n.5).
- 203 *See id.* at 633-34.
- 204 *Id.* at 633.
- 205 *Id.*
- 206 *Id.*
- 207 *Id.* at 634.
- 208 *Id.* (citation omitted).
- 209 *See id.* at 633-34.
- 210 *Id.* at 634. As part of its discussion of Solon's control over the firm, the Seventh Circuit cited *Schmidt v. Ottawa Medical Ctr.*, 322 F.3d 461 (7th Cir. 2003), a pre-*Clackamas* case in which the appellate court held that when an individual shareholder has the opportunity for shared control of a closely held professional corporation, including the opportunity to share in its profits, the individual will be deemed an "employer" for purposes of the ADEA. *Id.* at 468. In *Schmidt*, the Seventh Circuit explained that *Clackamas* had not yet been decided by the Supreme Court. *Id.* at 465. Nevertheless, the Seventh Circuit's discussion in *Schmidt* of common law agency principles remains instructive. *Id.* at 466. The court observed that under such principles, the focus is on the element of control. *Id.* The court found the individual shareholder-physician in the case, Dr. Schmidt, was an employer, not an employee, based on the fact that he was a founding shareholder of the corporation and remained one during the relevant time period, served as a corporate officer and held a seat on its board, and possessed an equal vote in all business matters put to shareholder vote—and thus "had ample opportunity to share in the management and control" of the business. *Id.* at 467. Furthermore, the court expounded that "the mere fact that lately [Dr. Schmidt's] preferences on shareholder-compensation proposals have not secured the majority opinion of his fellow shareholders does not alter the fact that with each vote he has exercised this right to control." *Id.* Possessing the opportunity to participate and to vote on business proposals was what counted. *Id.* In addition, the fact that his employment agreement repeatedly referred to him as an employee and gave sole authority of patient assignments to the corporate board did not detract from the court's conclusion that Dr. Schmidt was not an employee, since he was a member of the board and thus had decision-making authority over this matter. *Id.* The court also pointed out that Dr. Schmidt had "absolute authority" over treating his patients once assigned to him and that while he did not possess "sole authority" over his employment conditions since he shared such authority "in equal parts with other members of the board," he did "exercise significant control" and "as much control over his employment" as any other shareholder. *Id.*
- 211 398 F.3d at 633.
- 212 *Id.*
- 213 *Id.* at 634.
- 214 *Id.* at 630.
- 215 *Id.* at 633.
- 216 769 F.3d 944 (7th Cir. 2014).
- 217 *Id.* at 948, 951.
- 218 *Id.* at 951-56.
- 219 *Id.* at 955.
- 220 *Id.* at 953, 954-55.
- 221 *See id.* at 954.
- 222 *Id.* at 956.
- 223 *Id.* at 954.
- 224 *Id.* (citing *Schmidt*, 322 F.3d at 468).
- 225 *See id.* at 955.
- 226 *Id.* at 954.
- 227 *Id.* at 953.
- 228 *Id.* at 956.
- 229 *Id.* at 953 (citing *Solon*, 398 F.3d at 634, and *Schmidt*, 322 F.3d at 467).
- 230 *Id.*
- 231 *Id.*

- 232 *Id.* at 956.
- 233 *See id.* (analogizing Bluestein's shared authority with other members of the board to the same shared authority of the physician-shareholder in *Schmidt*, 322 F.3d at 467).
- 234 *See id.* at 953.
- 235 *Id.* at 954.
- 236 *Id.* (citing *Clackamas*, 538 U.S. at 448, and *Schmidt*, 322 F.3d at 467).
- 237 *Id.*
- 238 *Id.* at 956.
- 239 *Id.* at 955-56 (drawing from *Clackamas* and *Schmidt*).
- 240 *Id.* at 948, 955-56.
- 241 943 F.3d 1139 (8th Cir. 2019).
- 242 *Id.* at 1143.
- 243 *Id.*
- 244 *See id.* at 1143-45.
- 245 *Id.* at 1144.
- 246 *Id.* at 1144-45.
- 247 *Id.* at 1144 (internal quotation marks omitted).
- 248 *Id.*
- 249 *Id.* at 1144-45.
- 250 *Id.* at 1142, 1144-45.
- 251 *Id.* at 1144-45.
- 252 985 F.3d at 398.
- 253 648 F. App'x at 575, 580.
- 254 769 F.3d at 953.
- 255 398 F.3d at 633, 634.
- 256 943 F.3d at 1144.
- 257 985 F.3d at 397, 398.
- 258 437 F.3d at 481-82.
- 259 769 F.3d at 953.
- 260 398 F.3d at 633-34.
- 261 985 F.3d at 397-98.
- 262 437 F.3d at 481.
- 263 769 F.3d at 954.
- 264 943 F.3d at 1145.
- 265 985 F.3d at 395, 397-98, n. 2.
- 266 437 F.3d at 481.
- 267 769 F.3d at 954.
- 268 474 F.3d at 24.
- 269 714 F.3d at 767-68 (quoting *Castaways Family Diner*, 453 F.3d at 984).
- 270 985 F.3d at 397-98.
- 271 437 F.3d at 481.
- 272 648 F. App'x at 579-80 (quoting and discussing *Simpson*, 100 F.3d at 441).
- 273 769 F.3d at 954-56.
- 274 *Id.* at 955 (discussing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002)).
- 275 398 F.3d at 633-34.
- 276 943 F.3d at 1144-45.

- 277 538 U.S. at 450-51.
- 278 985 F.3d at 398.
- 279 437 F.3d at 481.
- 280 648 F. App'x at 579-80.
- 281 769 F.3d at 955-56.
- 282 398 F.3d at 630-31, 633.
- 283 943 F.3d at 1144.
- 284 538 U.S. at 451, n.11.
- 285 985 F.3d at 397.
- 286 648 F. App'x at 579.
- 287 398 F.3d at 633.
- 288 943 F.3d at 1144.
- 289 *See supra* note 12.
- 290 *See* Restatement (Third) of Employment Law § 1.03 (2015), and Reporters' Notes, *Comment a, b* (discussing *Clackamas* and its six-factor test). Although OCAHO cases announce this general rule as set forth in the Restatement, not all cases specifically cite to the Restatement nor do they note that the Restatement discusses and draws from *Clackamas*. For some helpful background on Restatements of the Law, which are legal treatises that restate, clarify, and explain applicable legal rules and principles relating to a certain area of law, *see Restatement of the Law*, CORNELL LAW SCHOOL, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/restatement\\_of\\_the\\_law#:~:text=Restatements%20of%20the%20Law%2C%20aka,ALI\)%20to%20clarify%20the%20law.](https://www.law.cornell.edu/wex/restatement_of_the_law#:~:text=Restatements%20of%20the%20Law%2C%20aka,ALI)%20to%20clarify%20the%20law.)
- 291 The OCAHO decisions address other issues in addition to the “employee or owner” question. We summarize only the part of the decision relating to the latter question. We also do not seek to cover every OCAHO case that may address this question but only to provide a more general understanding of how OCAHO has approached this issue.
- 292 10 OCAHO 1153 (2012), 2012 WL 8018168. A subsequent OCAHO decision discussed *infra*, *U.S. v. Jalisco's Bar & Grill, Inc.*, noted that the caption of this case “contains a misnomer in that Santiago’s actually was a partnership, not a corporation.” *See* 11 OCAHO 1224 (2014), 2014 WL 4056921, at \*7, n.5.
- 293 2012 WL 8018168, at \*2, 3-4.
- 294 *Id.* at \*3.
- 295 *Id.* at \*5.
- 296 *Id.* at \*4 (citing Restatement (Third) of Employment Law § 1.03).
- 297 *Id.* (citing DHS definitions at 8 C.F.R. §§ 274a.1(f), (g)).
- 298 *Id.* (discussing and quoting *Clackamas*, 538 U.S. at 448-50).
- 299 *Id.* (citing *Solon*, 398 F.3d at 634).
- 300 *Id.* at \*5.
- 301 *Id.* (citation omitted).
- 302 *Id.*
- 303 *Id.*
- 304 *Id.*
- 305 *Id.*
- 306 11 OCAHO 1224 (2014), 2014 WL 4056921.
- 307 *Id.* at \*7, 10.
- 308 *Id.*
- 309 *Id.* (emphasis added by OCAHO) (citing Restatement (Third) of Employment Law § 1.03).
- 310 *Id.* at \*7 (citing *Clackamas*, 538 U.S. at 449-50).
- 311 *Id.* (citing *Clackamas*, 538 U.S. at 449-50).
- 312 *Id.* (citing *Clackamas*, 538 U.S. at 451).
- 313 *Id.*
- 314 *Id.*
- 315 *Id.*

- 316 *Id.*
- 317 *Id.*
- 318 10 OCAHO 1208 (2014), 2014 WL 278900.
- 319 *Id.* at \*6.
- 320 *Id.*
- 321 *Id.* (citing Restatement (Third) of Employment Law § 1.03).
- 322 *Id.* (citing *Santiago's Repacking*, 2012 WL 8018168, at \*5 (citing *Clackamas*, 538 U.S. at 448-50)).
- 323 *Id.*
- 324 *Id.*
- 325 *Id.*
- 326 *Id.*
- 327 11 OCAHO 1228 (2014), 2014 WL 5419578.
- 328 *Id.* at \*1, 8-9.
- 329 *Id.* at \*7.
- 330 *Id.* (citing *Two for Seven*, 2014 WL 278900, at \*7 (citing Restatement (Third) of Employment Law § 1.03)).
- 331 *Id.* (citing *Jalisco's Bar & Grill*, 2014 WL 4056921, at \*9 (applying *Clackamas*, 538 U.S. at 445)).
- 332 11 OCAHO 1251 (2015), 2015 WL 9100506.
- 333 *Id.* at \*2.
- 334 *Id.*
- 335 *Id.* at \*5 (citing Restatement (Third) of Employment Law § 1.03).
- 336 *Id.* (citing *Clackamas*, 538 U.S. at 450-51).
- 337 *Id.* (citing *Clackamas*, 538 U.S. at 448, and *Jalisco's Bar & Grill*, 2014 WL 4056921, at \*9).
- 338 *Id.*
- 339 According to Homestead, Morua held a 20% ownership interest in the business, and Rabassa held a 10% ownership interest, but the ALJ pointed to the company's tax return showing that Otto San Roman still held 100% of the stock during the relevant time period. *Id.* at \*5. The ALJ ultimately found that San Roman was the "majority owner." *Id.* at \*7.
- 340 *Id.* at \*2, 5.
- 341 *Id.*
- 342 *Id.* at \*5.
- 343 12 OCAHO 1303 (2017), 2017 WL 2559807.
- 344 *Id.* at \*9.
- 345 *Id.*
- 346 *Id.* (citing *Speedy Gonzalez Constr.*, 2014 WL 5419578, at \*9 (citing *Jalisco's Bar & Grill*, 2014 WL 4056921, at \*9)).
- 347 *Id.* (citing *Speedy Gonzalez Constr.*, 2014 WL 5419578, at \*9 (citing *Two for Seven*, 2014 WL 278900, at \*7)).
- 348 *Id.* (quoting *Clackamas*, 538 U.S. at 449-51).
- 349 *Id.*
- 350 13 OCAHO 1319 (2019), 2019 WL 9046802.
- 351 *Id.* at \*3.
- 352 *Id.*
- 353 *Id.*
- 354 *Id.* (citing *Alpine Staffing*, 2017 WL 2559807, at \*11 (citing *Speedy Gonzalez Constr.*, 2014 WL 5419578, at \*9)).
- 355 *Id.* (citing *Alpine Staffing*, 2017 WL 2559807, at \*11 (quoting *Clackamas*, 538 U.S. at 450-51)).
- 356 *Id.* (citing *Santiago's Repacking*, 2012 WL 8018168, at \*6).
- 357 *Id.*

- 358 13 OCAHO 1348 (2020), 2020 WL 3047500.
- 359 *Id.* at \*4.
- 360 *Id.*
- 361 *Id.* (citing *Intelli Transp. Servs.*, 2019 WL 9046802, at \*4 (quoting *Alpine Staffing*, 2017 WL 2559807, at \*11), and *Speedy Gonzalez Constr.*, 2014 WL 5419578, at \*9).
- 362 *Id.* at \*4, 11.
- 363 *Id.*
- 364 18 OCAHO 1479 (2023), 2023 WL 2808455.
- 365 *Id.* at \*1.
- 366 *Id.* at \*5-6.
- 367 *Id.* at \*5 (citing *Visiontron Corp.*, 2020 WL 3047500, at \*4-5, and *Intelli Transp. Servs.*, 2019 WL 9046802, at \*4).
- 368 *Id.* (citing *Alpine Staffing*, 2017 WL 2559807, at \*11 (citing *Speedy Gonzalez Constr.*, 2014 WL 5419578, at \*9)).
- 369 *Id.* at \*6 (citing *Alpine Staffing*, 2017 WL 2559807, at \*11).
- 370 *Id.*
- 371 2012 WL 8018168, at \*5.
- 372 *Id.*
- 373 *Id.* at \*3, 5.
- 374 *Id.* at \*5.
- 375 *Id.* at \*3, 4.
- 376 2014 WL 4056921, at \*7, 10.
- 377 *Id.* at \*7.
- 378 *Id.*
- 379 *Id.*
- 380 2014 WL 278900, at \*6.
- 381 *Id.*
- 382 *Id.*
- 383 *Id.*
- 384 2014 WL 5419578, at \*7, 8-9.
- 385 *Id.*
- 386 *Id.* at \*1.
- 387 2015 WL 9100506, at \*7.
- 388 *Id.* at \*5.
- 389 *Id.*
- 390 2017 WL 2559807, at \*9.
- 391 *Id.*
- 392 *Id.*
- 393 *Id.*
- 394 2019 WL 9046802, at \*3.
- 395 *Id.*
- 396 *Id.*
- 397 *Id.*
- 398 2020 WL 3047500, at \*4, 11.
- 399 *Id.* at \*4.
- 400 2023 WL 2808455, at \*6.

