

There is considerable overlap between the two tests, but the common law test emphasizes right of control, whereas the economic realities test focuses more on the market for the contractor's services and the question of whether the person performing work is in business for herself. When the **right-of-control** factor is considered, the most relevant issue is whether the hiring party has the authority to control where, when, and how the work gets done, even if that party chooses not to fully exercise its authority or to delegate certain decisions to the person doing the work.

In *Narayan v. EGL, Inc.*, a federal appeals court uses a **hybrid test** combining economic realities and common law test criteria with a few additional factors to determine the employment status of package delivery drivers under California's Labor Code.

Narayan v. EGL, Inc **616 F.3d 895 (9th Cir. 2010)**

OPINION BY DISTRICT JUDGE KORMAN:

The California Labor Code ("Labor Code") confers certain benefits on employees that it does not afford independent contractors. * * * This appeal from a judgment of the United States District Court for the Northern District of California granting the motion of an employer for summary judgment . . . principally presents the issue whether, assuming the existence of an employer-employee relationship in California, the employer may avoid its obligations under the Labor Code by inserting a clause in an employer-drafted pre-printed form contract in which: (1) the employee acknowledges that he is an independent contractor and (2) agrees that the contract would be interpreted in accordance with the laws of another jurisdiction where such an agreement is generally enforceable.

EGL, the employer, is a global transportation, supply chain management and information services company incorporated under the laws of Texas and headquartered in Texas. * * * [The plaintiffs] were residents of California who were engaged to provide freight pick-up and delivery services for EGL in California. All three Drivers signed agreements with EGL for "Leased Equipment and Independent Contractor Services" (the "Agreements"). The Agreements provided that the "intention of the parties is to . . . create a vendor/vendee relationship between Contractor and [EGL]," and acknowledged that "[n]either Contractor nor any of its employees or agents shall be considered to be employees of EGL." * * *

Notwithstanding the terms of the Agreements, the Drivers filed a complaint in California against EGL . . .

alleging that they were EGL employees. . . . They sought money damages for unpaid overtime wages, business expenses, meal compensation and unlawful deductions from wages as well as other relief, including statutory penalties.

. . . EGL moved for summary judgment arguing that, under the terms of the Agreements, the Drivers were not employees. Instead they were independent contractors who were not entitled to the benefits conferred upon employees by the Labor Code. Relying on a choice-of-law clause in the Agreements, the district court held that the law of Texas applied, and that declarations in the Agreements that the Drivers were independent contractors rather than employees, compelled the holding that they were independent contractors as a matter of law. Moreover, although California does not regard such declarations as controlling, and applies a multi-factor analysis in which the intent of the parties is one of over a dozen and a half factors, the district court held, without undertaking any analysis of the relevant factors, that the result would be the same under California law. Consequently, the district court granted EGL's motion for summary judgment.

i. Choice-of-Law

EGL argues that the choice-of-law clause in the Agreements, which provides that the contracts "shall be interpreted under the laws of the State of Texas," applies to the current dispute. * * * The Drivers' claims involve entitlement to benefits under the California Labor Code. Whether the Drivers are entitled to those benefits depends on whether they are employees of EGL, which in turn depends on the definition that the

otherwise governing law—not the parties—gives to the term “employee.” While the contracts will likely be used as evidence to prove or disprove the statutory claims, the claims do not arise out of the contract, involve the interpretation of any contract terms, or otherwise require there to be a contract. * * * [H]ere, appellants claims arose under the Labor Code, a California regulatory scheme, and consequently, California law should apply to define the boundaries of liability under that scheme.

ii. Propriety of Summary Judgment Under California Law

* * * [U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee. * * * Once the employee establishes a prima facie case, the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor. * * *

The Supreme Court of California has enumerated a number of indicia of an employment relationship, the most important of which is the “right to discharge at will, without cause.” [The Court] has endorsed other factors . . . that may point to an employment relationship:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [The Court has] also approvingly cited five factors adopted by cases in other jurisdictions. These include: (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business. * * *

All factors . . . [are] “logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor.” * * * “We must assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other. * * *

The delivery services provided by the EGL drivers were an essential part of the regular business of EGL. Indeed, EGL’s instructional video shown to the drivers advises them that “as an [EGL] pickup and delivery driver, you have the key role in the shipping process . . . * * * You can identify shipments that are potential claims before they are put into our system and you ensure our customers’ freight is protected by using proper loading work method techniques.” * * * The video goes on to describe the drivers as “our company’s largest sales force,” because “[t]hrough your interactions with the customer, you communicate [EGL’s] commitment to excellence.” Indeed, the video acknowledges that “for our company to continue to grow, every [EGL] driver must understand the critical importance of the job they do.”

Consequently, EGL’s Safety and Compliance Manual and Drivers’ Handbook instructed the EGL drivers on . . . how to conduct themselves when receiving assignments and packages, responding to customer complaints and handling damaged freight. The drivers used EGL-supplied forms, received company memoranda and attended meetings on company policies. The Handbook also provided guidelines on how to communicate with EGL’s dispatch, instructing drivers to notify the dispatcher before leaving EGL’s facility dock, to contact the dispatcher after each delivery stop to report that the delivery was completed, and to immediately report any traffic delays. Indeed, the EGL drivers were told that “[c]ommunicating with dispatch is the single most important aspect of the services drivers are paid for. It is not enough to get the freight picked up or delivered. To be competitive in today’s market, the team must be able to identify at a moment’s notice exactly where a shipment is in the course of transit.” * * *

Moreover, there was evidence that EGL’s drivers were ordered to report to the EGL station at a set time each morning—whether or not packages were available to be delivered. Indeed, one of EGL’s dispatchers testified that one of the plaintiff Drivers was subject to disciplinary action for showing up late. Similarly, the record indicates that the drivers had to submit advance notice of vacation days. The plaintiff Drivers also

submitted evidence that, although their contracts purportedly gave them the right to pick and choose assignments, in practice, EGL presented them with batches of deliveries that they generally had to accept as an all-or-nothing proposition. In some circumstances, standard operating procedure agreements between EGL and many of its customers determined the manner in which drivers made deliveries. Moreover, the plaintiff Drivers drove exclusively for EGL during their period of employment, and there is at least a material issue of fact as to whether they could have driven for other delivery companies because EGL required them to affix EGL logos to their trucks, which the plaintiff Drivers allege could not practically be covered up.

The record also shows that EGL controlled many other details of their drivers' performance. EGL regulated their drivers' appearance—requiring them to wear EGL-branded shirts, safety boots and an EGL identification card. Although their drivers owned their own trucks or vans as noted above, EGL required that they affix EGL logos to the outside of their vehicles. * * * EGL imposed requirements on their drivers' vehicles—in particular, that they be painted white and less than five years old, although EGL disputes whether these requirements were enforced. * * * EGL's drivers supplied some of the equipment used to deliver packages (e.g., hand trucks, lift gates, etc.), but EGL provided other supplies such as EGL-branded boxes and packing tape to their drivers for package pick-ups. While EGL's drivers retained the right to employ others to assist in performing their contractual obligations, EGL required all helpers to be approved by it. The same rule applied to passengers. * * * [N]one of the plaintiff Drivers hired helpers to perform their duties for EGL.

Significantly, the contracts signed by the plaintiff Drivers contained automatic renewal clauses and could be terminated by either party upon thirty-days notice or upon breach of the agreement. Such an agreement is a substantial indicator of an at-will employment relationship. Moreover, the occupation that the plaintiff drivers were engaged in did not require a high level of skill. Drivers were not required to possess any special license beyond a normal driver's license, and no skills beyond the ability to drive.

Finally, the length and indefinite nature of the plaintiff Drivers' tenure with EGL also point toward an employment relationship. Here, the plaintiff Drivers worked at EGL for several years, and their Agreements were automatically renewed. This was not a

circumstance where a contractor was hired to perform a specific task for a defined period of time. There was no contemplated end to the service relationship at the time that the plaintiff Drivers began working for EGL. * * *

That the Drivers here had contracts "expressly acknowledging that they were independent contractors" is simply not dispositive under California's test of employment. [Drivers] were paid on a regular basis, although their salary was based on a percentage of each delivery. Nevertheless, the fact that their salary was determined in this way is equally consistent with an employee relationship, particularly where other indicia of employment are present.

Similarly, setting aside evidence that the plaintiff Drivers did not, as a practical matter, determine their own routes, the ability to determine a driving route is "simply a freedom inherent in the nature of the work and not determinative of the employment relation." "[I]f an employment relationship exists, the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not change the character of the relationship, particularly where the employer has general supervision and control."

Ultimately, under California's multi-faceted test of employment, there existed at the very least sufficient indicia of an employment relationship between the plaintiff Drivers and EGL such that a reasonable jury could find the existence of such a relationship. * * * The judgment of the district court granting EGL's motion for summary judgment is REVERSED and REMANDED.

CASE QUESTIONS

1. What issues did the court consider in this case? What was its decision?
2. What factors did the appeals court consider to determine the employment status of the drivers? How do these compare to the economic realities test? Common law test?
3. How did the appeals court apply these factors to the facts of this case?
4. Why had the district court ruled for the employer? Why does the agreement that the drivers signed not matter?
5. Does the business model of this logistics firm, including an emphasis on teamwork, customer service, and real-time tracking of parcels, fit with the use of independent contractors? Why or why not?