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PARTNERS AND SHAREHOLDERS AS COVERED EMPLOYEES UNDER FEDERAL ANTIDISCRIMINATION ACTS

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I. INTRODUCTION

Assume a partner in a general partnership or a shareholder in a professional corporation believes he has been discriminated against in the workplace in violation of federal law. Can he bring suit under federal antidiscrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA)? Courts presented with this question have reached different conclusions. Federal antidiscrimination laws allow "employees" to bring suit against "employers." Thus, the key question in determining whether the partner or shareholder is entitled to bring suit is whether he can be classified as an "employee." A majority of the federal circuit courts would allow the shareholder or partner to bring suit as an

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"employee" if he could prove that the employment relationship is such that he is not in a position of management or control of the business entity. A true partner, as opposed to a nominal one, the courts agree, is an employer, and, consequently, by definition, not an employee. A majority of courts hold that a shareholder who functions as a partner is not an "employee" and thus, similarly, is barred from claiming discrimination under federal antidiscrimination laws.[1] The minority view, however, insists that because professional corporations and partnerships are distinct legal entities, the roles of shareholders and partners must be assessed differently.[2] According to this view, it is not relevant how the shareholder functions; he is by definition, an employee of the corporation.

The question of who is an "employee" under the anti-discrimination laws is relevant not only when partners or shareholders are seeking protection, but also in cases involving partnerships or professional corporations that are relatively small in size. Federal antidiscrimination laws apply only to business entities that have a minimum number of fifteen or twenty employees, depending on the statute.[3] Plaintiffs seeking redress under federal antidiscrimination laws may seek to count partners or shareholders as employees in order to satisfy the jurisdictional minimum requirement of a statute. In such "counting cases," courts have followed the same analysis as in cases in which the partner or shareholder is seeking protection under antidiscrimination statutes, using either the economic realities approach or the corporate form approach. For example, in *Wells v. Clackamas*,[4] the Court of Appeals for the Ninth Circuit adopted the corporate form approach, holding that shareholders in a professional

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[1] *See, e.g.*, Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398 (11th Cir. 1991); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984).

[2] *See* Wells v. Clackamas Gastroenterology Assocs., P.C., 271 F.3d 903 (9th Cir. 2001), *cert. granted*, 536 U.S. 990 (2002); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793 (2d Cir. 1986).

[3] The number of covered employees required for federal antidiscrimination statutes to apply is generally fifteen. See, for example, the definition of "employer" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b). Twenty employees comprise the jurisdictional threshold for employer in the Age Discrimination in Employment Act. 29 U.S.C. § 630 (b). State antidiscrimination legislation, while not the subject of this paper, often requires far fewer employees to establish jurisdiction.

[4] 271 F.3d 903.

corporation may be employees within the meaning of federal antidiscrimination laws.[5] The ruling allowed Ms. Wells to bring her suit for discrimination under the ADA because counting the shareholders as employees gave the company the required minimum of fifteen employees to qualify as a covered entity under the Act.[6]

This article advocates that Congress revisit the definition of "employee" under federal antidiscrimination statutes in light of the diversity of judicial opinions on the issue and the proliferation of new business forms. The case law to date has involved whether partners or shareholders may be considered covered employees. Although courts have yet to address the covered employee status of individuals in other forms of business organizations, such cases would involve the same issues. The statutes should provide guidance on how to distinguish between employers and employees. In the absence of such legislative intervention, however, this article proposes that the courts focus on distinguishing between employers and employees, without regard to the form of the business entity.

Part II of this article describes the current dilemma courts face in seeking guidance to interpret the term "employee" under the statutes. Part III gives a brief history of the case law, indicating how the federal circuit courts of appeal have addressed the issue of whether and under what circumstances partners or shareholders may qualify as employees. This section considers the cases involving partners first, noting that there is considerable common ground on how courts approach such cases. Courts increasingly take a case by case approach to all of the circumstances involving the economic relationship between the proposed employee and the business entity, focusing more on the legal relationship than any title held by the individual claiming discrimination. Part III then considers cases involving shareholders, where the circuit courts of appeal have taken one of two distinct approaches. Courts have followed either the case by case economic realities approach used in the partner cases or a corporate form approach. According to the latter approach, the fact that a professional corporation was the selected form of doing business conclusively determines the shareholder's status as that of employee. Part IV suggests that recent guidance in the EEOC

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[5] *See id.* at 905.

[6] *Id.* at 905-06.

Compliance Manual concerning who is a covered employee supports the majority approach and seriously undermines the corporate form approach.

In Part V, recent revisions to the Uniform Partnership Act (UPA) are considered in terms of their impact on determining whether partners may be employees in the context of federal anti-discrimination laws. The revised UPA (RUPA), however, includes some provisions that might support a partner's right to sue as an employee for discriminatory conduct and others that would undermine the right to sue because the roles of partner and employee are generally considered mutually exclusive. In any case, a review of RUPA supports the view that courts should take a similar approach to both partners and shareholders in determining whether they are "employees" entitled to equal employment opportunity protection.

Part VI suggests that Congress should clarify the definition of "employee" to include reference to partners, shareholders, and other members of business entities where the plaintiffs or individuals in question may fulfill roles that should entitle them to assurance of equal employment opportunity. Part VI also suggests that legislative amendments should distinguish between cases in which the individual's status as a covered employee is at issue and those in which an individual who is concededly an employee seeks to satisfy the jurisdictional minimum by counting partners, shareholders, or those who might otherwise be considered employers. Courts, constrained by the inadequate definitions of "employer" and "employee," have interpreted the terms with consistency, whether the case involves an employee's status to sue or an employer's status to be sued. The goals of affording protection to employees who have suffered discrimination and protecting relatively small firms from the liability the statutes impose, however, are distinct. Consequently, provisions in federal antidiscrimination statutes should specify who might be counted in determining the size of an organization. Current definitions, which tally only "employees" to satisfy the jurisdictional minimum, unfairly penalize aggrieved employees. Counting both employees and employers for purposes of satisfying a number requirement would still protect very small organizations from the reach of federal antidiscrimination statutes while eliminating litigation involving threshold requirements regarding the jurisdictional minimum.

The article concludes that legislative amendments would best address the problems of who is a covered employee under federal antidiscrimination laws. In the absence of legislative amendments, however, the courts should follow the approach favored by a majority of the federal circuit courts of appeal, a case by case determination of the economic relationship between the individual seeking protection under the antidiscrimination laws and the business entity. The form of the business entity involved should not change a court's analysis of the employment relationship. This view is supported by the EEOC, which recommends six factors to evaluate whether a person is an employer or employee, without regard to labels such as "partner" or "shareholder." A combination of factors developed in economic realities tests by the courts and the factors recommended by the EEOC should allow courts to distinguish between employers and employees.

II. WHO IS A COVERED EMPLOYEE

A. Background

Since the enactment of federal employment discrimination legislation, the definition of who is a covered employee, and thus protected by each piece of legislation, has developed largely through judicial interpretation.[7] The definitions of employee under Title VII, the Equal Pay Act, the ADEA, and the ADA tend to be somewhat circuitous.[8] The federal courts have been left to flesh out the

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[7] *See, e.g.*, Serapion v. Martinez, 119 F.3d 982 (1st Cir. 1997) (interpreting "employee" under the ADA); Wheeler v. Main Hurdman, 825 F.2d 257 (10th Cir. 1987) (interpreting "employee" under Title VII, the ADEA, and the Equal Pay Act); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (interpreting "employee" under Title VII). Reconciling confusion with clarity regarding the term "employee," one scholar asserts that although the term "employee" is clearly defined in the respective federal employment discrimination statutes, the definitions' applications to specific legal scenarios is circular throughout the circuits, or otherwise described as "magnificent circularity," as introduced in *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986). *See* Daniel S. Kleinberger, *A Focus on Unincorporated Business: Article: "Magnificent Circularity" and the Churkendoose: LLC Members and Federal Employment Law*, 22 OKLA. CITY U.L. REV. 477, 493 n.78 (1997). The term churkendoose in the titled article refers to a hybrid animal in children's literature that the author compares to the hybrid entity of a limited liability company) (citation omitted). *Id.* at 482, n.14.

[8] Under Title VII:

> *The term "employee" means an individual employed by an employer*, except that the term "employee" shall not include any person elected to public office in any State or

parameters of who is a covered employee in the absence of definitive statutory guidance regarding specific individuals and classifications, and with scant legislative history.[9] In an attempt to find guidance, the courts have often referred to interpretations of employee status from earlier statutes, and to prior judicial construction of these previous legislative schemes. In some ways, this reference back has been dictated, or at least encouraged, by the legislature. For example, the definition of "employee" in Title VII specifically refers back to the definition of "employee" from the Fair Labor Standards Act of 1938,

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political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C.A. § 2000e(f) (West Supp. 2001)(emphasis added).

The Equal Pay Act of 1963 was enacted as section 6(d) of the Fair Labor Standards Act (FLSA) which defines "employee" as follows: "Except as provided in paragraphs (2), (3), and (4) [of this section] the term *'employee' means any individual employed by an employer.*" 29 U.S.C.A. § 203(e)(1) (West Supp. 2001) (emphasis added).

Under the ADEA:

The term *"employee" means an individual employed by any employer* except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C.A. § 630(f) (West Supp. 2001)(emphasis added).

Under the ADA, "The term *'employee' means an individual employed by an employer.* With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C.A § 12111(4) (West Supp. 2001)(emphasis added).

[9] As stated by the Court of Appeals for the Fifth Circuit, "there is simply not much statutory guidance on who is an employee," relying upon the weight of *Calderon v. Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981), to emphasize that "[w]ith magnificent circularity, Title VII defines an employee as 'an individual employed by an employer.'" Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986).

the first federal minimum wage and hour law.[10] The similarity among the definitions of "employee" in the above statutes is striking. As will be discussed, this reiterative definitional scheme has not been an unmitigated success story. The courts in various circuits apply precedent regarding different statutes wherein the test or criteria for covered employee status may not always match the critical facts or issues in the instant case.

Litigation over covered employee status is a common defensive strategy to avoiding coverage under these protective statutes. This defensive tactic may be used in one of two ways. First, employers may allege that the plaintiff is not a covered employee, raising the issue of the plaintiff's status or standing to sue. Second, employers may maintain that certain individuals in the entity are not covered employees, and thus that there are not a sufficient number of covered employees to establish subject matter jurisdiction under the statute in question.[11] A look at the litigation ensuing over covered employee status reveals that weaknesses in the definition of "employee" may provide a loophole through which defendants escape equal employment opportunity obligations.

Absent explicit guidance from the statutes in question, the courts have sought to create standards for judging who qualifies as a covered employee. The tests applied vary from one jurisdiction to another, and the criteria utilized often do not rationally relate to the purpose or policy behind the particular statute adjudged.[12] Furthermore, as the business environment has changed over the past fifty years, so too have the forms of business organizations evolved, and the interpretation of federal statutory definitions of a covered employee

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[10] *See supra* note 8. *See also* Walling v. Portland Terminal Co., 330 U.S. 148, 152-53 (1947) (regarding FLSA definition of employee); David R. Stras, Note, *An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected From Discriminatory Employment Practices*, 47 U. KAN. L. REV. 239, 248-51 (1998)(discussing origins of economic realities test as examining purpose behind statute and case-by-case factual analysis as to whether there is an employment relationship).

[11] *See supra* note 3.

[12] *See generally* Kleinberger, *supra* note 7, at 493 & n. 79, 512-39 (criticizing the reasoning and lack of logical analysis in the body of common law in this area but also arguing that *Nationwide Mutual Ins. Co. v. Darden*, "blocks inquiry into legislative purpose.") *Darden*, 535 U.S. 318, 325 (1992); Stras, *supra* note 10, at 267-68 (discussing "logical inconsistencies inherent in current tests").

have simply not kept pace with the state business formation laws.[13] The case law has addressed the status of partners in a general partnership, shareholders in a professional corporation, and members of a corporation's board of directors.[14] The case law has not addressed the status of individuals in other types of business organizations, such as limited liability partnerships or limited liability companies, but when it does, it will likely raise similar issues.

The criterion for determining who deserves protection from employment discrimination requires legislative clarification at the federal level.[15] The courts have had limited success, and revisions to state business organization statutes will not cure the present confusion. For example, courts have looked to the UPA for indicia of partnership status but statutes such as the UPA, even as revised, continue to operate in a default mode, allowing the parties to the agreement to vary most provisions.[16] Furthermore, as the courts have

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[13] *See generally* Stras, *supra* note 10, at 239-42 (recommending appropriate standard for assessing shareholder in professional corporation or partner in modern partnership as covered employee under antidiscrimination statutes).

[14] For cases involving partnerships, *see, e.g.,* Serapion v. Martinez, 119 F.3d 982 (1st Cir. 1997); Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996); Wheeler v. Main Hurdman, 825 F.2d 257 (10th Cir. 1987); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). For cases involving shareholders in a professional corporation, *see, e.g.,* Wells v. Clackamas, 271 F.3d 903 (9th Cir. 2001); Devine v. Stone, Leyton, & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Fountain v. Metcalf, Zima, & Co., P.A., 925 F.2d 1398 (11th Cir. 1991); EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984). The Court of Appeals for the Second Circuit considered the status of the members of a corporation's board of directors in *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).

[15] *See* Simpson v. Ernst & Young, 100 F.3d 436, 445-46 (6th Cir. 1997) (Daughtry, J., concurring) (recommending that federal legislative branch recognize changes in modern business entities and redefine class of individuals protected); *cf.* Randall J. Gingiss, Note, *Partners as Common Law Employees,* 28 IND. L. REV. 21, 41 (1994) (recommending best solution to confusion about covered employee status is further amendment to RUPA; however, federal legislation is also necessary if courts do not respect amendments to RUPA). It should be noted that RUPA is often popularly referred to as the UPA, but for purposes of analyzing the changes to the earlier Act, the revised Act will also be referred to as RUPA in this paper. Official citations to the revised Act are generally listed as UNIF. PARTNERSHIP ACT (1997) but for purposes of clarity in discussing changes from the UPA, once again RUPA is often used to distinguish the two acts. See UNIF. PARTNERSHIP ACT (1997) §1202, Short Title, 6 U.L.A. 265 (2001) noting "[Act] may be cited as the Uniform Partnership Act (1997)."

[16] *See* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview,* 49 BUS. LAW. 1, 2 & n.2, 18-19 (1993) (discussing that rules of RUPA generally operate in default of partnership agreement rules, RUPA §103 (1994), with

often noted, federal statutes should not be defined by state law, but by federal judicial precedent.[17] Given the circular language and sparse legislative history of the statutes, the courts have struggled to find a definition of "employee" or criteria to determine who is an employee that works consistently and sensibly.

B. The Struggle to Define Employee

The Supreme Court has not heard a case that directly addresses who is an employee under the federal antidiscrimination laws. In *Hishon v. King & Spalding*, the Court held that an associate in a partnership who is not promoted to partner because of an unlawful discriminatory reason has an actionable claim under Title VII.[18] The Court held that consideration for partnership was "a term, condition, or privilege" of employment which could not be granted or withheld in a discriminatory fashion.[19] The majority decision, however, did not reach the issue considered by the court below - whether partners

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exception of a few mandatory rules such as the core fiduciary duties among partners in RUPA § 404).

[17] *See* Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (ignoring state law and focusing on Title VII and federal jurisprudence in defining coverage of statute); Serapion v. Martinez, 119 F. 3d 982, 988 (1st Cir. 1997) (discussing "widely accepted principle that, in the absence of plain indication of contrary intent, courts ought to presume that the interpretation of a federal statute is not dependent on state law"); Calderon v. Martin County, 639 F.2d 271, 273 (5th Cir. 1981) (holding whether plaintiff is "employee" for Title VII purposes is matter of federal, not state law).

[18] Hishon v. King & Spalding, 467 U.S. 69, 78-79 (1984) (Burger, C.J., per curiam) (finding associate a covered employee under Title VII such that up or out partnership decision may be subjected to judicial review for discriminatory reasons, in this instance, gender discrimination). Discrimination against associates who are categorized as covered employees under other federal statutes is similarly actionable. *See generally* Charles S. Caulkins & James J. McDonald, Jr., *Lawyer Terminations: Increasingly the Subject of Employment Discrimination Suits*, 65 FLA. B. J. 27, 27-28 (1991) (discussing potential liability of law firms under various federal antidiscrimination statutes). In fact, the remedy in cases involving discrimination in consideration for partnership may even include promotion of an associate to partnership. Hopkins v. Price Waterhouse, 920 F.2d 967 (D.C. Cir. 1990) (upholding district court's remedy of promotion to partner in light of Title VII gender discrimination). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussing burdens of proof in the same Title VII case); Gerald A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From* Hishon *to* Price Waterhouse v. Hopkins, 7 HOFSTRA LAB. L. J. 257, 269-74 (1990) (discussing impact of these and other cases regarding covered employee status in partnerships).

[19] *Hishon*, 467 U.S. at 75.

in a law firm with fifty partners and fifty associates were more like employees than employers.[20] In addressing the partner versus employee issue, the Court of Appeals for the Eleventh Circuit had concluded that there was "a clear distinction between employees of a corporation and partners of a law firm."[21] Justice Powell, concurring with the Supreme Court's decision in *Hishon*, seems to support this distinction between partners and employees. Justice Powell wrote, "[t]he reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee."[22] Although Justice Powell's remarks might indicate a reluctance on the part of the Court to view partners as employees for purposes of Title VII and other antidiscrimination laws, a footnote to his remarks underscores the problem that courts continue to face. The footnote provides, "[o]f course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.' "[23]

Because *Hishon* left the partner as employee issue largely unanswered, courts continued to look to interpretations of the term "employee" in the more developed area of cases involving independent contractors. The Supreme Court's decision in *NLRB v. Hearst Publications, Inc.*,[24] focused on interpreting the term "employee" under the National Labor Relations Act (NLRA).[25] Attempting to determine whether newsboys were "employees" covered by the

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[20] Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 69 (1984).

[21] *Id.* at 1028.

[22] *Hishon*, 467 U.S. at 79 (Powell, J., concurring).

[23] *Id.* at 80, n.2.

[24] 322 U.S. 111 (1944).

[25] Under the NLRA:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

29 U.S.C.A. §152 (West Supp. 2001).

NLRA, as opposed to independent contractors, the Court stated that the term "employee" should be considered in light of the "evils the statute was designed to eradicate."[26] The "purpose of the Act and the facts involved in the economic relationship" were key factors in the Court's analysis and conclusion that the newsboys were protected employees.[27] Although the term "employee" is defined with more particularity in the NLRA than in many other statutes, other Supreme Court decisions and decisions of the lower courts followed the approach taken in *Hearst* of looking to the purpose of the statute and taking a broad remedial approach.[28] Thus, in cases arising under federal antidiscrimination laws, parties argued, and some courts agreed, that an expansive definition of the term "employee" should be adopted to accomplish the broad remedial goals of antidiscrimination laws.[29]

The view that the term should be interpreted expansively or with the broad remedial purpose of the act in mind was changed by a 1992 Supreme Court decision. In *Nationwide Mutual Insurance Co. v. Darden*,[30] the Court held that the term "employee" should be interpreted in accordance with traditional common law agency principles used to identify the master servant relationship, as opposed to the broad remedial approach previously followed.[31] The Court justified this change in approach by noting that Congress had amended statutes previously interpreted by the Court so that the term "employee" would not include individuals who "under the usual common law rules" would be considered independent contractors.[32] In *Darden*, the

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[26] *Hearst Publ'ns, Inc.*, 322 U.S. at 127; *see also* U.S. v. Silk, 331 U.S. 704, 712 (1947) (interpreting the term "employee," the Court stated, "As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose.").

[27] 322 U.S. at 129.

[28] Compare the definition of "employee" in the NLRA, *supra* note 25, with definitions of "employee" in Title VII, the ADEA, and the ADA, *supra* note 8.

[29] *See, e.g.*, Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) (holding that "the term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained,'" quoting *Hearst Publ'ns, Inc.*, 322 U.S. at 124).

[30] 503 U.S. 318 (1992).

[31] Ironically, the Supreme Court in *Hearst Publ'ns, Inc.*, had rejected a common law definition approach, believing it would undermine uniform national application by importing "common-law conceptions or some distilled essence of their local variations. . . ." *Hearst Publ'ns, Inc.*, 322 U.S. at 125.

[32] *See Darden*, 503 U.S. at 325.

Court stated that where Congress uses terms that have accumulated meaning under common law, the Court must infer that Congress meant to incorporate the established meaning.[33] The Court explicitly abandoned its previous approach of construing terms "in the light of the mischief to be corrected and the end to be attained," in favor of a common law definitional approach.[34] Thus, in *Darden*, the Court looked to agency law to develop a test for whether an individual should be characterized as an "employee" covered by the Employee Retirement Income Security Act (ERISA).[35]

The relevance of *Darden* to cases involving the employment status of partners and shareholders was raised recently in a Seventh Circuit decision involving the status of thirty-two partners who were demoted at a law firm. In *EEOC v. Sidley Austin Brown & Wood*, the court cited the list of factors the Supreme Court used to determine whether an individual is an employee or independent contractor under the common law of agency.[36] In doing so, it looked to *Darden* and subsequent case law. *Darden* stated that "[s]ince the common law test contains no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[37] Subsequent to *Darden*, the Seventh Circuit held in *Ost v. West Suburban Travelers Limousine, Inc.*,[38] that an employer's right to control an

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[33] *See id.* at 322-23.

[34] *See id.* at 324.

[35] *See id.* at 323-24. ERISA, like the federal antidiscrimination laws, defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6) (West Supp. 2001).

[36] 315 F.3d 696, 705 (7th Cir. 2002). The *Darden* Court adopted the following common law test for determining who qualifies as an "employee" under ERISA:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the project is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-25 (citations omitted).

[37] *Darden*, 503 U.S. at 323-25.

[38] 88 F.3d 435 (7th Cir. 1996).

individual's work was the critical factor in deciding whether an individual was an employee or an independent contractor.[39] Considering *Darden* and its subsequent decision regarding independent contractors, the Seventh Circuit in *Sidley* stated that the "the employer's right to control the worker's work . . . is a potentially important factor here as well." [40] Furthermore, the court noted that both *Darden* and *West Suburban Travelers* "reject mechanical tests."[41] Judge Easterbrook's concurring opinion attaches greater significance to *Darden* in the partner or shareholder context. According to Judge Easterbrook, "*Darden* tells us that federal law tracks ordinary principles of master-servant relations that come from state law;"[42] consequently, he reasons, "the prevailing law of agency" should determine how an individual is classified.[43]

Other courts, however, have found *Darden* to be of limited assistance in defining "employee" in the partnership or professional corporation context. While *Darden* requires dismissal of arguments urging expansive construction of the term in light of a statute's broad remedial purposes, courts have stated that *Darden* has little, if any, application in cases seeking to distinguish between partners, shareholders, and employees.[44] *Darden* is not helpful because factors developed according to common law principles of agency to distinguish between independent contractors and employees are not relevant in distinguishing partners or shareholders from employees.[45] Whereas the independent contractor versus employee inquiry focuses on whether the individual is part of the business organization, the individual contesting partner status is "concededly a part" of the

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[39] *Id.* at 438.

[40] *Sidley*, 315 F.3d 696, 705.

[41] *Id.*

[42] *Id.* at 708-09 (Easterbrook, J., concurring).

[43] *Id.* at 711.

[44] *See* Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Devine v. Stone, Leyton, & Gershman, P.C., 100 F.3d 78, 81, n.4 (8th Cir. 1996).

[45] *See* Wheeler v. Main Hurdman, 825 F.2d 257, 272 (10th Cir. 1987) (stating that independent contractor/employee factors are "largely useless in a general partnership context"); Hyland v. New Haven Radiology Assoc., P.C., 794 F.2d 793, 802 (2d Cir. 1986) (Cardamone, J., dissenting) (noting factors such as "skill required, equipment furnished and place of work, length of time worked are not relevant inquiries" and "focus is different when analyzing employment in a partnership setting since the question is the status of the individual within an organization of which he is concededly a part.").

organization.[46] One court suggested that applying *Darden* to situations involving distinctions between partners and employees required evaluation of the facts "against the common-law principles as codified in the UPA,"[47] an approach that courts were already taking before the *Darden* decision.

With little help from the language of federal antidiscrimination statutes, legislative history, or existing case law, the courts were left to their own devices to create tests that determine who is a covered employee. The test which courts refer to most frequently and most specifically is the "economic realities" test, a test derived from the Supreme Court's decision in *NLRB v. Hearst Publications Co.*[48] Used widely in cases involving independent contractors, the economic realities test was extended to cases seeking to determine whether partners or shareholders may be employees. The test purports to go beyond the labels assigned to individuals and entities and to look at the substance of the employment relationship. How this employment relationship is assessed varies with the cases. Most courts have favored the economic realities approach when considering whether partners and shareholders are employees under federal antidiscrimination laws. The only approach that stands in stark contrast to the economic realities approach may be referred to as the "corporate form" approach, an approach followed by two federal circuits. The corporate form approach, however, pertains only to cases involving shareholders. The following sections will show that there is a growing consensus among the circuits involving cases in which a plaintiff seeks to identify partners as employees while there is a definite split in the circuits where plaintiffs seek to identify shareholders as employees.

III. Review of the Case Law

A. The Partner v. Employee Dilemma: Evolution of the Economic Realities Approach

The economic realities test or approach has become a catch all phrase to describe the method courts are using to determine which parties are employees and which are employers within the meaning

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[46] *See Hyland*, 794 F.2d at 802.

[47] *See* Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996).

[48] 322 U.S. 111 (1944).

of antidiscrimination statutes. Where partners are considered, courts agree that true partners are employers, not employees. Heeding Justice Powell's statements in his concurring opinion in *Hishon*, courts also recognize that employers cannot simply label employees as partners in order to avoid liability under antidiscrimination laws.[49] The difficult task for the courts, then, has been to distinguish between "true" partners, who will be considered employers, and those who are partners in name only and should be protected as employees.

In 1977, the Court of Appeals for the Seventh Circuit decided *Burke v. Friedman*,[50] a case that predates economic reality analysis but which, nevertheless, provides a framework for distinguishing partners from employees. The issue before the court was whether the individual partners of the partnership could be considered as employees within the meaning of Title VII, to satisfy the jurisdictional minimum.[51] In deciding that the partners could not be employees for purposes of Title VII, the *Burke* court never mentions the term "economic reality," nor does it involve an analysis of whether the individuals in question acted more like partners or employees. The decision rests on the definition of a partnership as defined in section 6 of the UPA - "an association of two or more persons to carry on as co-owners a business for profit."[52] The court concluded, without analysis of the actual roles performed by the partners, that those "who own and manage the operation of the business" must be employers and not employees.[53] Despite its lack of analysis, the court's reliance on the criteria suggested in the UPA– management, ownership, and profit sharing – is essentially the same as that used by courts which explicitly adopt an economic realities approach or a case by case analysis of the employment relationship. Cases subsequent to *Burke* continue to focus on the characteristics of partnership articulated in section 6 of the UPA but, in doing so, courts have scrutinized the employment relationship to determine who is an employee and who is a partner. The economic realities approach is applicable to both large and small partnerships, but the partnership with many partners and many employees may require more intense analysis of the

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[49] *See* Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring).
[50] 556 F.2d 867 (7th Cir. 1977).
[51] *Id.* at 868.
[52] *Id.* at 869.
[53] *Id.*

employment relationship to determine whether an individual is a "true" partner, or a partner in name only who should be treated as an employee for purposes of federal antidiscrimination laws. The test has also been used to determine whether an individual may simultaneously have both partner and employee status.

Wheeler v. Main Hurdman,[54] decided by the Court of Appeals for the Tenth Circuit in 1987, considered how best to apply an economic realities approach in determining whether an individual could qualify as both a partner and an employee under antidiscrimination laws. *Wheeler* involved a suit by a partner of a large accounting firm who claimed discrimination under Title VII, the ADEA, and the Equal Pay Act. The plaintiff conceded that she had partnership status, but maintained that she also had employee status, which entitled her to antidiscrimination protection.[55] Under the *Burke* approach, the plaintiff's status as a partner would seem to categorize her as an employer because *Burke* presumes that the terms "partner" and "employee" are mutually exclusive.[56] The *Wheeler* court ultimately reached the same conclusion, but not without extensive analysis of the economic relationship between the plaintiff and the business entity.

In *Wheeler*, both the plaintiff and the defendant partnership claimed that the economic realities of the situation were in their favor. The plaintiff argued that when an individual is "so dominated in or by the organization that he or she really is like an employee, with corollary susceptibility to discrimination," protection should be granted.[57] The court rejected this approach, finding a domination theory to be unrealistic as partnerships, both large and small, may be dominated by individuals or groups of individuals.[58] According to the *Wheeler* court, a test bent on distinguishing "true" from "dominated" partners ignores "the economic reality of partnership status itself."[59] Despite more extensive analysis, the *Wheeler* court concluded, much as the *Burke* court had, that UPA criteria, such as "participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, and [her] voting rights," were characteristics

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[54] 825 F.2d 257 (10th Cir. 1987).

[55] *Id.* at 261.

[56] *See* Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

[57] *Wheeler*, 825 F.2d at 269.

[58] *Id.* at 272-73.

[59] *Id.* at 274.

that removed a general partner from the statutory term "employee."[60] The fact that the plaintiff/partner was one of 502 partners in a firm of 3570 individuals; that her contribution to capital was relatively insignificant, .000058 share of the firm's total capital account; and that she had little independence or decision making power did not convince the court that she was an employee deserving protection from alleged discriminatory practices.[61] The court remained faithful to the "total bundle of partnership characteristics" in distinguishing partners from employees.[62]

The *Wheeler* court's conclusion that "bona fide general partners are not employees under the Antidiscrimination Acts,"[63] involved more analysis of the employment relationship than *Burke* did but still failed to answer the question of who is a "bona fide" or "true" partner. Cases subsequent to *Wheeler* considered not only whether an individual had the attributes of a partner, but the extent to which the individual functioned as a partner. Cases decided in the First and Sixth Circuits indicated a trend towards evaluating rather than merely enumerating indicia of partnership. In *Simpson v. Ernst & Young*,[64] a case in which an individual holding the title "partner" claimed age discrimination under the ADEA, the Court of Appeals for the Sixth Circuit urged a case by case analysis, with extensive consideration of all factors supporting both partner status and employee status.[65] As in *Wheeler*, the plaintiff in *Simpson* held the title "partner" in a large firm. But the *Simpson* court, unlike the *Wheeler* court, was convinced that the plaintiff's actual role in the partnership was closer to that of an employee than a partner/employer.[66]

The case by case analysis favored by the *Simpson* court was further refined by the Court of Appeals for the First Circuit in *Serapion v. Martinez*.[67] In *Serapion*, the court gathered all of the various

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[60] *Id.* at 276.

[61] *Wheeler*, 825 F.2d at 260-62.

[62] *Id.* at 276.

[63] *Id.* at 277.

[64] 100 F.3d 436 (6th Cir. 1996).

[65] *Id.* at 443.

[66] *Id.* at 444. The court's conclusion was apparently based on the trial court's finding that "Simpson had few, if any, meaningful attributes of a partner," including no bona fide ownership interest, no share in profits and losses, no significant management control, and no meaningful voting rights. *Id.* at 442.

[67] 119 F.3d 982 (1st Cir. 1997).

approaches to the economic realities test that the circuit courts had used in cases involving either partners or shareholders as employees. The court then attempted to fuse the various approaches and factors into a simpler analytical framework.[68] The result was "three broad overlapping categories" pertinent to assessing an individual's role as employee or employer—ownership, remuneration, and management.[69] These categories are nearly identical to the UPA factors that compelled the decision in *Burke*. In *Serapion*, however, the court clarified the categories with enumerated nonexclusive factors that might further assist courts in distinguishing partners from employers.[70] Under ownership, the court listed "investment in the firm, ownership of firm assets, and liability for firm debts and obligations."[71] Under remuneration, the critical component is whether compensation is tied to firm profits, while fringe benefits might also indicate a proprietary interest.[72] Indicia of management included the "right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals." [73]

Thus, the simple conclusion in *Burke*, that partners cannot be regarded as employees if they "own and manage the operation of the business,"[74] expanded from mere inquiry into whether the individuals in question were partners, to a case by case analysis in which various factors may be evaluated to determine whether the individual functions more like an employer or an employee. The court, in *Serapion*, stated that "status determinations are necessarily made along a continuum,"[75] recognizing that such a method also involves close cases and "case-specific assessment of whether a particular

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[68] The court, in *Serapion*, considered factors used in *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996); *Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir. 1987); *Devine v. Stone, Leyton & Gersham*, 100 F.3d 78, 81 (8th Cir. 1996); and *Fountain v. Metcalf*, 925 F.2d 1398, 1401(11th Cir. 1991).

[69] *Serapion*, 119 F.3d at 990.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

[75] *Serapion*, 119 F.3d at 990.

situation is nearer to one end of the continuum or the other."[76] Courts have increasingly looked beyond an individual's title to determine whether he functions more like an employer or employee. Nevertheless, it is only the evaluation of the "total bundle of partnership rights" that has changed. The conclusion that partners who "own and manage" the business are employers remains unchanged.

B. Shareholders as Employers or Employees: Economic Reality v. Corporate Form

As the cases developed regarding partners, courts were also deciding cases in which plaintiff/shareholders in a professional corporation sought protection under federal antidiscrimination laws or employees sought to qualify shareholders of the professional corporation as employees to satisfy the jurisdictional minimum. To evaluate these cases, several circuits adopted the economic realities or case by case analysis approach used to determine partner status.[77] In these cases, the courts avoided a labeling approach and investigated the substantive employment relationship. A starting point for most courts was whether the shareholders functioned like partners. If so, the court would conclude that the shareholders were employers and not employees entitled to protection under the relevant act. In two circuits, however, courts have taken a radically different approach. Both the Second and Ninth Circuits have held that shareholders are, by definition, employees of the professional corporation.[78] Under this view, there is no need to analyze the employment relationship, or to consider factors that might indicate whether an individual is more like an employer or employee; the corporate form chosen is sufficient to determine the individual's status as employee.

Cases in the Seventh, Eighth, and Eleventh Circuits have followed the economic realities approach in cases involving shareholders. In *EEOC v. Dowd & Dowd*,[79] the Court of Appeals for the Seventh Cir-

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[76] *Id.*

[77] *See* Devine v. Stone, Leyton, & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Fountain v. Metcalf, Zima, & Co., P.A., 925 F.2d 1398 (11th Cir. 1991); EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984).

[78] *See* Wells v. Clackamas, 271 F.3d 903 (9th Cir. 2001); Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2d Cir. 1986).

[79] 736 F.2d 1177 (7th Cir. 1984).

cuit concluded that the three attorney/shareholders in a law firm organized as a professional corporation could not be counted as employees to satisfy the jurisdictional minimum under Title VII.[80] The Seventh Circuit had previously addressed the issue of whether partners could be counted as employees in *Burke v. Friedman*.[81] In *Dowd & Dowd*, the court found that its conclusions regarding partners in *Burke* applied to shareholders because "[t]he economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control and ownership of a partnership."[82]

In *Fountain v. Metcalf, Zima, & Co., P. A.*,[83] the Court of Appeals for the Eleventh Circuit held that a shareholder of a professional corporation was not entitled to protection as an employee under the ADEA.[84] Rejecting any reliance on labels, the *Fountain* court followed the economic realities approach of the partner status cases and focused on "the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership."[85] Like the Seventh Circuit in *Dowd & Dowd*, the Eleventh Circuit concluded that the professional corporation functioned like a partnership and the shareholder/claimant functioned as a partner, not an employee.[86] Similarly, in *Devine v. Stone, Leyton, & Gershman, P.C.*,[87] the Court of

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[80] *Id.* at 1178-79.

[81] 556 F.2d 867 (7th Cir. 1977). *See supra* text accompanying notes 50-53.

[82] *Dowd & Dowd*, 736 F.2d at 1178. In *Sidley*, 315 F.3d 696, 710-11(7th Cir. 2002), Judge Easterbrook, in his concurring opinion, questioned the meaning of the economic realities test which the Seventh Circuit used in *Dowd & Dowd* after the Supreme Court's decision in *Darden*. See *supra* text accompanying notes 30-47, discussing *Darden*. Judge Easterbrook stated, "any reference to 'economic realities' poses the question *which* of many realities will be selected as those that matter. Maybe all that *Dowd* shows is that our court seeks to search out those realities that matter under ordinary agency law...."

Sidley, 315 F.3d at 710-11(Easterbrook, J., concurring).

[83] 925 F.2d 1398 (11th Cir. 1991).

[84] *Id.* at 1400-01.

[85] *Id.*

[86] *See id.* at 1401. The court noted that Fountain "shared in the firm's profits, losses, and expenses; was compensated on the basis of a share in the firm's profits; was liable for certain debts, obligations, and liabilities of the firm; and had a right to vote his thirty-one percent ownership . . . ." *Id.*

[87] 100 F.3d 78 (8th Cir. 1996).

Appeals for the Eighth Circuit rejected the argument that corporate form determines an individual's status and relied instead on an analysis of the employment relationship and factors such as the degree of management and control the shareholder has.[88] Consequently, the court determined that the shareholders in the professional corporation could not be considered employees to satisfy the jurisdictional minimum of Title VII.[89]

Until recently, the Second Circuit stood alone in viewing shareholders in a professional corporation as employees by virtue of corporate form alone. But a case recently decided in the Ninth Circuit follows the corporate form approach adopted in *Hyland v. New Haven Radiology Associates, P.C.*[90] In *Hyland*, a majority of the Court of Appeals for the Second Circuit held that because the defendant NHRA had chosen a professional corporation as its form of doing business, it could not be characterized as a partnership for purposes of antidiscrimination laws.[91] In doing so, the Court of Appeals for the Second Circuit overturned the decision of the United States District Court for the District of Connecticut which had determined that the professional corporation was a partnership in all but name, and the plaintiff, as a partner, was not an employee for ADEA purposes.[92] Although the Second Circuit agreed with the Seventh Circuit's decision in *Burke*, that partners are generally not eligible to receive the benefits of antidiscrimination laws,[93] it disagreed with the approach taken in *Dowd & Dowd*, in which the court used an economic realities test to investigate whether shareholders were more like partners than

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[88] *Id.* at 80-81. The court also relied on an earlier Eighth Circuit decision, *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928 (8th Cir. 1985), in which the court allowed the EEOC to investigate whether some individuals in a partnership with 1300 partners were employees despite the fact that they bore the title and some indicia of partnership. *See id.* In a subsequent suit by a Peat, Marwick, Mitchell & Co. partner, the United States District Court for the Southern District of New York concluded that the partner/plaintiff was an employee, entitled to bring suit under the ADEA. *See* Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 150 (S.D.N.Y. 1987).

[89] *Devine*, 100 F.3d at 81-82.

[90] 794 F.2d 793 (2d Cir. 1986).

[91] *Id.* at 798. Justice Cardamone dissented favoring an economic realities approach and case by case analysis of how the entity functions. *See id.* at 799-802.

[92] *Id.* at 797-98.

[93] *Id.* at 797.

employees.[94] The *Hyland* court drew a sharp distinction between partners and shareholders. According to the *Hyland* decision, the voluntary choice to do business as a professional corporation precludes inquiry into how the individuals function within the entity, so that "every corporate employee is covered for purposes of the ADEA and any inquiry regarding partnership status would be irrelevant."[95] In *Hyland*, the plaintiff alleging age discrimination was one of a total of five shareholders who also served as officers and directors.[96] The five members had equal shares in capital contribution, equal voice in management, and equal share of the firm's profits and losses.[97] The *Hyland* court, however, focused not on the shareholder's role as owner and manager but on the "contractual employment relationship voluntarily entered into by Hyland and the corporation."[98]

In *Wells v. Clackamas*,[99] the Court of Appeals for the Ninth Circuit agreed with the corporate form approach taken in *Hyland*. In *Wells*, the court held that four physician/shareholders should be classified as employees, thereby allowing the plaintiff/employee to satisfy the statutory minimum under the ADA.[100] The defendants maintained that they were employers because they functioned as partners, but the *Wells* majority held that how the shareholders functioned was irrelevant, as the choice of corporate form conclusively determined that the shareholders were employees.[101] The court, in *Wells*, maintained that an economic realities test cannot be applied to classify shareholders because "shareholders of a corporate enterprise may or may not be 'employees,' [but] they can never be partners in that corporation because the roles are 'mutually exclusive.' "[102] According to the *Wells* decision, a business entity should not have the advantages of corporate status, such as tax benefits and civil liability

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[94] *See id.* at 798.
[95] *Id.*
[96] *Id.* at 794.
[97] *Id.*
[98] *Id.* at 797.
[99] 271 F.3d 903 (9th Cir. 2001), *cert. granted*, 536 U.S. 990 (2002).
[100] *Id.* at 906.
[101] *Id.* at 905.
[102] *Id.*

benefits, and simultaneously be able to avoid liability for unlawful employment discrimination.[103]

C. Conclusions About the Case Law

In his concurrence in *Hishon*, Justice Powell noted that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'"[104] Following this reasoning, logic dictates that a labeling approach should be avoided in categorizing employers and employees in other forms of business, as well. The corporate form approach, however, does just that. It automatically labels shareholders as employees, and while this approach has the effect of extending rather than curtailing businesses' exposure to liability under the antidiscrimination statutes, it ignores the employer/employee distinction made in the statutes.

The corporate form approach has led to the most significant discrepancy in how the case law should classify shareholders of a professional corporation. Absent legislative clarification, courts should focus on the only distinction made in the statutes – that between employer and employee. Focusing on the employer/employee distinction would provide more consistency in how courts approach the antidiscrimination laws and would allow courts to develop indicia of employer status that would not be dependent on the individual's title, such as partner or shareholder. As the Seventh Circuit's decision in *Sidley* noted, there is no exemption in federal laws for discrimination against partners.[105]

Because the traditional partnership has evolved and new forms of business organization have replaced partnerships, courts must move beyond analysis that is tied to assumptions about partners and partnerships. Even the cases involving partners recognize that whether an individual held the title "partner" was less important than how the individual functioned within the business entity. Although courts have continued to state that true partners are employers and not employees, they look increasingly at which characteristics make someone a true partner. In deciding cases involving whether shareholders are employers or employees under antidiscrimination statutes, the courts continue to analogize to cases involving partners.

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[103] *See id.*

[104] Hishon v. King & Spalding, 467 U.S. 69, 80 n.2 (1984) (Powell, J., concurring).

[105] EEOC v. Sidley Austin Brown & Woods, 315 F.3d 696, 701 (7th Cir. 2002).

The majority of courts have focused on the actual role the individual played in the business entity to differentiate between employers and employees.

The corporate form approach, followed by the Second and Ninth Circuits, however, has focused improperly on a distinction between partners and shareholders. The appropriate inquiry, as indicated in the statutes, should be whether the shareholders are employers or employees, not whether they are like partners. The faulty reasoning in *Hyland* is evident in the court's own language. Acknowledging that "it is generally accepted that the benefits of the antidiscrimination statutes . . . do not extend to those who are properly classified as partners,"[106] the court goes on to state that "it is by reason of their unique status as business owners and managers that true partners cannot be classified as employees."[107] The *Hyland* court failed to inquire, however, whether the shareholders in a professional corporation had such "unique status as owners and managers." In *Wells*, the court stated that the four physician shareholders "actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements."[108] Thus, both *Wells* and *Hyland* ignore the ownership and management functions of the shareholders, which should signal that they are employers rather than employees, despite the corporate form chosen.[109] The better and more consistent approach is to base status determinations on how the individual functions within a business entity, rather than on a title, of "partner" or "shareholder."

Indicia of partnership, such as ownership, management, and profit sharing, form the basis for most courts' inquiries into whether certain individuals are employers or employees under the antidiscrimination laws. The factors that distinguish an individual in a partnership as an employer should, logically, be the same factors that would distinguish individuals in other forms of business organizations as employers.

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[106] *Hyland*, 794 F.2d at 797.

[107] *Id.*

[108] *Wells*, 271 F.3d at 906.

[109] *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1546 (2d Cir. 1996) (Jacobs, C.J., dissenting) (maintaining that directors of a corporation who own and control the company "should be considered employers—not employees.") *Id.*

This view is further supported by the EEOC's approach discussed in the next section.

IV. THE EEOC COMPLIANCE MANUAL DIRECTIVE ON COVERED EMPLOYEES

In 2000, the EEOC published in its Compliance Manual six factors to determine who is a covered employee under federal antidiscrimination laws.[110] The factors are designed to pertain to "partners, officers, members of boards of directors, and major shareholders," alike.[111] The six factors are preceded by a paragraph which states that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees," but that an individual's title is not determinative of his status.[112] The six factors are used to determine whether the individual in question "acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."[113] Thus, the EEOC's approach is similar to that of courts that employ an economic realities test as it goes beyond title to investigate issues such as management and control. The EEOC factors are similar to those developed by the First Circuit in *Serapion*,[114] but even more fact specific in nature. The six factors listed by the EEOC to determine who is a covered employee are:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;

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[110] EEOC COMPLIANCE MANUAL DIRECTIVES TRANSMITTAL No. 915.003 (2000) *available at* http://www.eeoc.gov/docs/threshold.html [hereinafter COMPLIANCE MANUAL].

[111] *See id.* at 2-III(A)(d).

[112] *Id.*

[113] *Id.*

[114] *See* Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997); *see supra* text accompanying notes 67-76.

> 6. Whether the individual shares in the profits, losses, and liabilities of the organization.[115]

Like the factors cited in *Serapion*, the EEOC factors focus on ownership, remuneration, and management. Ownership and remuneration are the focus of EEOC factor six, whereas factors one through five are all questions that attempt to draw a distinction between proprietors and employees. In *Serapion*, the court cited "the right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals" as indicia of management.[116] Although the *Serapion* factors focus on which characteristics indicate employer status and the EEOC factors focus on employee status, the questions to determine such status are quite similar.

Courts have yet to apply the six factors cited by the EEOC in its Compliance Manual, substantively. Nevertheless, the United States District Court for the Northern District of Illinois referred to these factors in deciding that a law firm was required to comply with an EEOC subpoena seeking information about the status of its partners.[117] The EEOC requested the information in connection with its investigation of a retirement plan instituted by the law firm, Sidley Austin Brown & Wood (Sidley).[118] The EEOC sought to determine whether the firm's retirement plan violated the ADEA and whether any of the thirty-two partners demoted under the plan were covered employees.[119] Sidley maintained that all of the demoted partners were "true partners" and that the firm had supplied the EEOC with information demonstrating indicia of partnership consistent with that relied on by courts.[120] The court, while recognizing that "the cases, as a group, favor Sidley in their outcomes," concluded that such cases turn on "fact-specific analysis of the partnership presented" and that

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[115] COMPLIANCE MANUAL, *supra* note 110.

[116] *Serapion*, 119 F.3d at 990.

[117] *See* EEOC v. Sidley Austin Brown & Woods, No. 01-C9635, 2002 U.S. Dist. LEXIS 2113 (N.D. Ill. Feb. 11, 2002).

[118] *Id.* at *2. The retirement plan was instituted in the context of a merger with another law firm. Partners were demoted from partner to counsel or senior counsel status pursuant to a discretionary retirement age that was lowered to sixty from sixty-five. *Id.* at *1 & n.1.

[119] *Id.*

[120] *Id.* at *12.

Sidley was therefore required to comply with the EEOC's subpoena seeking further information about the retirement plan and the demoted partners.[121] The court recognized that the EEOC has the authority to determine the "particular combination of factors that may add or detract from the core elements of partnership . . . ."[122]

On appeal, the Seventh Circuit affirmed the lower court's decision requiring Sidley to comply with the EEOC's subpoena, regarding information on the employment status of the demoted partners.[123] The court seemed critical of the EEOC's factors, however, noting that Sidley had valid arguments concerning the EEOC's investigation of the status of its partners, especially the fact that "the functional test of employer status toward which the EEOC is leaning is too uncertain to enable law firms and other partnerships to determine in advance their exposure to discrimination suits."[124] The determination of the partners' status was not ripe for review, but the Seventh Circuit suggested that "it would be better if the courts and the Commission interpreted the employer exclusion to require treating all partners as employers, with perhaps a narrow sham exception."[125]

The impact of the EEOC's six factors in determining who is a covered employee is yet to be determined. The factors are similar to those employed by several courts favoring an economic realities approach and provide additional guidance to those courts. Moreover, by specifying that the factors apply to "partners, officers, members of boards of directors, and major shareholders," the EEOC clearly indicates that the corporate form approach, articulated by the Second Circuit in *Hyland*[126] and by the Ninth Circuit in *Wells*,[127] should be abandoned because the factors are to be considered for all individuals who seek covered employee status regardless of title. The

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[121] *Id.* at *12-13.

[122] *Id.* at *13, n.7. In *Sidley*, the court noted that the "Supreme Court has recognized (in dictum) that the EEOC has the authority to initiate an investigation for alleged violations of the ADEA independent of the filing of a charge." *Id.* at *2, n.2, citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

[123] *See* EEOC v. Sidley Austin Brown & Woods, 315 F.3d 696, 707 (7th Cir. 2002).

[124] *Id.*

[125] *Id.*

[126] Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2d Cir. 1986); *see supra* text accompanying notes 90-98.

[127] Wells v. Clackamas, 271 F.3d 903 (9th Cir. 2001); *see supra* text accompanying notes 99-103.

EEOC factors place significant emphasis on the entity's supervisory authority over the contested individual. The organization's ability to hire, fire, regulate, and supervise the individual's work comprises the first three EEOC factors, while the factors that are featured in the *Serapion* test, are relegated to factors four and six. Interestingly, the fifth EEOC factor pertains to the intention of the parties with respect to the arrangement, specifically as the intention is expressed in written agreements or contracts. General partnerships do not require written agreements even under the revised UPA, so this factor should reflect the legal reality of general partnerships, that they need not be formed in writing. Thus, oral evidence should also be considered.[128]

The EEOC Compliance Manual focuses on the distinction between employer and employee in the section on covered employees. It does not offer additional factors in the section on requirements for coverage of employers.[129] Because courts rely so heavily on factors of partnership as indicia of employer status, the next section considers recent revisions to the UPA and their impact on distinguishing employers from employees.

V. THE IMPACT OF REVISIONS TO THE UNIFORM PARTNERSHIP ACT (1997)

A. The Entity Approach

The Revised Uniform Partnership Act (RUPA) has now been adopted by a majority of states.[130] Since most of the decisions regarding covered employee status within partnerships derived from cases prior to the enactment of RUPA, it is important to analyze how RUPA may impact judicial interpretation in the future. The law of partnership embodied in the revised Act includes clarification of the

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[128] *See generally* notes 141-43 *infra* and accompanying text (regarding less formal partnerships without written agreements).

[129] COMPLIANCE MANUAL, *supra* note 110, at 2-III(B)(a).

[130] *See* UNIF. PARTNERSHIP ACT (1997), 6 U.L.A. 1-2 (2001) (listing thirty-two jurisdictions that have adopted the revised Act); National Conference of Commissioners on Uniform State Laws, *Revised Uniform Partnership Act Reflects Modern Business Practices 28 Jurisdictions Have Now Updated Venerable 80-Year Old Partnership Law*: Jan. 2000, *available at* http://www.nccusl.org/nccusl/pressreleases/pr1-00-5.asp (last visited February 27, 2002); *see also* TWOMEY, JENNINGS & FOX, ANDERSON'S BUSINESS LAW & THE REGULATORY ENVIRONMENT, 817 & n.2 (14th ed. 2001) (discussing background of UPA and RUPA and transition to RUPA by states).

partnership as a separate entity from the partners aggregated.[131] Although federal antidiscrimination acts specifically recognize a partnership as an employer, the entity theory, by viewing the partners as distinct from the partnership, increases the likelihood that a court would find that a partner is a covered employee for antidiscrimination purposes.[132] The adoption of an entity theory clarifies that the partnership is the employer, and tends to place the individual partners, at least theoretically, in a category that is more akin to employees than employers. The entity approach clarifies that a partnership, like a professional corporation, has persons who work for an entity. While these individuals may be co-owners if they are genuine partners, so are members in a professional corporation co-owners. Thus, the rationale for treating co-owners in a corporation differently from co-owners in a partnership lessens under the entity theory.

B. Exposure to Liability

It should be noted, however, that the aggregate approach, which views the partnership as a totality of persons rather than an entity in itself, is specifically retained in RUPA for some purposes, such as partners' joint and several liability.[133] The revised statute actually broadens joint and several liability for partners in a general partnership, increasing such liability to contract as well as to tort judgments.[134] Since a partner's exposure to personal liability for partnership debts has traditionally weighed in favor of finding

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[131] *See* National Conference of Commissioners on Uniform State Laws, UNIF. PARTNERSHIP ACT (1997) Prefatory Note, 6 U.L.A. 5 (2001). Section 201(a) provides that a partnership is an entity distinct from its partners, and the Comment to that section reflects upon the partners' liability as joint and several unless the partnership files a statement of qualification to become a limited liability partnership under section 306. *See* UNIF. PARTNERSHIP ACT (1997) § 201(a) & Comment, 6 U.L.A. 91(2001); *see also* Gingiss, *supra* note 15, at 21-22 (discussing entity versus aggregate theory).

[132] *See* Gingiss, *supra* note 15, at 21-22, 26, 29 (discussing that while RUPA does not specifically address this issue, the adoption of the entity theory in RUPA may increase protection of partners as common law employees for Title VII and other purposes).

[133] *See* UNIF. PARTNERSHIP ACT (1997), Prefatory Note, 6 U.L.A. 6 (2001); BLACK'S LAW DICTIONARY 66 (7th ed. 1999) (defining "aggregate theory of partnership").

[134] *See* UNIF. PARTNERSHIP ACT (1997) § 306, Partner's Liability, & Comment 1, 6 U.L.A. 117 (2001). While RUPA broadens joint and several liability to contract obligations, it does require the judgment creditor to exhaust partnership assets prior to seeking judgment against a partner's own assets. *Id.*

genuine partner status, as opposed to covered employee status under equal employment opportunity laws, this RUPA provision seems to decrease the likelihood that courts will find partners entitled to federal statutory protection. One might ask why personal exposure to liability should be considered critical in terms of categorizing an individual as outside the protection of the antidiscrimination acts. In cases involving professional corporations that were decided under the economic reality theory, the courts did not let the fact that shareholders were not jointly and severally liable for firm liabilities prevent them from equating their treatment of shareholders to that of genuine partners. [135]

Courts should not focus too heavily on an individual's exposure to unlimited liability – it should be only one factor to consider among several in examining employer versus employee status, rather than a factor that automatically disqualifies an individual from statutory protection.[136] The trend in modern business entities seems to be toward liability shields.[137] Under RUPA, a partnership may specifically become a limited liability partnership (LLP).[138] The LLP is a different creature than a general partnership, and limited liability partners with their liability shields would likely be treated similarly to shareholders in a professional corporation.[139] In the future, as more

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[135] *See* EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984); Fountain v. Metcalf, Zima & Co., 925 F. 2d 1398 (11th Cir. 1991), and Devine v. Stone, Leyton & Gershman, 100 F. 3d 78 (8th Cir. 1996).

[136] *See Devine*, 100 F.3d at 81 (stating that "[a]ll relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee" and that liability for debts is one indicia of ownership along with contributions to firm capital, and compensation based on firm profits). As one author sagely queried regarding the emphasis placed on a co-owner's personal liability by some courts: "is a partner in any different position than three shareholders in a closely held business who own all of the corporation's stock and who are compelled to guaranty all loans from banks or credit from vendors?" *See* Gingiss, *supra* note 15, at 42.

[137] This trend is evident in the evolution of various business forms, perhaps starting with the use of the business trust, the corporation, limited partnerships, and evolving further with professional corporations, and most recently, limited liability partnerships and limited liability companies.

[138] *See* UNIF. PARTNERSHIP ACT (1997) § 1001, Limited Liability Partnership, Statement of Qualification & Comment, 6 U.L.A. 239-41 (2001) (regarding LLPs).

[139] It is important to remember that some courts may not treat the two types of entities, general partnership and professional corporation, any differently for covered employee purposes. The jurisdictions that avoid a labeling approach tend to focus less on liability

members of business entities shed unlimited personal liability, courts will likely re-evaluate the emphasis that they place on this factor in the covered employee context.

C. Other Issues: Size of the Partnership, the Right to Sue, and Authority

RUPA does not significantly alter the definition of a partnership; rather it draws upon the language of the prior statute.[140] The prefatory note to RUPA, prepared by the National Conference of Commissioners on Uniform State Laws, indicates that the primary focus of the revised Act is "the small, often informal partnership."[141] The larger, more formal partnerships are of less concern because such partnerships usually have agreements, rather than relying on the RUPA default provisions.[142] How the courts evaluate the size and formality of the partnership varies. In many instances, however, small size indicates that each co-owner has more influence, control, and stake in the business, and thus a partner in a small partnership would be more likely to be characterized by the courts as a genuine partner than a nominal one.[143] A larger partnership is often structured in a way that is perceived as more analogous to the corporate form.[144] As the Court of Appeals for the Sixth Circuit found in *Simpson v. Ernst &*

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exposure and more on the substance of the individual's role within the business entity and the regulatory environment. Thus, the fact that the licensing and regulation of a general partnership and a professional corporation overlap, in that both shareholders in a professional corporation and general partners in a professional partnership "must be licensed professionals" weighed in favor of treating the partner and shareholder alike in *Dowd & Dowd*, 736 F.2d at 1179. Changing an entity from a partnership to a limited liability partnership would have little consequence in jurisdictions that treat the partnership and the professional corporation equivalently for covered employee purposes.

[140] *See* UNIF. PARTNERSHIP ACT (1997) § 101(6) & Comment, 6 U.L.A. 61-62 (2001): "'Partnership' means an association of two or more persons to carry on as co-owners a business for profit formed under Section 202, predecessor law, or comparable law of another jurisdiction." UNIF. PARTNERSHIP ACT (1997) § 101(6) (1997). "The RUPA continues the definition of 'business' from Section 2 of the Uniform Partnership Act (UPA)." *Id.* at 62, Comment.

[141] *See* UNIF. PARTNERSHIP ACT (1997), Prefatory Note, 6 U.L.A. 6 (2001).

[142] *Id.*

[143] A nominal partner would be more likely to have access to the protection of antidiscrimination statutes.

[144] In *Sidley*, the Court of Appeals for the Seventh Circuit noted that in a partnership of more than 500 partners, where control resides in a small, unelected committee, the partners share characteristics of corporate employees. *See* EEOC v. Sidley Austin, 315 F.3d 696, 702-03 (7th Cir. 2002).

Young, large size may work in favor of allowing equal employment opportunity protection to a partner whose actual role is not that of a genuine partner.[145] A partner is deemed nominal because he does not have the right to participate in management, vote, or share in profits.[146] Under RUPA, partners may now sue each other as well as the partnership.[147] The partnership may also sue any partner.[148] The partner's explicit right to sue indicates more power, control, or leverage by a partner over the partnership than under the UPA, and this would seem to discourage courts from a finding of covered employee status for partners.

There are clear provisions under RUPA for a partnership to file statements limiting a partner's authority.[149] The comments to section 303 of the Act indicate that the purpose is to clarify who is authorized to transfer the real property of the partnership, as well as in some instances to limit or broaden the ordinary agency authority of partners.[150] Where the partnership files a statement limiting a partner's authority, this would likely be considered a factor weighing against true partner status.

D. Dissociation

RUPA's concept of dissociation permits partners to leave without a formal dissolution or discontinuation of the firm.[151] Pursuant to RUPA, a partnership may vote to expel a partner, and yet the

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[145] Simpson v. Ernst & Young, 100 F. 3d 436, 440-41, 443-44 (6th Cir. 1996). The Court of Appeals for the Tenth Circuit was less impressed with large size in *Wheeler v. Main Hurdman*, 825 F.2d 257, 260, 277 (10th Cir. 1987) (finding that plaintiff was a genuine partner who was not entitled to covered employee protection despite 3570 personnel at defendant partnership). Nonetheless, partnership size seems to be one measure, albeit a shorthand one, for judging whether a member has sufficient power and control relative to and within the entity such that he is outside the protection of the antidiscrimination acts.

[146] *Simpson*, 100 F.3d at 441-44.

[147] UNIF. PARTNERSHIP ACT (1997)§ 405(b) & Comment 2, 6 U.L.A. 150-51(2001). This right to sue permits actions during the term of the partnership and does not require dissolution in order to permit an action for an accounting. Neither does it require an action for an accounting as a prerequisite to any suit. *Id.*

[148] UNIF. PARTNERSHIP ACT (1997) § 405 (a) & Comment 1, 6 U.L.A. 150-51(2001). Comment 1 to this section indicates that this section is new and that it flows from the entity theory of partnership.

[149] UNIF. PARTNERSHIP ACT (1997) § 303, 6 U.L.A. 107-108 (2001).

[150] UNIF. PARTNERSHIP ACT (1997) § 303, Comments, 6 U.L.A. 108-110 (2001).

[151] UNIF. PARTNERSHIP ACT (1997) § 601, 6 U.L.A. 163-64 (2001).

partnership continues intact in most instances while the partnership merely provides the dissociated partner the value of his interest.[152] This new concept of dissociation reflects how little control an unwilling exiting partner has over his situation. It should be noted that even under RUPA, there are still instances in which a partner's dissociation results in dissolution and winding up, but these are not always required as under the UPA.[153] The outcome of dissociation may not be so very different for the dissociated partner than the situation that occurs when a partnership governed by the UPA dissolves and then forms anew without the partner that the group wished to expel. In one sense, the changes wrought by RUPA regarding dissociation have more to do with accounting issues than with increasing or decreasing the job security of any individual partner.[154] Yet the fact that RUPA allows for dissociation when a partner leaves does make it easier to remove a partner than under the UPA. Under the UPA, every departure of a partner required a technical dissolution and winding up, a more cumbersome process.[155] RUPA's explicit provision for expelling a partner, albeit for specified causes and by a unanimous vote, makes clear that partners serve at

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[152] UNIF. PARTNERSHIP ACT (1997) § 603 (a) & Comment 1, 6 U.L.A. 172-73 (2001). This RUPA provision requires that a partner's interest be purchased in accordance with buyout rules in article 7 unless there is a dissolution and winding up under article 8.

[153] *See* UNIF. PARTNERSHIP ACT (1997) § 603 & Comment 1, Effect of Partner's Dissociation, 6 U.L.A. 172 (2001); UNIF. PARTNERSHIP ACT (1997) § 801, Events Causing Dissolution and Winding up of Partnership Business, 6 U.L.A. 189 (2001). It should also be noted that a partner did have an implicit power to withdraw from the partnership under the UPA section 31(2) whether the withdrawal was rightful as in accordance with the partnership agreement, or wrongful because it violated the agreement. *See* UNIF. PARTNERSHIP ACT (1997) § 602, Comment 1, 6 U.L.A. 170 (2001).

[154] UNIF. PARTNERSHIP ACT (1997) § 601, Events Causing Partner's Dissociation & Comments, 6 U.L.A. 163-67 (2001) (discussing how entity theory of RUPA provides for concept of continuing firm despite partner's departure and how various issues surrounding reasons for partner expulsion remain similar to those under UPA, with exception that under RUPA section 601(4) partners may now unanimously vote to expel a partner for causes specified in RUPA, and these causes need not be authorized in partnership agreement as was required under prior UPA section 31(1)(d)).

[155] *See* UNIF. PARTNERSHIP ACT (1997) § 601 & Comment 1, 6 U.L.A. 163-64 (2001) (discussing changes from UPA to RUPA on dissolution versus dissociation). *See also* UNIF. PARTNERSHIP ACT (1997) § 603 & Comment 1, 6 U.L.A. 163-64 (2001) (discussing UPA exceptions to automatic winding up where partnership agreement provides otherwise, allowing for continuation of business where a partner wrongfully dissolves the partnership in breach of the agreement).

the will of the entity, much as employees serve.[156] One could argue that the concept of dissociation under RUPA decreases partner power or control over his own destiny, creating more of a justification for partners to be protected from employment discrimination, either as covered employees or under a category of their own.

E. Reflections on RUPA and Recommendations

After reviewing the changes wrought by RUPA, it remains unclear whether the revised Act will make much difference to partners in terms of their protection under federal antidiscrimination acts.[157] RUPA could be amended to clarify the criteria that would place a partner either within or beyond the protection of equal employment opportunity laws. This would be a step in the right direction –namely clarifying the roles that individuals in the partnership organization play, whether the individuals are called employees, as that term is understood in the equal employment opportunity context, or something else entirely. Once again it should be noted that RUPA's focus is on the smaller partnership; thus there is some chance that RUPA would characterize an individual as a covered employee, and yet the jurisdictional minimum number of employees may not be present in a given partnership. In addition, RUPA's characterization of an individual's role, and even the label attributed to the individual, would be subject to interpretation and review under federal law if the protection of federal antidiscrimination laws were in question.

Another suggestion regarding RUPA is that a generic equal employment opportunity (EEO) provision could be added to the Act, perhaps under section 404, the General Standards of Partner's Conduct.[158] The focus of section 404 is on the partner's conduct rather than on that of the partnership. However, the subject matter of an EEO clause fits in well with duties of care, good faith and fair dealing, fiduciary duty, and loyalty.[159] It would be important to place

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[156] UNIF. PARTNERSHIP ACT (1997) § 601, 6 U.L.A. 163 (2001).

[157] *But see* Gingiss, *supra* note 15 (arguing RUPA should be interpreted to allow partners as covered employees).

[158] UNIF. PARTNERSHIP ACT (1997) § 404 & Comments, 6 U.L.A. 143-46 (2001) (discussing this new section entitled 'General Standards of Partner's Conduct' as drawn from the Revised Model Business Corporation Act).

[159] *See also* Mark S. Kende, *A Tribute to Honorable Raymond L. Sullivan: Article: Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners,* 46 HASTINGS L.J. 17 (1994) (discussing thesis of article that RUPA's implied covenant of good faith and fair

the EEO provision within the nonwaivable category of section 103 so that while individual partnership agreements might vary the terms, they would be less likely to abrogate the duty.[160] Partnership agreements could also be designed to address the covered employee status of various partners within each partnership entity. Despite these recommendations, it is unlikely that most partnerships will outline the status of nominal partners in a manner that would allow them EEO protections. It is more probable that most partnerships will aim to avoid covered employee status for their partners, because avoiding regulation is often perceived as economical.[161] Ultimately, federal courts will look to federal law regarding who is a covered employee under federal statutes.[162] Consequently, federal legislative amendments are far preferable to either RUPA amendments or proposed partnership agreement language.

VI. RECOMMENDATIONS

A. Recommendations for Amending the Statutes

The most effective way to remedy the current confusion in determining who is a covered employee under federal antidiscrimination statutes is for Congress to amend the statutes.[163] The same

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dealing itself prohibits partners from discriminating against each other). Professor Kende concludes that the duty of good faith should be interpreted to prevent discriminatory partner expulsions. *Id.* at 63.

[160] UNIF. PARTNERSHIP ACT (1997) § 103, Effect of Partnership Agreement; Nonwaivable Provisions, 6 U.L.A. 73-74 (2001).

[161] *See generally* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 61 (1998) (discussing complexity of employment discrimination problem and suggesting restructuring antidiscrimination laws to induce employers to eliminate inequality).

[162] *See supra* note 17 and accompanying text.

[163] *See supra* note 15 and accompanying text; *see also Circuit Split Roundup*, 70 U.S.L.W. 2519 (Feb. 19, 2002)(No. 31) (noting *Wells*, 271 F.3d 903, represents the joining of the Ninth Circuit with the Second Circuit and rejecting the view of the Seventh Circuit, in that *Wells* case held shareholders in professional corporations are not "partners" and therefore count as "employees" under the ADA and Title VII). The court in *Wheeler*, 825 F.2d 257, noted that "[i]f Congress amends the Acts to include partners it will be in a position through the hearing and debate process to fashion restrictions appropriate to partnerships. More importantly, by categorical inclusion or exclusion of partners Congress will allow administration of the Acts without resort to a case-by-case approach based on illogical,

criteria for determining antidiscrimination coverage should apply whether the case involves a general or limited liability partnership, close and/or professional corporation, limited liability company, or other form of business organization.[164] Neither the form of business organization, nor the name of the actor in question should dictate whether coverage applies to a given individual. Any labeling approach which assumes that an individual is an employer or employee merely because he or she is a shareholder or has the title partner, should be discounted, and instead, the actual role of the person in question should be assessed based upon a new definition that is common across the statutes.[165] Legislative amendments should clarify three points in distinguishing employees from employers. First, Congress should address whether employer and employee status must be mutually exclusive. Second, Congress should indicate which indicia are critical in determining status for purposes of the acts. Third, Congress should address whether cases in which an employee is claiming some members of the firm are employees for purposes of satisfying the jurisdictional minimum should be treated differently than cases where an individual is claiming he has employee status for protection under the acts.

1. *Exclusivity of the Terms Employer and Employee*

In devising factors to determine who is an employer or an employee under the antidiscrimination acts, the courts have assumed that an individual who satisfies the criteria of an employer cannot also be an employee.[166] Courts fear "a potentially chaotic situation . . . with partners drifting into and out of covered 'employee' status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a 'pure' partner."[167] The overlap

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unsatisfactory types of tests such as those proposed here." *Id.* at 277.

[164] *See* Kleinberger, *supra* note 7, at 560 (discussing his proposed rule that is also not entity specific).

[165] As Justice Powell wrote in a footnote to his concurrence in *Hishon*, "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" 467 U.S. at 80 n.2 (Powell, J., concurring). The use of labels or a per se approach is inadequate as a number of courts have noted. Even in *Hyland*, the dissent rebuked the per se approach. 794 F.2d 793, 799-800 (Cardamone, J., dissenting).

[166] *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997).

[167] Wheeler v. Main Hurdman, 825 F.2d 257, 274 (10th Cir. 1987).

between employer and employee status is most likely to cause problems in large firms, especially those with executive management committees. Such firms are likely to face issues regarding the aging population of partners or shareholders and whether those individuals are entitled to sue for age discrimination under the ADEA. Should aging partners and shareholders who experience a change in status as a result of a retirement policy be entitled to sue? The question recalls the Supreme Court's decision in *Hishon* which held that consideration for partnership is a "term, condition, or privilege" of employment which cannot be granted or withheld in a discriminatory fashion.[168] Arguably, a change in the terms and conditions of partnership status could indicate that an individual had devolved to employee status. Such foreseeable scenarios illustrate problems with labeling individuals as employers or employees, and that one's status as employer may be subject to change.

2. *Criteria for Status Determination*

Specific recommendations by Congress as to the import of the various factors indicative of employer status would reduce significant discrepancies in outcome among the circuits. Congress should codify factors to determine employment status, indicating the weight to be placed on each factor. To date, the most convincing criteria for determining whether an individual is an employer are set out in the *Serapion* decision.[169] These factors are outlined here with suggested refinements in light of RUPA and the changing business environment. The factors of ownership, remuneration, and management, as elucidated in *Serapion*, would apply equally to partners, shareholders, and members in other entities. *Serapion* focused on these traditional factors of partner status as indicative of employer status. Furthermore, the court listed factors under each category to refine the test for indicating a proprietary role:

1. Ownership: investment in the firm, ownership of firm assets, liability for firm debts and obligations;
2. Remuneration: compensation based on firm profits, fringe benefits more generous than benefits received by others;

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[168] *See* Hishon v. King & Spalding, 467 U.S. 69, 75 (1984).

[169] *Serapion*, 119 F.3d at 990; *see also* Stras, *supra* note 10 at 268-70 (recommending use of *Serapion* three prong test).

> 3. Management: the right to engage in policymaking, participate in and vote regarding firm governance, ability to assign work and to direct activities of employees within the firm, ability to assign work and to direct activities of employees within the firm, ability to act for the firm and its principals.[170]

Employing the factors set out in *Serapion*, courts are able to assess who is a co-owner, an individual with such a significant proprietary role in the business that she could not at the same time expect or deserve to be a covered employee. The *Serapion* factors could be further enhanced, explained, and weighted by legislative mandate, thereby reflecting exactly what criteria will be necessary for covered employee status. Some factors may not suffice to exclude individuals from the protection of the antidiscrimination statutes. For example, under the first prong, the impact of personal liability for firm debts should be re-evaluated. Although RUPA redefines partners' personal liability for firm debts to include joint and several liability for both tort and contract obligations, limited liability business organizations are proliferating, and in these entities, decreased personal liability of actors is the trend. The actors with limited liability in such business entities may perform the same functions as a general partner, and thus the distinction between shareholders with limited liability and partners with unlimited liability should not be determinative of covered employee status.[171] In this regulatory environment, it seems logical to make the personal liability factor less critical in determining covered employee status for antidiscrimination purposes.

Some of the factors listed under the third prong of the *Serapion* test should also be less weighted. Neither supervisory activities nor agency authority are factors that should place individuals beyond the pale of the statutes' shelter. The legislative intent and scope of the various antidiscrimination statutes must be considered, as well as the motivation for limited liability that influences the choices made by business entities. RUPA outlines new methods for limiting a partner's agency authority. Significant limitation of what would be traditional partner authority may reflect the partnership's intent to limit the entity's responsibility for a partner's acts as well as indicating the

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[170] *See Serapion*, 119 F.3d at 990.

[171] *See supra* notes 133-39 and accompanying text.

partner's proximity to employee rather than employer status. Also, supervisors are not categorically excluded from the protective ambit of the antidiscrimination statutes. Rather, supervisory status is more critical to exclusion from bargaining units within the context of the NLRA.[172] The weight placed on traditional criteria for covered employee status needs to keep pace with the modern interpretation of the relevant statutes.

3. *Reevaluating Satisfaction of the Jurisdictional Minimum*

Congress should also clarify who may be counted as an employee for purposes of satisfying the jurisdictional minimum. The intent of Congress in imposing a minimum number of employees was "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending suits when efforts at compliance fail."[173] Currently, courts must respect the intent of the statutes and must make a distinction between employers and employees to determine if there are a sufficient number of employees to satisfy the jurisdictional minimum. Where the claimant is an employee, clearer guidelines for establishing the size of regulated entities should be established. Including both employers and employees for counting purposes would not upset the statutory scheme. Although consistency in defining employees and employers has its merits, a more inclusive approach to "counting" cases would allow aggrieved employees to pursue otherwise valid claims of discrimination. Despite the arguments for consistency in approach, there is a theoretical basis to distinguish the two types of cases, and distinctly different policies are served in each context.

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[172] *See* 29 U.S.C. § 152(3) (1994) (supervisors excluded from the definition of covered "employee" under the NLRA).

[173] Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999) (discussing intent to exempt tiny employers from antidiscrimination laws including the ADA), *quoted in* Wells v. Clackamas, 271 F.3d 903, 908 (9th Cir. 2001) (Graber, J., dissenting). *See also* Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993). In *Miller*, the Court of Appeals for the Ninth Circuit noted that Congress exempted small employers from the ADEA and Title VII in order to protect them from "the costs associated with litigating discrimination claims" in cases involving attempt to hold individual employees liable under statute. 991 F.2d at 587. Additionally, the statutory thresholds relate to congressional judgment as to "how large a business has a presumed effect on interstate commerce." *Wells*, 271 F.3d at 903 (Graber, J., dissenting).

Definitions in federal antidiscrimination legislation should specify that the following individuals be counted toward the minimum number of "employees" for jurisdictional purposes: partners in a partnership, shareholders who work for and in closely held corporations, as well as members in limited liability companies, limited liability partnerships, and other forms of business entities. The definition of employees for counting purposes could be expanded, or else the classification of individuals counted could easily incorporate this change, allowing those who have often been categorized as employers to satisfy the jurisdictional minimum. Even with the proposed expanded notion of an employee for counting purposes, traditional exceptions would continue to exist for independent contractors and consultants, while partners and shareholders that otherwise meet the number of hours per week and weeks per year thresholds would be included in the count. While the purpose of the small employer exemption is primarily economic, this purpose seems to be satisfied where the individuals counted toward the minimum are employed by the entity. This revision would be advantageous for its clarity and simplicity. It would eliminate much litigation regarding employment status where only the quantity of individuals employed is at issue. Such an amendment would allow the courts greater certainty in counting cases, and would avoid decisions such as *Hyland* and *Wells* where the courts relied on faulty reasoning to count shareholders as employees.

B. Suggestions for Judicial Interpretation

Without further legislative action, the courts must choose between the various tests developed to determine who is an employer or employee. Tests that are overly broad disregard the distinction the statutes make between employers and employees. The challenge for the courts is to maintain the distinction between employer and employee while disregarding corporate form and titles held by individuals seeking protection under the statutes. An economic realities approach, as outlined by the factors in *Serapion* and in the EEOC recommendations, offers a point of departure. But courts must strive for greater clarity and consistency in determining which factors are the most influential in ascertaining employment status. Although the factors in *Serapion* focus on criteria that indicate who is an employer and the EEOC factors focus on who is an employee, the criteria listed in each inquiry are similar. The difficult part of the

analysis is determining how much weight to give the various factors. The *Serapion* case mentions that determinations must be made along a continuum.[174] Similarly, the EEOC factors mention the "extent" of certain criteria.[175] Cases at one end of the continuum or other will be easily decided, but the case law currently indicates quite a disparity in how the factors are assessed.

The difference between the *Serapion* approach and the EEOC factors is that *Serapion* preserves the three broad categories that have traditionally indicated employer status – ownership, management, and remuneration. *Serapion* offers sub-factors to assist in making a determination of status under each category. The six factors offered by the EEOC include essentially the same factors and sub-factors, but each factor is listed individually without categorization. Although the factors listed by the EEOC are helpful, the approach offered by *Serapion* is better organized to assist courts in making a determination because a conclusion can be made about each broad category and the ultimate determination of employment status can rest on an assessment of these three criteria. The sub-factors are crucial in determining the "extent" to which an individual satisfies each category. Thus, a court could conclude that although an individual had some input in the management category, the individual's influence was not sufficient to satisfy the management prong for employer status.

Assuming that an individual must satisfy some criteria under each of the three broad prongs to be considered an employer, courts must determine not only whether each category is satisfied but also how the three categories, viewed together, indicate employment status. The individual's role in management is likely to pose the greatest concerns in determining employment status. Large firms, such as the law firm in *Sidley*, are often structured so that a central or executive committee makes the key decisions about the firm and its policies. Should courts view only those who participate in such committees as the true employers of the firm? If so, partners, shareholders, or members who have an ownership interest, even significant ownership interest, and who are compensated based on the firms' profits and losses would be considered employees covered by federal antidiscrimination laws.

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[174] *See* Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997).

[175] COMPLIANCE MANUAL, *supra* note 110.

Courts have rejected domination theories and suggestions that true partners must have an equal voice in the management of the firm. The question, then, is whether to qualify as an employer, an individual must have some significant voice in the control or management of a firm.[176] The concurring opinion in *Sidley* suggests that partners who participate in profits satisfy the "defining characteristic" of a bona fide partner.[177] Profit sharing, together with liability for firm debts may be enough to qualify for true partner status, according to Judge Easterbrook, who suggests that the relationship between practice groups and the whole firm and the "allocation of managerial authority among the lawyers do not matter to classification."[178] Such a conclusion would have broad implications for firms that have many "partners" who have little voice in firm policy and decision-making.

One author proposed two questions that should be asked to determine when a partner should be a covered employee under federal antidiscrimination laws: "(1) Under the partnership agreement, may a partner be involuntarily expelled from the partnership? (2) Could the partnership afford to pay the partner the value of his partnership interest if he decides to leave?"[179] The author proposes that if the partner may be involuntarily expelled or if he is "expendable" because the partnership could afford to buy his interest, then there should be a rebuttable presumption that the partner is a covered employee under federal antidiscrimination laws, such as Title VII or the ADEA.[180] The author who proposes this line of inquiry suggests that a "true partner," involuntarily expelled, has protection because, unlike the employee, he can demand that the business be liquidated.[181] Similarly, a "true partner" would be able to discourage discrimination because he is not expendable in the sense that the firm could not afford to buy out his partnership interest.[182] This test

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[176] *See* Hyland v. New Haven Radiology Assoc., 894 F.2d 793, 802 (2d Cir. 1986) (Cardamone, J., dissenting).

[177] EEOC v. Sidley Austin Brown & Woods, 315 F.3d 696, 709 (7th Cir. 2002) (Easterbrook, J., concurring).

[178] *Id.* at 710.

[179] *See* Colleen Eck, *Title VII and the Age Discrimination in Employment Act: Should Partners be Protected as Employees?*, 36 KAN. L. REV. 581, 602 (1988).

[180] *See id.* at 608.

[181] *See id.* at 605.

[182] *See id.* at 607.

appears too simple and expansive in its coverage to pass muster judicially or legislatively. The proposed test for covered employee status in partnerships was fashioned prior to the enactment of revisions to the UPA.[183] As has been discussed, in some respects, RUPA seems to decrease the likelihood that expelled partners will be construed as protected covered employees within the federal antidiscrimination statutes because RUPA increases the personal liability of partners, and increases partners' rights to sue each other. Personal liability and the ability to sue other partners would be evidence of partnership indicia such as ownership and management.

In other respects, RUPA's entity theory, as well as its provisions for filing statements to limit partner authority, and its ease of dissociating a partner without mandatory dissolution weigh in favor of including an involuntarily expelled partner within the protection of covered employee status. This is so because the latter provisions reflect a partner's similarity to the traditional employee who serves at the will of an entity that is its employer. A theory which proposes to categorize partners as employees based on expulsion without cause and expendability is reminiscent of the proposed domination theory which the Tenth Circuit rejected as too sweeping in scope.[184] Under the rebuttable presumption test proposed above, virtually all involuntarily ejected partners would be qualified to sue as covered employees under the antidiscrimination statutes, or at a minimum, be entitled to a rebuttable presumption of employee status. To allow partners expelled for cause and partners considered "expendable" because the partnership can buy out their interest, to enjoy a rebuttable presumption of employee status would greatly expand the category of individuals who would be considered employees. In large firms, most partners would be considered expendable, at least in the sense that the partnership could afford to buy out their interest. This proposed line of inquiry requires a broad interpretation of congressional intent. As the Court of Appeals for the Tenth Circuit warned in *Wheeler*, adopting a rule that makes "any partner who can be discriminated against, . . . ipso facto, an employee" creates a problem in that "Congress perceived a need to limit the application

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[183] *Id.*

[184] *See Wheeler*, 825 F.2d at 269, 273.

of these [employment discrimination] statutes" to employment practices rather than all business relationships.[185]

Despite these criticisms, it is clear that the burden of proof in these cases is of vital importance. If there were a rebuttable presumption of covered employee status available,[186] then plaintiffs who meet the threshold requirements would at least survive a motion to dismiss and obtain the opportunity to develop a record at trial. Adopting such an evidentiary scheme is one way that plaintiffs could get a better opportunity to convince a judge or jury of the credibility of their claim and status.[187] This case by case approach has distinct advantages for involuntarily expelled partners and shareholders who seek to establish the viability of their claims, but there still must be criteria for determining who is entitled to such a presumption. Without such criteria, the rebuttable presumption would circumvent the intended exemptions from the statutes' coverage, once again providing more expansive coverage than Congress intended.

VII. CONCLUSION

Greater clarity from the courts or Congress would allow business organizations both large and small to evaluate exposure to federal antidiscrimination laws. Adopting the economic realities approach over the corporate form approach is the first step in putting all business organizations on notice that it is the nature of the relationship, not the title, that determines who may sue under the statutes. Specifying which criteria are the most critical in determining employer or employee status is the current challenge. In doing so, Congress or the courts must be aware of the two distinct types of lawsuits involving disputed status under the statutes. Suits such as *Wells*, involving small firms, where an employee seeks to categorize shareholders as employees to satisfy the jurisdictional minimum should be approached differently than suits, such as *Sidley*, where the

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[185] *Id.* at 275-76, citing Hickey v. Arkla Indus., Inc., 699 F.2d 748, 752 (5th Cir. 1983).

[186] *See* Dawn S. Sherman, *Partners Suing the Partnership: Are Courts Correctly Deciding Who is an Employer and Who is an Employee Under Title VII?*, 6 WM. & MARY J. WOMEN & L. 645, 662 (2000) (recommending this presumption).

[187] See, for example, *Simpson v. Ernst & Young*, 100 F. 3d 436 (6th Cir. 1997), where a full record was developed at trial and the plaintiff accountant was deemed an employee for purposes of the ADEA, ERISA, and for state law claims, despite the fact that plaintiff was a titular partner, and was liable for firm losses.

issue involves charges of discrimination against individuals who may or may not be employees entitled to protection of the federal antidiscrimination statutes.

ADDENDUM

As this article went to press, the United States Supreme Court issued its opinion in *Clackamas v. Wells*.[188] The decision resolved the split among the Circuit Courts of Appeal about the appropriate test to use in determining who is a covered employee under federal employment discrimination statutes. The Court in *Clackamas* endorsed a test that is similar to the economic realities test while ruling on the question whether shareholders in a professional corporation count as employees toward the jurisdictional minimum for coverage of the ADA.[189] The Supreme Court reversed the Court of Appeals for the Ninth Circuit, which had used the corporate form approach to find that the physician shareholders counted as employees toward the required fifteen employee threshold. While the Court remanded the case back to the lower court to review the status of the critical four director shareholders, it also indicated that some of the district court's findings of fact seemed to weigh against a determination that the physicians would qualify as employees, in light of their apparent control and operation of the clinic, profit sharing, and personal liability for malpractice claims.[190] The Court emphasized that the "common law element of control is the principal guidepost" in distinguishing employers from employees.[191] Further, it advocated use of EEOC guidance on who is a covered employee, guidance that lists six factors to differentiate those who act independently and participate in managing the organization from those who are subject

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[188] 123 S.Ct. 1673 (2003).

[189] Justice Stevens authored the majority opinion for the Court; Justice Ginsberg wrote a dissent in which she was joined by Justice Breyer. *Id.* at 1681. The dissent would affirm the judgment of the Court of Appeals, finding that the physician shareholders were employees working for the corporation. *Id.* at 1681-83.

[190] *Id.* at 1681. The Court noted also that other facts on the record "may contradict those findings or support a contrary conclusion under the EEOC's standard that we endorse today." *Id.* These included that the four physician shareholders receive salaries, must comply with standards established by the clinic, and report to a personnel manager. *Id.* at n.11.

[191] *Id.* at 1679.

to the control of the organization.[192] The Supreme Court made clear that the same rules apply to different forms of business organizations, and thus to shareholders and partners alike. The majority opinion made no distinction between counting cases where the jurisdictional minimum must be achieved, and claimant cases where the purported victim of discrimination must qualify as an employee.[193] Potentially, the *Clackamas* decision may enlarge the coverage of the federal employment discrimination statutes because partners may qualify as employees when they have minimal control in larger partnerships "where control is concentrated in a small number of managing partners."[194]

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[192] *Id.* at 1680, citing EEOC COMPLIANCE MANUAL DIRECTIVES TRANSMITTAL No. 915.003 (2000), *supra* note 110. The *Clackamas* Court also relied upon *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 322-23 (1992) for the proposition that where Congress refers to 'employee' without further definition, the common law definition of master-servant relationship from the RESTATEMENT (SECOND) OF AGENCY is inferred. *See Clackamas*, 123 S.Ct. at 1677-78.

[193] The dissent appeared to express particular concern for counting cases where the plaintiff is clearly an employee as opposed to a claimant shareholder. " [T]he determination whether the physician-shareholders are employees of Clackamas affects not only whether they may sue under the ADA, but also—and of far greater practical import—whether employees like bookkeeper Deborah Anne Wells are covered by the Act." *Id.* at 1683.

[194] *Id.* at 1678, comparing Hishon v. King & Spalding, 467 U.S. 69, 80, n.2 (1984) (Powell, J., concurring).