

# VICARIOUS LIABILITY UPDATE

DALLAS BAR ASSOCIATION

AUGUST 17, 2010

Stephanie L. Russ

Kirte M. Kinser



**MULLIN LAW, PC**  
ATTORNEYS & COUNSELORS



W R I G H T  
G I N S B E R G  
B R U S I L O W

*A Professional Corporation*

## Overview

- Legal standards for employment relationships
  - Common Law Test
  - “ABC” Test
  - Joint Employer Test
  - Consequences: Vicarious Liability
- Legal standards for principal/agent relationships
  - Control or right of control test
  - Instrumentality Rule (Kerl Test)
  - Consequences: Vicarious Liability
- Recent cases
- Practices to help avoid liability

## Common Law “Right to Control” Test

1. Does worker have right to control work details; control over manner and means; right to hire substitute workers without consent or knowledge?
2. Does worker have independent opportunity for profit or loss?
3. Has worker invested own funds in equipt. or materials?
4. Did services rendered require special skills?
5. What is the permanence of the relationship?
6. Was the service an integral part of “employer’s” business?
7. Are worker’s services available to general public on a continuing basis?
8. Is worker paid by “the job”; is worker responsible for incidental expenses?
9. How do the parties define the relationship?

## Common Law “Right to Control” Test

- Followed by federal government, 24 states, and District of Columbia:
  - Alabama, Arizona, California, D.C., Florida, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Washington, Wisconsin, & Wyoming
- Generally, the company’s “right to control” the worker, not the label the company places on the relationship, defines the relationship.
- No one factor is determinative.

## The “ABC” Test

Putative employer must show:

- A. Worker has been and will continue to be free from control and direction in connection with performance of services under the contract and in fact;
- B. Service performed is either outside the usual course of business or is performed outside of all the places of business of the company for which the service is performed; and
- C. Worker is customarily engaged in an independently established trade, profession, business of the same nature as that involved in the service performed.

## The “ABC” Test

- Followed in 26 states:
  - Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, and West Virginia
- Generally, the “ABC” Test imposes the “Right to Control” test in part A., plus the other two requirements, parts B. and C.

## Joint Employer Test

- Legal doctrine in which two independent entities are both considered to be employers of one entity's employees.
  - Does the putative joint employer have the authority to hire and fire employees, dictate work rules and assignments, and set conditions of employment such as compensation, benefits, and hours?
  - Is there day-to-day supervision of the employee, including the ability to discipline employees?
  - Does the putative joint employer have control over employee records, including payroll, insurance, and taxes?

## Joint Employer Test

- No one factor is determinative.
- A single criteria, if sufficiently strong can be enough to establish a joint employer relationship.
- If a joint employer relationship is established, both employers are equally liable for meeting obligations to the employee.

## Consequences of Employee/Employer Relationship Determination: Vicarious Liability

- Generally, a principal is liable for all torts committed by its employees while acting within the scope of their employment.
- The existence of an employer/employee relationship is a prerequisite to imposing vicarious liability onto the franchisor.
- Consequences: franchisor is liable for Title VII and wage and hours claims that are brought against franchisee/employee Title VII; class actions can be devastating.

## Traditional Principal/Agent Tests

- Actual Agency: Traditional right to control test adapted to the franchisor/franchisee relationship to determine if the relationship between the two rises to the level to impute vicarious liability to the franchisor.
  - Does the franchisor issue controls designed to primarily insure the uniformity and standardization of products and services versus controls designed to direct the details of the work?
- Apparent Agency

## Principal/Agent Instrumentality (Kerl) Test

- Does the franchisor have control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm?

*Viado v. Domino's Pizza, Inc.*, 230 Ore. App.  
531, 217 P.3d 199 (2009)

- Third-party negligence action.
- Court applied two-part agency analysis focused on “right of control.”
- Court recognized franchising as a specific business model.

*Viado v. Domino's Pizza, Inc.*, 230 Ore. App.  
531, 217 P.3d 199 (2009)

- Franchisee was agent of franchisor because of “right of control.”  
*If in practical effect, the franchise agreement goes beyond the stage of setting standards and allocates to the franchisor the right to exercise control over the daily operation of the franchise, an agency relationship exists.*
- Franchisee’s employee was a subagent of franchisor.
- Franchisee and its employee were NOT employees of franchisor; right of control did not extend to “method” by which franchisee performed its obligations – drawing distinction between right to control over end result and the “details” of how to reach results.

*Viado v. Domino's Pizza, Inc.*, 230 Ore. App.  
531, 217 P.3d 199 (2009)

- No vicarious liability *as a matter of law*; right of control did not extend to the *specific* conduct giving rise to the tort claim – the claim was for negligent operation of vehicle, not negligent training or violation of a standard set by franchisor. Franchisor did not have right to control “*the physical details of the manner of driving.*”
- Distinction in liability standards – employer is responsible for all conduct within scope and course of employment; non-employer principals only liable for results intended or authorized by principal or the manner of performance of that act.

*Jason Roberts, Inc. v. Administrator*  
*Unemployment Compensation, 2009 Conn.*  
Super. LEXIS (2009)(unreported)

- Request for unemployment benefits.
- Court applied ABC Test.
- Franchisor relied solely on terms of Franchise Agreement.

*Jason Roberts, Inc. v. Administrator*  
*Unemployment Compensation, 2009 Conn.*  
Super. LEXIS (2009)(unreported)

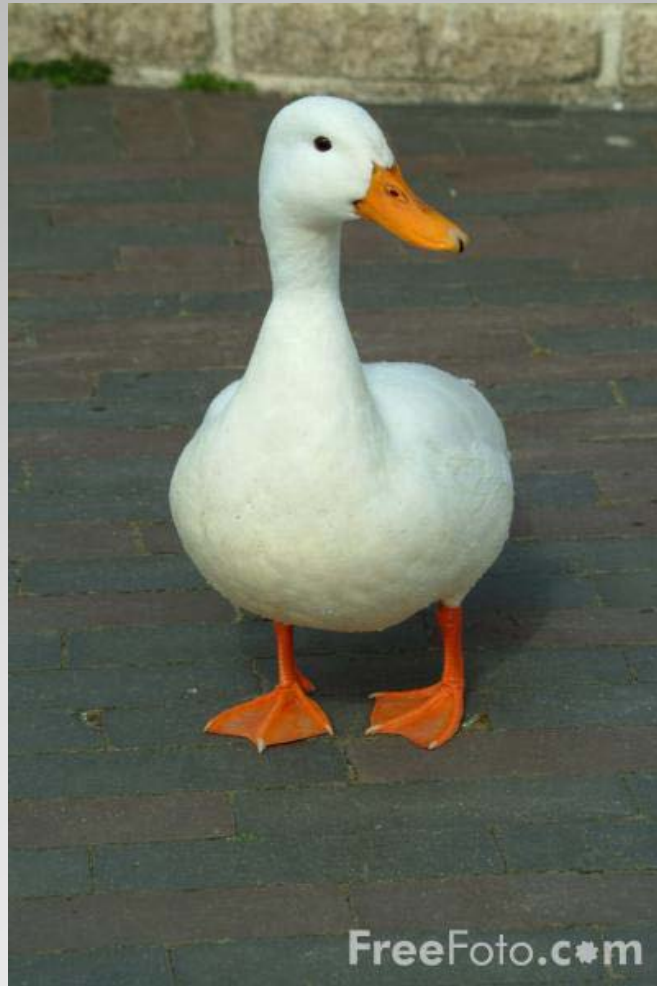
- Franchisor in fact controlled franchisee on day-to-day operations.
- Franchisee performed services only for franchisor.
- Franchisee had no true independence.

*Awuah v. Coverall North America, Inc.*, 563  
F. Supp 312 (D. Mass. 2008)

- Action to determine employment status.
- Used modified statutory “ABC Test” (employer’s burden).  
*The service is performed outside the usual course of the business of the employer.*
- Court did not recognize franchising as a unique business model.

*Awuah v. Coverall North America, Inc.*, 563  
F. Supp 312 (D. Mass. 2008)

- Franchisor is employer of franchisee.
- Franchisor is not in the business of franchising; it is in the business of the services provided by the franchisee.
- Otherwise, franchising is a “Ponzi scheme.”



FreeFoto.com

## Best Practices to Help Avoid Liability

- Require that all franchisees incorporate and be “employed” by some entity.
- Give serious consideration as to which actions are needed to provide system uniformity versus those that are not: “required” versus “recommended.”
- Do not impose HR/employee polices.
- Make sure Item 1 description in the FDD describes the business as selling franchises and developing products or services.

**Stephanie L. Russ**

**972-852-1710**

**stephanie.russ@mullinlawpc.com**



**MULLIN LAW, PC**  
ATTORNEYS & COUNSELORS

**Kirte M. Kinser**

**972-788-1600**

**kkinser@wgblawfirm.com**

  
W R I G H T  
G I N S B E R G  
B R U S I L O W

*A Professional Corporation*