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Victoria Arend Carbone

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LABOR AND EMPLOYMENT LAW—THE CASE OF
CAMARGO AND THE CONUNDRUM OF DEFINING WORKER
STATUS UNDER MASSACHUSETTS WORKPLACE LAWS

*Victoria Arend Carbone**

A worker's status as an "employee" or "independent contractor" determines the amount of protection she will receive under a vast array of workplace laws. However, the definitions of "employee" and "independent contractor" are increasingly misapplied in today's labor market. The resulting worker misclassification is a widely recognized problem that prevents workers from knowing and asserting their rights. Incongruous statutory standards for defining worker status exacerbate worker misclassification. In Ives Camargo's Case, the Massachusetts Supreme Judicial Court contended with such incongruities in a decision that determined the correct standard for defining who is an "employee" and "independent contractor" under Massachusetts workers' compensation law. The court's holding affirmed the Commonwealth's current definitional system for worker status in which, paradoxically, "the same worker can be an employee for one purpose but an independent contractor for another."¹ This Note will argue that the Massachusetts Supreme Judicial Court missed an opportunity in Camargo to clarify the incongruous standards used to define worker status in Massachusetts. In the wake of Camargo, this Note calls for a uniform definition of "independent contractor" across the Commonwealth's workplace laws.

* Candidate for J.D., Western New England University School of Law, 2020; M.A., University of Massachusetts Amherst, 2014; B.A., Bennington College, 2010. I would like to thank Professor Harris Freeman for his mentorship throughout the writing of this Note. I would also like to extend my thanks to the staff of the *Western New England Law Review* for their tireless efforts in preparing this piece for publication. Finally, to my mom, Mary, and my husband, Nick—thank you for your unending love, patience, and support.

1. *Ives Camargo's Case*, 96 N.E.3d 673, 682 (Mass. 2018) (Gants, C.J., concurring).

INTRODUCTION

Ives Camargo worked as a newspaper delivery person. Between 2001 and 2012, Camargo delivered newspapers for Publishers Circulation Fulfillment (PCF),² a company that provides delivery services to print media publishers.³ These publishers contract with PCF to provide “final mile” distribution services to their customers.⁴ PCF, in turn, hires “delivery providers,”⁵ like Camargo, to deliver the newspapers and magazines to subscribers’ homes.⁶

During the course of her employment as a delivery agent with PCF, Camargo signed various contractual agreements identifying herself as an independent contractor.⁷ Camargo made deliveries on a self-determined schedule and used her own vehicle to complete her route.⁸ She purchased independent contractor work insurance, and filed taxes as an independent contractor.⁹ Camargo felt compelled to sign the agreements in order to keep her job and so she signed them.¹⁰ Furthermore, because of the nature of the work Camargo performed for PCF—given that the deliveries she made were arguably central to their business—she considered herself a PCF employee.¹¹

Camargo likely did not think much about her employment status until she was injured on the job. During the course of her employment, Camargo was injured in two separate accidents while completing her delivery routes, both of which she reported to PCF.¹² After the second injury, PCF terminated Camargo,¹³ who subsequently filed a workers’ compensation claim with the Massachusetts Department of Industrial

2. *Id.* at 675–76.

3. *About PCF*, PCF, <http://pcfcorp.com/about/> [<https://perma.cc/TX49-3ENF>].

4. *Id.*

5. *Id.*

6. Michael C. Duff, *More Independent Contractor Confusion: A New Massachusetts Workers’ Compensation Decision*, WORKERS’ COMPENSATION LAW PROF BLOG (May 11, 2018), <https://lawprofessors.typepad.com/workerscomplaw/2018/05/more-independent-contractor-confusion-a-new-massachusetts-workers-compensation-decision.html>.

7. *Camargo*, 96 N.E.3d at 675.

8. *Id.*

9. *Id.*

10. Ives Camargo, 30 Mass. Workers’ Comp. Rep. 311, 2016 WL 7335381, at *1 (Mass. Dep’t Indus. Accidents Dec. 9, 2016).

11. *Camargo*, 96 N.E.3d at 675; *see also Camargo*, 2016 WL 7335381, at *3.

12. *Camargo*, 96 N.E.3d at 675–76.

13. *Id.* at 676.

Accidents (DIA),¹⁴ the state agency charged with overseeing the Commonwealth's workers' compensation system.¹⁵

At an initial hearing, the DIA found that Camargo was not an "employee" as defined by chapter 152 of the Massachusetts General Laws, the workers' compensation statute,¹⁶ and the *MacTavish-Whitman* test¹⁷—a twelve-factor common law test adopted by the agency to determine which workers are covered employees under Massachusetts workers' compensation law. The DIA denied Camargo's claim on the grounds that Camargo was an independent contractor, not an employee, of PCF.¹⁸ On appeal to the DIA Reviewing Board (Board), Camargo argued that the DIA hearing officer had used the incorrect standard to define her employment status. Instead of chapter 152 and the *MacTavish-Whitman* test, Camargo argued that her status must be defined under section 148B of chapter 149, the Massachusetts independent contractor statute. Camargo asserted that because the language of section 148B contained a reference to chapter 152, and therefore necessarily incorporated it,¹⁹ Camargo claimed that she was a "covered employee" under section 148B.²⁰ The Board was not convinced by this argument and affirmed the DIA's initial decision.²¹ Camargo appealed to the Massachusetts Supreme Judicial Court (SJC), arguing again that the wrong standard had been used to determine her employment status.²²

In *Ives Camargo's Case*,²³ the SJC was asked to resolve a statutory ambiguity concerning the definition of "employee" and "independent contractor" under Massachusetts workers' compensation law.²⁴ The court scrutinized two definitions: chapter 149, section 148B, of the Massachusetts General Laws (defining "independent contractor" under

14. *Id.* at 675.

15. *Department of Industrial Accidents*, MASS.GOV, <https://www.mass.gov/orgs/departments-of-industrial-accidents> [<https://perma.cc/4M3L-YZHD>].

16. MASS. GEN. LAWS ch. 152, § 1 (2019).

17. *Whitman's Case*, 952 N.E.2d 983 (Mass. App. Ct. 2011); *MacTavish v. O'Connor Lumber Co.*, 6 Mass. Workers' Comp. Rep. 174, 1992 WL 253660 (Mass. Dep't Indus. Accidents 1992).

18. *Ives Camargo*, 30 Mass. Workers' Comp. Rep. 311, 2016 WL 7335381, at *3 (Mass. Dep't Indus. Acc. Dec. 9, 2016).

19. *Id.* at 6.

20. *Camargo*, 96 N.E.3d at 675 (Mass. 2018).

21. *Ives Camargo*, 2016 WL 7335381, at *3.

22. *Id.*

23. *Camargo*, 96 N.E.3d at 675.

24. *Id.*

wage and hour and unemployment law);²⁵ and chapter 152 (defining “employee” for the purposes of workers’ compensation),²⁶ which the DIA interpreted by applying the twelve-factor *MacTavish-Whitman* test.²⁷ The definition under section 148B is an “ABC” test for employment status—a simple, three-factor test that creates a presumption of employee status and is more protective of workers than other standards.²⁸ The statutory definition under chapter 152 combined with the *MacTavish-Whitman* factors form a common law control test, assessing the amount of control an employer exercises over a worker.²⁹

This dispute over how to define “employee” and “independent contractor” is not a new one, particularly in the area of workers’ compensation.³⁰ Yet given the complexities of the employment relationship, especially as it has evolved in recent years, the matter remains unsettled.³¹ *Camargo* posed to the SJC a novel question of statutory interpretation regarding the age-old distinction between “employee” and “independent contractor,”³² challenging the court to investigate the incongruities of the Commonwealth’s approach to defining worker status.

Camargo thus presented the SJC with an opportunity to critically analyze the inconsistencies of Massachusetts workplace laws that confuse questions of worker status and thus increase the likelihood of misclassification in the Commonwealth. Instead of seizing this opportunity, the SJC deferred to agency judgment and carried out a cursory analysis of the two statutes at issue.³³ The majority’s opinion did not fully address the practical problems of such a system, merely explaining that the “lack of uniformity [] reflects differences in the

25. MASS. GEN. LAWS ch. 149, § 148B (2019).

26. MASS. GEN. LAWS ch. 152, § 1 (2019).

27. See *Whitman’s Case*, 952 N.E.2d 983 (Mass. App. Ct. 2011); *MacTavish v. O’Connor Lumber Co.*, 6 Mass. Workers’ Comp. Rep. 174, 1992 WL 253660 (Mass. Dep’t Indus. Accidents 1992).

28. See *Athol Daily News v. Bd. of Rev. of Div. of Emp. & Training*, 786 N.E.2d 365, 370–71 (Mass. 2003); *infra* Section I.B.3.

29. See *Ives Camargo’s Case*, 96 N.E.3d 673, 683 n.3 (Mass. 2018); *infra* Section I.B.1.

30. See *MacTavish*, 6 Mass. Workers’ Comp. Rep. at 177 (“The issue of who is an independent contractor and who is an employee has bedeviled the bar and bench since the beginning of workers’ compensation.”).

31. ROSA J. CHO ET AL., INT’L CTR. FOR RES. ON WOMEN, INDEPENDENT WORKERS AND THE CHANGING WORKPLACE 4–5, <https://www.icrw.org/wp-content/uploads/2016/11/Independent-Workers-and-the-Changing-Workforce-pdf.pdf> (2016) [<https://perma.cc/7J4P-8T4Q>].

32. *Camargo*, 96 N.E.3d at 675.

33. *Id.* at 678–680.

particular laws.”³⁴ The court held that the definition of independent contractor under section 148B does not apply in the context of a workers’ compensation claim, despite a reference to chapter 152 contained therein.³⁵ In a concurring opinion, Chief Justice Gants, joined by Justices Lowy and Budd, advocated for the Massachusetts legislature to take a more coherent approach to defining worker status.³⁶ On the whole, the decision overlooks the impact judicial action could have had.

Camargo exemplifies the definitional conundrum facing workers and employers across the country that is posed by a “patchwork of different standards for determining whether a worker is an employee or an independent contractor.”³⁷ The SJC declined to take judicial responsibility for a judicially solvable problem in *Camargo*—a decision that will likely have a detrimental impact on Massachusetts workers. This Note will argue that the SJC missed an opportunity in *Camargo* to clarify the Commonwealth’s inconsistent standards for defining who is an independent contractor under Massachusetts workplace laws, further obfuscating those laws’ remedial intent and increasing the likelihood of worker misclassification. In the wake of *Camargo*, this Note calls for a common standard for defining “independent contractor” across the Commonwealth’s workplace laws.

To demonstrate the necessity of such change, Part I will discuss the how incongruous definitional standards for worker status increase the threat of worker misclassification, identify the primary tests used to define employment status, and review the definitional standards at issue in *Camargo*. Part II will analyze the majority’s reasoning and the concurring opinion in *Camargo*. Part III will investigate the benefits and challenges of adopting a coherent approach to defining worker status, considering the example of Maine, which uses a common definitional standard. Furthermore, Part III will propose that a uniform definition of “independent contractor” under the ABC test of section 148B be applied consistently across Massachusetts workplace laws.

I. “EMPLOYEE” AND “INDEPENDENT CONTRACTOR”—AN

34. *Id.* at 680.

35. *Id.* at 681.

36. *Id.* at 683.

37. *Id.* at 681.

AMBIGUOUS DISTINCTION, A PLURALITY OF STANDARDS

Today's workers and employers struggle to understand their relationship with, and obligations to, one another.³⁸ In recent years, as the nature of work has changed drastically,³⁹ so, too, has the traditional employment relationship—a transformation indicative of the evolving nature of work and the workplace.⁴⁰ Employers rely less on permanent, full-time employees, and more on contingent, part-time workers and independent contractors,⁴¹ “shedding direct employment”⁴² in favor of what David Weil describes as a “fissured workplace,”⁴³ where the relationship between workers and employers has become more opaque.⁴⁴

“The modern employment relationship bears little resemblance to that assumed in our core workplace regulations.”⁴⁵ This makes it difficult for labor market participants to know their status and to follow the evolving legal definitions of worker and employer.⁴⁶ The problem is rooted in the workplace laws that govern the employment relationship.⁴⁷ Unclear and inconsistent standards for defining worker status remain a formidable obstacle to preventing misclassification.⁴⁸ In particular, inconsistent definitions of who is a covered “employee” and who is an “independent contractor” pose significant challenges⁴⁹ to the courts and agencies tasked with interpreting them.

38. See CATHERINE RUCKELSHAUS ET AL., NAT'L EMP'T LAW PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 1, 3 (2014), <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

39. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 7 (2014).

40. *Id.* at 7–9.

41. CHO ET AL., *supra* note 31, at 1–2.

42. WEIL, *supra* note 39, at 4. These changes have resulted in a “fundamental restructuring of employment in many parts of the economy.” *Id.* at 3.

43. *Id.* at 183.

44. *Id.* at 7. “The modern workplace has been profoundly transformed. Employment is no longer the clear relationship between a well-defined employer and a worker. . . . Like a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured.” *Id.*

45. *Id.* at 183.

46. See Mitchell H. Rubinstein, *Employees, Employers, and Quasi-employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 612–13 (2012).

47. *Id.*

48. *Id.* at 613.

49. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 119 (2009).

Such incongruities inherent to a “patchwork”⁵⁰ system for defining employment status were at the heart of *Camargo*.⁵¹ This Part of the Note will discuss the extent to which inconsistent standards for defining who is an “employee” and “independent contractor” aggravate the problem of worker misclassification; the principal standards used by legislatures, courts, and administrative agencies to define employment status; and finally, the definitional standards at issue in *Camargo*.

A. *The Menace of Misclassification*

When an employee is misclassified as an independent contractor, the effect is far more than semantic.⁵² Classification as an employee gives a worker access to a set of legal protections and benefits in the workplace.⁵³ Misclassification as an independent contractor causes workers to lose income, important benefits—such as those conferred by the workers’ and unemployment compensation systems—and legal protections guaranteed to employees, including safeguards against employer discrimination, and the right to unionize and collectively bargain.⁵⁴ By preventing access to

50. *Ives Camargo’s Case*, 96 N.E.3d 673, 682 (Mass. 2018).

51. *See generally id.*

52. *See Sarah Leberstein & Catherine Ruckelshaus, Independent Contractor vs. Employee: Why Misclassification Matters and What We Can Do To Stop It*, NAT’L EMP’T LAW PROJECT 3–4 (May 2016), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>. Federal, state, and local governments also experience the burden of misclassification, losing millions of dollars in revenue as a result of unpaid payroll taxes, and decreased employer contribution to unemployment and workers’ compensation funds. *Id.* at 4. Employers also lose out, as those who properly classify workers are unfairly burdened due to the other employers’ opportunistic application of employee/independent contractor statutes. *Id. See also* Buscaglia, *supra* note 49, at 111–12.

53. Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666–67 (2013); Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 61 (2015); Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 115–16 (2018). A number of protections afforded by workplace laws are available only to employees and not to independent contractors or other categories of workers:

Prohibitions against race, sex, age, and disability discrimination, below-minimum wages, dangerous working conditions, retirement funding requirements, and attacks on collective activity, among others, are limited to employees. State employment provisions such as workers’ compensation and unemployment compensation are also limited to employees. These statutory schemes are designed to provide protections to employees as employees and not to any other groups, even if those outside the employee category might benefit from the scheme.

Id. (citations omitted).

54. Leberstein & Ruckelshaus, *supra* note 52, at 3.

the protections workplace laws were designed to confer, misclassification creates a broad class of vulnerable labor market participants.⁵⁵

While instances of misclassification proliferate in particular industries, including home care, transportation, and the “on-demand” or “gig” economy, the problem is pervasive, its scope likely more vast than current data reflects.⁵⁶ Misclassification has a cross-sectional reach that knows no geographical bounds, crossing state lines, and impacting workers in every corner of the nation.⁵⁷ Many employers, motivated by economic incentives to save money⁵⁸ and avoid liability,⁵⁹ take advantage of a shifting labor landscape and increasingly misclassify workers.⁶⁰

The federal government has taken considerable steps to combat misclassification in the last decade.⁶¹ But states have played an even more critical enforcement role in seeking to hold employers accountable.⁶² Notably, Massachusetts was one of the first states to focus on the problem,⁶³ crafting legislation to target misclassification⁶⁴ and

55. See Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 121–22 (2009–2010).

56. See Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP’T LAW PROJECT 1–2 (Sept. 2017), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/> [<https://perma.cc/SXK2-RDPQ>].

57. Leberstein & Ruckelshaus, *supra* note 52, at 1.

58. See Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 71–72 (2013).

59. V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 79 (2017) (“[T]he vagueness of worker categorization tests incentivizes employers to drive a greater number of their workers into a zone of ambiguity, thereby lowering employers’ financial and legal risks.”); Pivateau, *supra* note 58, at 71–72.

60. Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1681 (2016); Ruckelshaus & Gao, *supra* note 56, at 1.

61. U.S. DEP’T OF LABOR, WORKING FOR YOU: U.S. DEPARTMENT OF LABOR 2009–2016 6 (2016), <https://web.archive.org/web/20190702204638/https://www.dol.gov/sites/default/files/WorkingForYou-2009-2016.pdf> [<https://perma.cc/VV5U-XU9P>]; see also Deknatel & Hoff-Downing, *supra* note 53, at 62 (“Simultaneous to local misclassification legislating and enforcement, federal enforcement has expanded, led primarily by the Department of Labor (DOL) and the Internal Revenue Service (IRS).”).

62. See Moran, *supra* note 55, at 105. See generally Adam H. Miller, *Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve a National Problem*, 39 VT. L. REV. 207 (2014).

63. Jason M. Goldstein, *Money Under the Bridge: The Worker Misclassification Problem*, 5 FLA. A & M U. L. REV. 107, 125, 127 (2009).

64. Deknatel & Hoff-Downing, *supra* note 53, at 65 (discussing legislative amendments to the Massachusetts independent contractor statute that incorporated the ABC test—a worker-protective standard creating a presumption of employment).

establishing a task force to combat “the underground economy and employee misclassification.”⁶⁵

Efforts to combat misclassification do not address a major obstacle: a plurality of definitional standards used to define worker status. In general, “[m]ost employment laws in the United States at the state and federal level define ‘employee’ according to stated objectives of the individual statute. This has led to varied—and highly contested—debates on who is or is not an employee.”⁶⁶ Numerous definitions of “employee” and “independent contractor” proliferate, laid out by various federal and state statutes.⁶⁷ Additionally, states use discrete definitions for different areas of work laws.⁶⁸ Consequently, numerous definitions of “employee” and “independent contractor” are used within the same state—one definition applying to workers’ compensation, another to unemployment insurance, and yet another to wage and hour laws.⁶⁹ Furthermore, courts and administrative agencies tasked with interpretation and enforcement seek to clarify the meaning of these statutes,⁷⁰ often crafting common law tests to be interpreted alongside existing statutory language.⁷¹ The result

65. COUNCIL ON THE UNDERGROUND ECONOMY, ANNUAL REPORT 2015 3 (2015), <https://www.mass.gov/files/2017-07/cue-annual-report-2015.pdf> [https://perma.cc/Q86F-GF4Z]. Massachusetts Attorney General Maura Healy has also highlighted the significance of the problem. Press Release, Office of Attorney Gen. Maura Healey, AG Healey Leads Multistate Effort to Curb Misclassification of Workers (Apr. 30, 2018), <https://www.mass.gov/news/ag-healey-leads-multistate-effort-to-curb-misclassification-of-workers>. In April 2018, Attorney General Healey joined in a coalition of twelve state attorneys general to file an amicus brief in an action before the National Labor Relations Board to support a finding that the purposeful misclassification of workers as independent contractors can constitute an unfair labor practice. Brief of the States of Mass. et al. as Amici Curiae, in Support of the General Counsel’s Request to Affirm the Administrative Law Judge’s Decision at 2, *Velox Express, Inc. v. Edge*, (2018) (No. 15-CA-184006), <https://www.mass.gov/files/documents/2018/04/30/Amici%20States%20Brief%20Velox%204-30-18.pdf> [https://perma.cc/8792-L49H]. The amici argued that “[m]isclassification not only denies workers the most basic statutory protections, such as the right to be paid minimum wage and to be paid on time, but it also contravenes their right to organize for better pay and working conditions,” among other rights. *Id.* at 2–3.

66. WEIL, *supra* note 39, at 20–21.

67. *See* Dubal, *supra* note 59, at 71–73; Goldstein, *supra* note 63, at 109–15; Rubinstein, *supra* note 46, at 612–625.

68. *See infra* Section I.B.

69. *See generally* Moran, *supra* note 55 (discussing the impact of conflicting worker classification standards on New York state).

70. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298 (2001) (“The real work of identifying ‘employees’ and their employment relationships has always been in the courts.”).

71. *See, e.g.*, *MacTavish v. O’Connor Lumber Co.*, 6 Mass. Workers’ Comp. Rep. 174, 1992 WL 253660 (Mass. Dep’t Indus. Accidents 1992).

of this impracticable approach is “an ever-expanding catalogue of ‘factors’” creating an unwieldy “multi-factored analysis [which] becomes more complex and its outcome less predictable.”⁷² Ultimately, “the lack of statutory and judicial clarity has contributed to the problem of misclassification.”⁷³ These inconsistent standards have created significant confusion, frustrating efforts to properly classify workers.⁷⁴

B. *Principal Standards for Defining “Employee” and “Independent Contractor”*

Three main tests define employment status:⁷⁵ the common law control test, the economic realities test, and the ABC test, or variations thereof.⁷⁶ Each of these tests, traditionally used in distinct areas of workplace law,⁷⁷ focuses on different aspects of the employment relationship to reach a definition of who is a covered “employee” and who is not.⁷⁸

1. Control Test

Under the common law control test, the amount of control exerted by an employer over a worker is paramount to determining whether a worker is an employee or independent contractor.⁷⁹ The test is founded on tort principles found in the Second Restatement of Agency.⁸⁰ The test is aimed at ascertaining the circumstances under which an employer is liable for the actions of someone in her employ. In this way, “employment is used as the basic dividing line in the doctrine of respondeat superior”⁸¹ to determine whether an agency relationship, and the resulting employer liability, exists. Forms vary, but the test usually includes a list of non-dispositive factors weighed alongside one another to assess the amount of

72. *Id.* at 299.

73. Rubinstein, *supra* note 46, at 613.

74. *See* Buscaglia, *supra* note 49, at 127.

75. Dubal, *supra* note 59, at 72 (providing a useful comparison of the different tests, identifying the dispositive factors of each and the employment protections or benefits with which they are associated).

76. *Id.*

77. Moran, *supra* note 55, at 107–08.

78. Dubal, *supra* note 59, at 72.

79. Brigham’s Case, 202 N.E.2d 597, 598 (Mass. 1964).

80. RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining an employee, or “servant,” as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”); *see* John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on From a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 28 (2018).

81. Bodie, *supra* note 53, at 668.

control exercised by the employer in a given employment relationship.⁸² A form of the control test is used in a number of federal statutes to define employment status, including the National Labor Relations Act of 1935 (NLRA), Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act.⁸³ State workers' compensation laws also define employment status using a form of the control test.⁸⁴

The Supreme Court highlighted the limitations of the control test in *National Labor Relations Board v. Hearst Publications*, where the Supreme Court sought to determine whether unionized newspaper delivery boys were considered "employees" under the NLRA.⁸⁵ The Court found, first, that the common law control test was limited; and, second, that the legislative intent of the NLRA was a necessary consideration in determining the workers' status.⁸⁶ In its analysis, the Court highlighted the protective nature of the act,⁸⁷ finding that employee status must be "determined broadly" under the NLRA, and "in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."⁸⁸ This noted departure from the control test was later rejected by the Court and the use of the test solidified.⁸⁹

Despite its prevalence, the control test has significant drawbacks. Any single factor of the common law control test can be weighed more heavily than the others by courts or agencies. This renders the test prone to producing inconsistent results because of this multifactor analysis. Two recent cases involving the same employer (FedEx) and workers employed in the same position (delivery drivers) gave rise to contrary findings under the control test: in one, FedEx workers were found to be employees;⁹⁰ in the other, they were deemed independent contractors.⁹¹ In *FedEx Home*

82. See, e.g., *MacTavish v. O'Connor Lumber Co.*, 6 Mass. Workers' Comp. Rep. 174, 177, 1992 WL 253660 (Mass. Dep't Indus. Accidents 1992). *MacTavish* borrowed from the Second Restatement to create a ten-factor test to assess worker status in workers' compensation claims. See *infra* Section I.C.1.

83. See *Dubal*, *supra* note 59, at 72–74.

84. *MacTavish*, 6 Mass. Workers' Comp. Rep. at 177; *Brigham*, 202 N.E.2d at 598.

85. *N.L.R.B. v. Hearst Publ'ns*, 322 U.S. 111 (1944).

86. *Id.* at 120–21, 136.

87. *Id.* at 127–29.

88. *Id.* at 129.

89. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–25 (1992) (characterizing *Hearst* as "feeble precedent[] for unmooring the term [employee] from the common law."). *Id.* at 324. See also *Pearce & Silva*, *supra* note 80, at 6–8.

90. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014).

91. *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 503 (D.C. Cir. 2009).

Delivery v. National Labor Relations Board, the D.C. Circuit placed a greater emphasis on the entrepreneurial opportunity enjoyed by FedEx delivery drivers in comparison to the other common law factors, concluding that the drivers were independent contractors.⁹² Conversely, in *Alexander v. FedEx Ground Packaging System*, the Ninth Circuit placed significant weight on FedEx's control of the "manner and means" of the work performed by its drivers, ultimately concluding that this control demonstrated employee status.⁹³ The *FedEx* cases demonstrate the disadvantages of the control test, whose multifactor analysis sets the stage for inconsistent application.

2. Economic Realities Test

The economic realities test is more expansive than the common law control test and is therefore more protective of workers.⁹⁴ This test focuses on the financial aspects of the employment relationship. It is used under certain federal wage and hour laws, including the Fair Labor Standards Act.⁹⁵ The economic realities test recognizes that "[w]orker status is not based on the work itself, but on the financial reality that accompanies the work."⁹⁶ The test's objective is to determine whether a worker is economically dependent on an employer.⁹⁷ Factors analyzed under the test include the degree of control the employer has over the worker, the workers' opportunity for profit or loss, and the importance of the work done to the employer's business, among others.⁹⁸ There is an overlap between the common law control test and the economic realities test; some courts have also used a hybrid form of the two.⁹⁹

3. ABC Test

Similar to the common law control test, the ABC test focuses on the aspect of control in the employment relationship.¹⁰⁰ The ABC test's analytical framework, however, is much simpler than that of the control

92. *Id.* at 497.

93. *Alexander*, 765 F.3d at 989.

94. Carlson, *supra* note 70, at 311.

95. Pivateau, *supra* note 58, at 89.

96. *Id.*

97. *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 632 (1st Cir. 1996).

98. Pivateau, *supra* note 58, at 90.

99. *Speen*, 102 F.3d at 630 (observing that some courts use a test that combines an economic realities analysis with a common law control analysis).

100. Dubal, *supra* note 59, at 72.

test,¹⁰¹ which can be both a strength and a weakness, paradoxically flexible and rigid at the same time.¹⁰² This test is often used in the context of unemployment insurance¹⁰³ and state wage and hour laws.¹⁰⁴ It has also “come to dominate reform of independent contracting definition laws,”¹⁰⁵ particularly because it creates a presumption of employment.¹⁰⁶

In general, the ABC test is more protective of workers in that it “create[s] a presumption of employee status . . . that shifts the burden of proof to an employer to show that an individual is *not* an employee.”¹⁰⁷ “Although ABC standards differ by state, a common formulation begins with the presumption that firms employ the workers whom they hire.”¹⁰⁸ The test encompasses three factors:¹⁰⁹ (1) whether the worker is free from control or direction in the performance of the work; (2) whether the work is done outside the usual course of the company’s business and off the premises; and (3) whether the worker is usually considered to operate a separate, independent business or trade.¹¹⁰ The presumption of “employee” status can only be overcome if these three elements are met.¹¹¹

C. Definitions of “Employee” and “Independent Contractor” at Issue

101. *Id.*

102. See Ben Davies, Independent Study, *Independent Contractor or Employee? A Brief Review and Critique of State and Federal Tests to Determine if Workers Should be Classified as Independent Contractors or Employees*, 31 (Dec. 2, 2018) (made available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316441) (“[T]he ABC’s three prongs allow for flexibility by the courts when applying the test. This is both a strength and a weakness since employee status is easier to find but misapplications and judicial overreach happen more often.”).

103. *Id.*

104. WEIL, *supra* note 39, at 205.

105. Deknatel & Hoff-Downing, *supra* note 53, at 65.

106. Pivateau, *supra* note 58, at 85. The test’s simplicity has advantages and disadvantages:

Its variance with federal law tests [which] means that workers that fall within the federal definition of independent contractors may be considered employees under the state law test. The test involves such a broad scope that it may reach workers in areas that are traditionally independent contractors, while at the same time, preventing the growth of the employment market.

Id.

107. WEIL, *supra* note 39, at 205.

108. Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 NORTHERN ILL. L. REV. 379, 409 (2019).

109. *Athol Daily News v. Bd. of Review of Div. of Emp. & Training*, 786 N.E.2d 365, 370 (Mass. 2003).

110. Dubal, *supra* note 59, at 72.

111. Cunningham-Parmeter, *supra* note 108, at 409.

in Camargo

In Massachusetts, several statutory definitions distinguish employees and independent contractors.¹¹² In general, these laws create a strong presumption of employee status.¹¹³ However, this presumption is not universal; its impact is diluted by incongruities in the Commonwealth's statutory scheme. There are distinct statutory definitions of who is an employee under workers' compensation,¹¹⁴ unemployment insurance,¹¹⁵ wage and hour,¹¹⁶ and labor and industry standards.¹¹⁷ For the purposes of this Note, the discussion will focus solely on the definition of "employee" under chapter 152 and the *MacTavish-Whitman* test, and the distinction between "independent contractor" and "employee" in the section 148B of chapter 149, at issue in *Camargo*.

1. Definition of "Employee" Under Chapter 152

The question of who is an employee and who is an independent contractor under workers' compensation law has "bedeviled the bar and bench"¹¹⁸ in Massachusetts for more than a century.¹¹⁹ Since the introduction of the workers' compensation system, employers have raised the independent contractor defense in disputes concerning worker status.¹²⁰ Today under chapter 152,¹²¹ an employee is defined as "every person in the service of another under any contract of hire," excepting certain specified categories of workers.¹²² To interpret this standard, Massachusetts courts have used a form of the control test to define the

112. *Ives Camargo's Case*, 96 N.E.3d 673, 679 (Mass. 2018).

113. *See Depianti v. Jan-Pro Franchising Intern, Inc.*, 990 N.E.2d 1054, 1067 (Mass. 2013) (discussing the presumption of employee status under MASS. GEN. LAWS ch. 149, § 148B).

114. MASS. GEN. LAWS ch. 152, § 1 (2019).

115. MASS. GEN. LAWS ch. 151A, § 2 (2019).

116. MASS. GEN. LAWS ch. 151 (2019).

117. MASS. GEN. LAWS ch. 149 (2019).

118. *MacTavish v. O'Connor Lumber Co.*, 6 Mass. Workers' Comp. Rep. 174, 177, 1992 WL 253660 (Mass. Dep't Indus. Accidents 1992).

119. The Workmen's Compensation Act of 1911 was a predecessor of the state's current workers' compensation law. MASS. GEN. LAWS ch. 152. Original enactment, St. 1911, c.751. It established an elective, no-fault system meant to compensate workers for injuries suffered "in the course of and arising out of" employment. *In re Madden*, 111 N.E. 379, 384 (Mass. 1916).

120. *In re McAllister*, 118 N.E. 326, 326 (Mass. 1918).

121. MASS. GEN. LAWS ch. 152, § 1(4) (2019).

122. The exceptions include, but are not limited to, real estate agents, salespeople working on commission, taxi drivers, and persons whose employment "is not in the usual course of the trade, business, profession or occupation of his employer." *Id.*

employment relationship in workers' compensation disputes¹²³ and to determine "whether the employer retained authority to direct and control the work, or had given it to the claimant."¹²⁴ The right of an employer to "direct and control" a worker has thus been central to determining whether a worker is a covered employee or independent contractor in Massachusetts.¹²⁵

In the past twenty-five years, Massachusetts courts have also used a common law test developed by the DIA, the agency charged with investigating and adjudicating workers' compensation claims, when making determinations about worker status.¹²⁶ The DIA created the first version of this test in *MacTavish v. O'Connor*,¹²⁷ adapting a set of ten factors from the Second Restatement of Agency:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job.
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.¹²⁸

123. *In re McDermott*, 186 N.E. 231, 233 (Mass. 1933).

124. *In re McAllister*, 118 N.E. 326, 326 (Mass. 1918).

125. *MacTavish v. O'Connor Lumber Co.*, 6 Mass. Workers' Comp. Rep. 174, 177, 1992 WL 253660 (Mass. Dep't Indus. Accidents 1992); *Whitman's Case*, 952 N.E.2d 983, 988 n.4 (Mass. App. Ct. 2011) (citing *McDermott*, 186 N.E. at 232).

126. MASS. GEN. LAWS ch. 152, § 2 (2019).

127. *MacTavish*, 6 Mass. Workers' Comp. Rep. at 177 (citing RESTATEMENT (SECOND) OF AGENCY § 220 (1958)).

128. *Id.*

The ten-factor *MacTavish* test was later supplemented by two additional factors in *Whitman's Case*.¹²⁹ The *MacTavish-Whitman* test is an example of a right to control test¹³⁰ and has become central to analysis of worker status in Massachusetts workers' compensation claims.¹³¹

The DIA recognized the challenges of the *MacTavish-Whitman* test, noting that problems arise when there is no clear evidence, the evidence is mixed, or there are insufficient facts aligning with the above factors.¹³² In such circumstances, the Board concluded that the intent of workers' compensation law must be considered, noting that

[t]he issue must be addressed in the context of the theory of workers' compensation: that the cost of industrial accidents should be borne by the consumer as part of the cost of the product [A] worker whose services form a regular and continuing part of the employer's business, and whose method of operation is not such an independent business that it forms in itself a separate route through which his costs of industrial accidents can be channeled, should be found to be an employee and not an independent contractor.¹³³

So even where the multifactor analysis proves challenging in application, the DIA notes that the overarching purpose of the workers' compensation system provides guidance in determining whether a worker is an employee or independent contractor.

Most of the workplace laws in the Commonwealth presume workers to be employees,¹³⁴ such as for the purposes of unemployment insurance,¹³⁵ minimum wages and overtime, and for determinations of

129. *Whitman's Case*, 952 N.E.2d at 990 n.3 (adding the following two factors to the *MacTavish* analysis: the tax treatment of the workers' payment; and the right of the worker to end the employment relationship without liability).

130. *Infra* Section I.B.

131. *Ives Camargo's Case*, 96 N.E.3d 673, 681 (Mass. 2018); *Ives Camargo*, 30 Mass. Workers' Comp. Rep. 311, 2016 WL 7335381, at *1 (Mass. Dep't Indus. Accidents Dec. 9, 2016).

132. *MacTavish*, 6 Mass. Workers' Comp. Rep. at 177–78.

133. *Id.* at 178 (citing 1 LARSON WORKERS' COMPENSATION § 43.50, at 8–10).

134. *Camargo*, 96 N.E.3d at 682 (“Under wage and hour, minimum wage, and overtime laws, an individual who performs services is presumed to be an employee unless the employer can prove that he or she is in fact an independent contractor. The same holds true for purposes of unemployment insurance. But that presumption disappears in the context of workers' compensation, where the claimant bears the burden to prove his or her entitlement.”). *Id.* (citations omitted).

135. *See* MASS. GEN. LAWS ch. 151A, § 2 (2019).

Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this

independent contractor status.¹³⁶ However, chapter 152 does not create a presumption of employee status.¹³⁷ Rather, workers carry the burden of proving their employee status.¹³⁸

2. Definition of “Independent Contractor” and “Employee” Under Chapter 149, Section 148B

Under wage and hour law, section 148B¹³⁹ defines worker status using a form of the three-prong ABC test.¹⁴⁰ The statute is intended “to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees.”¹⁴¹ In 2004, the Massachusetts legislature amended section 148B of chapter 149 so that the language was more protective of workers, constituting a “simplified version of the common law ‘right to control’ factors with a presumption of employment surmountable only by satisfying a three-prong assessment commonly referred to as the ‘ABC test.’”¹⁴² This simplified test creates a strong presumption of employee status¹⁴³:

For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—

chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that—

(a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and

(b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Id. Cf. MASS. GEN. LAWS ch. 149, § 148B (2019).

136. MASS. GEN. LAWS ch. 149, § 148B (2019) applies to both determinations of status for minimum wages and overtime, and for independent contractor status.

137. *See* Ives Camargo’s Case, 96 N.E.3d 673, 682 (Mass. 2018).

138. *Connolly’s Case*, 668 N.E.2d 378, 380 (Mass. 1996).

139. MASS. GEN. LAWS ch. 149, § 148B (2019).

140. *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 747 (Mass. 2009).

141. *Depianti v. Jan-Pro Franchising Int’l, Inc.*, 990 N.E.2d 1054, 1066 (Mass. 2013) (quoting *Taylor v. E. Conn. Operating, Inc.*, 988 N.E.2d 408 (Mass. 2013)).

142. *Deknatel & Hoff-Downing*, *supra* note 53, at 65.

143. *Pearce & Silva*, *supra* note 80, at 28.

- (1) the individual is *free from control and direction* in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed *outside the usual course of the business* of the employer; and,
- (3) the individual is *customarily engaged in an independently established* trade, occupation, profession or business *of the same nature* as that involved in the service performed.¹⁴⁴

“[F]ailure to satisfy any prong will result in the individual’s classification as an employee.”¹⁴⁵ Additionally, the statute imposes a significant penalty for worker misclassification under the statute.¹⁴⁶

Under the first prong of the test, a showing that the worker’s activities are “carried out with minimal instruction” and with “little direction” contributes to a finding that a worker is an independent contractor under the statute.¹⁴⁷ The second prong of the test concerns whether the work done is “outside the usual course of the business.”¹⁴⁸ Factors considered under the second part of the test include whether the work performed is “necessary to the business” of the employer or is “merely incidental,”¹⁴⁹ and a business’ self-described purpose or mission.¹⁵⁰ The second prong is the most litigated of the three, disputes often arising over what constitutes an employer’s “usual course of business.”¹⁵¹ Finally, the “critical inquiry” under the third prong has focused on “whether ‘the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the

144. MASS. GEN. LAWS ch. 149, § 148B (2019) (emphasis added).

145. *Sebago v. Boston Cab Dispatch, Inc.*, 28 N.E.3d 1139, 1146 (Mass. 2015).

146. MASS. GEN. LAWS ch. 149, § 148B (2019). *See also* *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 750 (Mass. 2009) (“Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden.”).

147. *Sebago*, 28 N.E.3d. at 1149.

148. MASS. GEN. LAWS ch. 149, § 148B (2019).

149. *Sebago*, 28 N.E.3d at 1150.

150. *Carey v. Gatehouse Media Mass. I, Inc.*, 94 N.E.3d 420, 429 (Mass. App. Ct. 2018) (holding that newspaper delivery drivers employed by publishing company were employees and not independent contractors under section 148B because the publishing company had offered no evidence of the “actual operations” of the drivers’ work to satisfy the second prong of the statute).

151. *Id.* (discussing preemption of the second prong of section 148B by the Federal Aviation Administration Act of 1994 in a case concerning the employment status of a delivery driver employed by a newspaper publisher); *Sebago*, 28 N.E.3d. at 1150.

worker to depend on a single employer for the continuation of the services.”¹⁵²

While each of the definitional standards at issue in *Camargo* appears within its own statutory scheme, each does not exist in a vacuum. Rather they form part of a set of remedial laws designed to protect the rights of workers. The following Part will demonstrate the unique challenges facing agencies and courts when the relationship between these laws is conflicting or ambiguous. Moreover, this discussion will demonstrate the necessity of resolving statutory ambiguities in the interest of furthering their remedial purpose.

II. EMPLOYING A CONTRADICTION: CAMARGO CAUGHT IN A “PATCHWORK STATUTORY SCHEME”¹⁵³

In *Camargo*, the SJC examined a decision of the DIA Reviewing Board that denied newspaper delivery agent Ives Camargo eligibility for workers’ compensation on the grounds that she was not an employee of the company that had hired her.¹⁵⁴ The language under examination in *Camargo*—found in subsection (d) of section 148B of chapter 149—contained a reference to chapter 152:

Whoever fails to properly classify an individual as an employee according to this section *and in so doing violates chapter 152* [the workers’ compensation statute] shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter.¹⁵⁵

Camargo argued that this language suggested that the definition of “independent contractor” in section 148B applied to chapter 152, contending that the DIA Reviewing Board had erred by using the wrong standard in concluding that she was an independent contractor and not an employee.¹⁵⁶ Rather than resolving the ambiguity regarding the

152. *Sebago*, 28 N.E.3d. at 1153.

153. *Ives Camargo’s Case*, 96 N.E.3d 673, 682 (Mass. 2018).

154. *Id.* at 675.

155. MASS. GEN. LAWS ch. 149, § 148B(d) (2019) (emphasis added).

156. *Camargo*, 96 N.E.3d at 675. *See also* Brief for the Plaintiff-Appellant at 9, *Ives Camargo*, 96 N.E.3d 673 (Dec. 21, 2017) (No. 12368), 2017 WL 6943316.

application of the “independent contractor” definition, the SJC affirmed the Board’s determination, holding that section 148B did not apply to workers’ compensation.¹⁵⁷ Chief Justice Gants concurred with the majority’s conclusion. Nevertheless, he opined that practical problems arise from the current methods for defining employment status in Massachusetts. He suggested that the legislature confront them, rejecting a role for the court in resolving a contradictory statutory scheme.¹⁵⁸

This Part will suggest that the court’s holding represents an abdication of judicial responsibility that will likely exacerbate the problem of worker misclassification in the Commonwealth. The SJC missed an opportunity to clarify and support the remedial purpose of Massachusetts workplace laws. By deferring to agency judgment and assigning the problem to the legislature, the SJC failed to act on an issue that the court could have resolved, much to the detriment of workers in the Commonwealth. In order to understand the court’s failure to resolve the problem in *Camargo*, this Part will analyze the majority’s reasoning and assess the arguments presented in the concurring opinion.

A. *The Majority’s Cursory Conclusions*

When *Camargo* appealed the DIA’s decision, the Board considered the obvious inconsistencies in Massachusetts workplace laws, citing the presumption of employee status as a particular example.¹⁵⁹ The Board reasoned that because “a worker has the burden of proof to prove her employment status, as they do for all workers’ compensation claims,” no presumption of employee status exists in chapter 152, and thus section 148B does not apply.¹⁶⁰ The Board dismissed the ambiguous language at issue, rejecting the argument that the language had any bearing on determining which was the appropriate definitional standard to use for deciding worker status in workers’ compensation claims.¹⁶¹ The Board further noted that its ruling in *Camargo*’s case would create a greater divide among Massachusetts workplace laws, concluding that “by so ruling, three somewhat different tests for independent contractor status are discerned in Massachusetts jurisprudence, that being § 148B, G.L. c.

157. *Camargo*, 96 N.E.3d at 675.

158. *Id.* at 681.

159. *Ives Camargo*, 30 Mass. Workers’ Comp. Rep. 311, 2016 WL 7335381, at *5 (Mass. Dep’t Indus. Accidents Dec. 9, 2016), (observing that workers are presumed to be employees under the independent contractor statute and under the state’s unemployment statute).

160. *Id.* (citations omitted).

161. *Id.* at *5.

151A, § 2, and the *MacTavish-Whitman* factors.”¹⁶² On appeal to the SJC, Camargo contended that the Board had erred by failing to use 148B in defining her status.¹⁶³—her argument was again rejected. The SJC deferred to the DIA’s and Board’s judgment, holding that 148B did not apply to workers’ compensation.¹⁶⁴

The core issue before the SJC was one of statutory interpretation.¹⁶⁵ The court’s analysis, however, is more perfunctory than painstaking. First, the court deferred unquestioningly to agency judgment, accepting the DIA’s interpretation of chapter 152 and use of the *MacTavish-Whitman* factors.¹⁶⁶ Second, the court analyzed the ambiguous reference to chapter 152 within 148B with the assumption that the two statutes’ intents are distinct, failing to consider their common, remedial purpose.

1. Deference to the DIA

In general, state¹⁶⁷ and federal¹⁶⁸ administrative agencies receive significant deference from courts. The Supreme Court recognized the deference doctrine in *Chevron*, which solidified the power of an administrative agency to enforce and interpret statutes that fall within its legislatively determined enforcement authority.¹⁶⁹ When reviewing a statute that an agency administers, courts must first determine whether the legislative intent of the statute is ambiguous.¹⁷⁰ If not, and the legislative purpose is clear, then an agency’s statutory construction may stand only if expressive of that intent.¹⁷¹ If, however, a reviewing court determines the statute is ambiguous, the court may not reject an agency’s reasonable interpretation of a statute.¹⁷² A similar level of deference is due to an

162. *Id.* at *4–5.

163. *Ives Camargo’s Case*, 96 N.E.3d 673, 675 (Mass. 2018).

164. *Id.*

165. *Id.* at 678.

166. *Id.* at 677.

167. *Olmstead v. Dep’t of Telecomms. & Cable*, 999 N.E.2d 125, 132 (Mass. 2013) (“[W]e give deference to a reasonable interpretation by the agency implementing the statute”); *Flemings v. Contributory Ret. Appeal Bd.*, 727 N.E.2d 1147, 1148 (Mass. 2000) (“We give great deference to decisions of administrative agencies.”).

168. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” (footnote omitted)).

169. *Id.*

170. *Id.* at 842.

171. *Id.* at 843.

172. *Id.*

agency's interpretation of its own ambiguous regulation.¹⁷³ When reviewing an agency's construction of a statute that does not fall within its authority, courts are not required to defer to the agency's interpretation.¹⁷⁴

While agency deference is a well-established doctrine, it has received significant criticism, as evidenced by recent state court decisions¹⁷⁵ suggesting that it is not absolute. Moreover, the Supreme Court limited the deference doctrine in a recent decision involving agency regulatory construction,¹⁷⁶ which upheld the deference doctrine but narrowed its application,¹⁷⁷ leaving it "potent in its place, but cabined in its scope."¹⁷⁸

Massachusetts state agencies are given "considerable leeway" to interpret and enforce the statutes they are responsible for administering.¹⁷⁹ In *Camargo*, the DIA's interpretation of the workers' compensation law, chapter 152, was due—and was given—deference by the SJC.¹⁸⁰ Observing that the twelve-factor *MacTavish-Whitman* test had been used by the agency "for over one-quarter century," the court underlined the test's validity and emphasized its precedential value.¹⁸¹ Furthermore, the court noted that other jurisdictions use similar standards for defining

173. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

174. *Id.*

175. *See King v. Miss. Military Dep't*, 245 So.3d 404, 407–08 (Miss. 2018) ("[O]ur pronouncements on the deference due the agency have not been consistent and, especially in recent years, we have backed away from showing 'great deference' to agency interpretations of statutes. . . . [W]e announce today that we abandon the old standard of review giving deference to agency interpretations of statutes.").

176. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

177. The Court clarified agency—particularly *Auer*—deference in *Kisor*, noting that courts should not simply apply deference indiscriminately. Instead, courts must only apply the doctrine when a regulation is truly ambiguous. To do this, courts must "exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415. Then the reasonableness of the agency's interpretation must be assessed. Even then, even if an agency's construction is reasonable, deference may only be applied when the "character and context of the agency interpretation entitles it to controlling weight," *id.* at 2416, and when the regulatory interpretation reflects "fair and considered judgment." *Id.* at 2417.

178. *Id.* at 2408.

179. *Sy v. Mass. Comm'n Against Discrimination*, 950 N.E.2d 75, 79 (Mass. App. Ct. 2011) (quoting *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm'n*, 933 N.E.2d 74 (Mass. App. Ct. 2010)).

180. *Ives Camargo's Case*, 96 N.E.3d 673, 677 (Mass. 2018).

181. *Id.* at 676.

employment status under workers' compensation, providing persuasive support for the test's use by the DIA.¹⁸²

The SJC declined to consider the reasonableness of the *MacTavish-Whitman* test itself, noting conclusively, “[w]e owe deference to the department’s interpretation of the definition of employee under G.L. c. 152.”¹⁸³ The test was criticized by amici for Camargo as an “unwieldy, unclear, lengthy list of factors.”¹⁸⁴ The amici noted further that the test was developed by the agency as a necessary response to the “vague” definition of “employee” under chapter 152.¹⁸⁵ As the amici argued, the statutory definition of workers’ compensation has been “layered with factors imported from the common law through subsequent case law.”¹⁸⁶ The SJC did not analyze the agency’s standard nor consider its reasonableness. Moreover, the court demonstrated judicial hesitation and unwavering deference to a test that had only been in use by the DIA for twenty-five years when it declined to consider whether the *MacTavish-Whitman* test is still workable or should be changed.¹⁸⁷ The court consequently missed an opportunity to assess whether the *MacTavish-Whitman* factors still provide an adequate standard for distinguishing employees from independent contractors under Massachusetts workers’ compensation law.

182. *Id.*

183. *Id.* at 677–78.

184. Amicus Brief for Appellant at 16, Ives Camargo’s Case, 96 N.E.3d 673 (Dec. 21, 2017) (No. 12368), http://masscases.com/briefs/sjc/479/479mass492/SJC-12368_06_Amicus_Brazilian_Women_S_Group_Brief.pdf [<https://perma.cc/9NZW-6UEE>] [hereinafter Camargo’s Brief].

185. *Id.*

186. *Id.* at 22–23.

187. Multifactor tests like *MacTavish-Whitman* pose significant challenges to the courts and agencies tasked with interpreting them:

Once a court goes through the complicated and time-consuming process of determining which test to use, it must next apply complex tests involving a large number of factors. The tests vary in length and number of factors, ranging from the five exclusive factors . . . up to twenty nonexclusive factors While the factors may vary slightly between tests, many factors within any one test are similar and therefore can be overlapping, confusing the courts. . . . This makes it difficult for employers and employees to determine how they should define their relationship to be in accordance with the law, and also makes it difficult to generate predictable and consistent outcomes if a case is taken to court.

Pearce & Silva, *supra* note 80, at 17–18. See also *supra* Section I.B.

2. Perfunctory Reading of Section 148B

The SJC's analysis of section 148B emphasized both the limiting nature of the language at issue and the statute's distinct purpose as compared to chapter 152.¹⁸⁸ The language of the statute indicated that its sole application was "for the purpose of [G.L. c. 149] and [G.L. c.] 151," demonstrating to the court a purposeful exclusion of the workers' compensation statute from its scope.¹⁸⁹ The reference to chapter 152 was, according to the court, "specific and limited."¹⁹⁰ Furthermore, the court misconstrues the reference to chapter 151 in chapter 148B's misclassification penalty provision, concluding that violations of 148B and 152 are distinct despite statutory language indicating otherwise.¹⁹¹ Consequently, the court was satisfied that the Board correctly concluded that this language was not intended to replace the standards set by the statute and the *MacTavish-Whitman* factors.¹⁹²

The court's reading of section 148B, too, was "specific and limited." The statute, remedial in nature, is entitled to liberal construction;¹⁹³ its language should be read so as to effectuate the meaning to the whole statute rather than concentrate on a word or phrase in isolation.¹⁹⁴ Where two statutes are unified in purpose or in protecting the same class of people, ambiguous language may be read *in pari materia*¹⁹⁵ to discern the meaning of an ambiguous term in one statute based "on the meaning that

188. *Camargo*, 96 N.E.3d at 677 ("General Laws c. 149 provides specific benefits and protections to employees, including how often an employee must be paid, when an employee must be notified of wage deductions, and how much time an employee must be given for break periods during work.").

189. *Id.* at 678.

190. *Id.* at 679 (quoting MASS. GEN. LAWS ch. 152, § 1).

191. The court stated:

"We do not agree that subsection (d) of § 148B can be interpreted to include [G.L. c.] 152 in toto. The subsection addresses expanded penalties for misclassifying workers, not whether an individual is an employee or an independent contractor for the purpose of workers' compensation benefits The subsection's requirement that a party that misclassifies a worker in violation of § 148B(d) 'and in so doing violates [G.L. c.] 152' creates two criteria. The first is the violation of § 148B(d), the second is when that violation also violates [G.L. c.] 152."

Id. (quoting *Ives Camargo*, 30 Mass. Workers' Comp. Rep. 311, 2016 WL 7335381, at *5 (Mass. Dep't. Indus. Accidents Dec. 9, 2016)).

192. *Id.* at 679.

193. *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1066 (Mass. 2013).

194. *Bankers Life & Cas. Co. v. Comm'r of Ins.*, 691 N.E.2d 929, 932 (Mass. 1998).

195. *Commonwealth v. Smith*, 728 N.E.2d 272, 276 (Mass. 2000) (noting that statutes are to be read *in pari materia* "when the two statutes relate to the same class of persons or things or share a common purpose." (citing NORMAND J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01–03 (5th ed. 1992))).

has settled on the same language in [the] other legislation.”¹⁹⁶ Underscoring the remedial nature of the statutes, amici on behalf of Camargo emphasized the need for the court’s “liberal interpretation”¹⁹⁷ and “harmonious” reading “consistent with the legislative purpose of protecting the rights of employees.”¹⁹⁸ The two statutes, the amici argued, should be read *in pari materia* because they “relate to the same class of persons or things or share a common purpose.”¹⁹⁹ Furthermore, such a reading would support the intent of the legislature’s 2004 amendments to 148B²⁰⁰—including the language in section (d) referencing chapter 152—which demonstrated an intent to “broaden [its] scope and relevance.”²⁰¹ While amici gloss over language in section 148B defining the statute’s scope,²⁰² giving primacy to the reference to chapter 152 in section (d),²⁰³ their argument makes an important point: that the two statutes at issue share a common purpose and should be read together.

The SJC, however, summarily dismisses the argument that the two statutes should be construed *in pari materia*.²⁰⁴ The court cites very little case law to support its conclusion that the purposes of the statutes are distinct.²⁰⁵ The court found that the incongruities in Massachusetts workplace laws are intentional, noting that “laws have imposed different, and not uniform, definitions of employees and independent contractors It is thus not uncommon to have competing definitions of the same word where the purposes of the respective statutes are different.”²⁰⁶ Moreover, “[t]his lack of uniformity also reflects differences in the particular laws.”²⁰⁷ The court, however, does not adequately explain or cite what those differences are, stating only broadly that each of the

196. *Smith*, 728 N.E.2d at 276.

197. Camargo’s Brief, *supra* note 184, at 21.

198. Brief for the Plaintiff-Appellant at 7, *Ives Camargo*, 96 N.E.3d 673 (Dec. 21, 2017) (No. 12368), 2017 WL 6943316.

199. Camargo’s Brief, *supra* note 184, at 28.

200. See 2004 Mass. Legis. Serv. ch. 193 (West).

201. Camargo’s Brief, *supra* note 184, at 20.

202. MASS. GEN. LAWS ch. 149, § 148B(a) (2019) (“For the purpose of this chapter and chapter 151 . . .”).

203. *Id.* § 148B(d) (2018) (“Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished . . .”).

204. Camargo’s Brief, *supra* note 184, at 28.

205. *Ives Camargo’s Case*, 96 N.E.3d 673, 680 (Mass. 2018).

206. *Camargo*, 96 N.E.3d at 679–80.

207. *Id.* at 680.

laws where these definitions are found require “complex allocation of costs and benefits.”²⁰⁸

Nor does the court provide much support for its conclusion that chapter 152 and section 148B of chapter 149 should not be read *in pari materia*, citing a single case from the Supreme Court of Nevada²⁰⁹ for support. In *Terry v. Sapphire Gentlemen’s Club, Inc.*,²¹⁰ a group of performers at a strip club filed suit against their employer, alleging that they were employees and were guaranteed a minimum wage.²¹¹ At issue were two differing standards to determine worker status under workers’ compensation and wage and hour law.²¹² The Nevada court reasoned that the two statutes should not be construed together

because the underlying purpose of the state’s workers’ compensation laws—to wit, to limit “private controversy and litigation between employer and employee” and to give workers the right to compensation regardless of fault—is distinct from that of the statutory minimum wage scheme, which seeks to safeguard the “health and welfare of persons required to earn their livings by their own endeavors.”²¹³

Here the Nevada court’s reasoning is no less convincing than the SJC’s, their view no less myopic. The common purpose of the statutes—to “safeguard” workers—is given less attention than the distinct means the statutes provide to achieve that purpose.

Both courts fail to address precisely why workers’ compensation is so distinct from other workplace laws that it requires a completely different definition for “employee” and “independent contractor.” Other courts have similarly struggled to explain the distinct nature of workers’ compensation in comparison to other workplace laws, such as wage and hour and unemployment. These courts, like the SJC, hesitate to find distinct workplace statutes *in pari materia* because they “were not enacted for *precisely* the same purpose”²¹⁴ but rather that they have “a goal similar to, but *not identical with*”²¹⁵ other workplace laws.

208. *Id.*

209. *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951 (Nev. 2014).

210. *Id.*

211. *Id.* at 953.

212. *Id.*

213. *Id.* at 957 (citations omitted).

214. *Commonwealth v. Stuber*, 822 A.2d 870, 872–73 (Pa. Commw. 2003) (emphasis added), *aff’d*, 859 A.2d 1253 (Pa. 2004).

215. *Id.* at 873 (emphasis added).

The SJC’s statutory interpretation in *Camargo* does not adequately address the remedial nature of the statutes at issue. The court ultimately concluded that they “need not . . . belabor the similarities or differences in the statutes, as it is up to the Legislature to decide how much uniformity to impose, and it has done so with care and particularity in these statutory schemes.”²¹⁶ This punting to the legislature demonstrates a failure of the court to take judicial responsibility. If not the court’s, whose duty is to “belabor the similarities or differences” of statutes—to interpret their meaning?²¹⁷

B. *The Concurring Opinion’s Unsolved Problem*

Chief Justice Gants, along with Justices Budd and Lowy—three of the seven justices on the court—provided an alternative view of the statutory inconsistencies.²¹⁸ In his concurrence, the Chief Justice discusses the “practical consequences” of the Commonwealth’s “patchwork statutory scheme” for distinguishing employees from independent contractors—namely, “confusion and uncertainty.”²¹⁹ Focusing on workers misclassification, the Chief Justice emphasizes the need for change.²²⁰ Yet, like the majority’s opinion, the concurrence declines to take judicial responsibility for the problem before the court, instead inviting the legislature to act and address the issue.²²¹

Inconsistent standards create additional confusion for workers and employers alike.²²² Determining employment status can be challenging, especially given that “under the current law, the same worker can be an employee for one purpose but an independent contractor for another.”²²³ Such a system ultimately leads to workers being uncertain or unaware of their rights under the laws,²²⁴ and thus interferes with their ability to assert

216. *Ives Camargo’s Case*, 96 N.E.3d 673, 680 (Mass. 2018).

217. *Id.*

218. *Id.* at 681 (Gants, J., concurring).

219. *Id.* at 681–82.

220. *Id.* at 681.

221. *Id.* at 683.

222. *Id.* at 682.

223. *Id.*

224. *Camargo’s Brief*, *supra* note 184, at 4 (“[S]ome workers will never pursue a claim at all, not realizing that they have been misclassified, not understanding the protections to which they are entitled, or unable to obtain legal assistance to file a claim”). Even the DIA contributes to the confusion, failing to give a straight answer on how the agency determines independent contractor status. The agency’s own guidance skirts the issue, commenting that “[q]uestions regarding independent contract coverage will be answered by one of our attorneys.” MASS. DEP’T OF INDUS. ACCIDENTS, MASS. WORKERS’ COMP. SOURCEBOOK & CITATOR PT. 1

those rights.²²⁵ Additionally, employers can struggle to classify workers properly with such an inconsistent statutory scheme,²²⁶ increasing the likelihood of worker misclassification.²²⁷ Chief Justice Gants focuses on the real, practical implications of the current definitional standards,²²⁸ which are further complicated by the majority's holding.

The concurrence observes “it is time to confront the problems that arise from this complex statutory scheme, especially to workers,”²²⁹ underlining the difficulties of the inconsistencies analyzed by the majority. The Chief Justice's concurrence proffers legitimate policy reasons for a consistent means of defining worker status, going further than the majority in that regard. However, like the majority, the concurrence does not recognize any judicial role in addressing the inconsistencies in the statutory scheme of the Commonwealth's workplace laws, nor in requiring more clarity from an administrative agency charged with interpreting that scheme. Instead, the legislature is called to act—to confront the matter the court was so hesitant to. The Chief Justice's call to the legislature offers potential solutions, discussing legislative efforts taken in other states to achieve more harmony in states' approaches to defining employment status.²³⁰ No judicial solution is proffered or even considered, nor is any discussion of what the court could have done to address the issue. Like the majority's opinion, the concurrence declines to accept any judicial responsibility for the Commonwealth's fractured standards to define who is an “employee” and “independent contractor,” notably declining to engage in any critical analysis of the DIA's *MacTavish-Whitman* factors.²³¹

In practice, *Camargo* affirms an inconsistent system that further confuses the distinction between “employee” and “independent

(MCLE 2019). The agency's website even provides erroneous information, listing section 148B as the appropriate standard for determining independent contractor status under workers' compensation despite *Camargo's* holding otherwise. *Who is Covered by Workers' Compensation Insurance*, MASS. DEP'T OF INDUS. ACCIDENTS, MASS.GOV, <https://www.mass.gov/service-details/who-is-covered-by-workers-compensation-insurance> [<https://perma.cc/6MLZ-38NK>].

225. *Ives Camargo's Case*, 96 N.E.3d 673, 682 (Mass. 2018) (Gants, C.J., concurring).

226. *Id.*

227. *Id.*

228. *Id.* at 682–83.

229. *Id.* at 683.

230. *Id.* (citing Maine's efforts in passage of a uniform standard for defining “independent contractor” as a prime example).

231. *Id.*

contractor”²³²—a system allowing for the paradoxical result that a worker can at once be an independent contractor under one employment law and an employee under another. By upholding the inconsistencies in the current “piecemeal and inconsistent”²³³ system and failing to resolve them, the SJC missed an opportunity to solve a judicially solvable problem. Nevertheless, a solution must be proposed.

III. UNIFORMITY OVER PLURALITY: A COMMON DEFINITION OF “INDEPENDENT CONTRACTOR” IN MASSACHUSETTS

The proliferation of incongruous tests defining worker status in Massachusetts is representative of a pervasive national problem.²³⁴ The proposed solutions to these definitional challenges are just as varied as the different standards.²³⁵ Camargo argued her case in favor of uniformity, yet the SJC’s holding in *Camargo* cursorily disregarded her argument, maintaining the status quo of plurality among Massachusetts workplace laws defining “employee” and “independent contractor.” Thus, the SJC missed an opportunity to read clarity and consistency into the Commonwealth’s workplace laws. However, the problem remains and calls for a solution.

This part of the Note will first consider and evaluate the example of one state—Maine—that sought to achieve consistency across its workplace laws through legislative amendments. This Part will then propose that Massachusetts uniformly apply the ABC test under 148B in order to establish a single definition of “independent contractor” across the Commonwealth’s workplace laws. This would provide consistency in determining worker status and thus decrease the risk of worker misclassification present in the current statutory scheme.

A. *Harmonizing Worker Classification in Maine*

One approach to the definitional conundrum posed by multiple tests for determining worker status has been to harmonize the conflicting definitions. In some instances, this approach has been characterized as a “consolidating” approach.²³⁶ By substituting multiple worker status tests with a single test, the objective is “to reduce horizontal conflicts between

232. See generally *id.*

233. Dubal, *supra* note 59, at 72–73 (discussing the tension between statutory definitions and the courts’ use of those definitions in determining worker status).

234. *Id.* at 75–76.

235. *Id.* at 76.

236. Miller, *supra* note 62, at 232.

worker status laws . . . significantly reducing the confusion associated with applying different tests to different laws.”²³⁷ Additionally, this approach could be characterized as an effort to “harmonize”²³⁸ the definitions of “employee” and “independent contractor” in various workplace laws in order to decrease the likelihood of misclassification.

Maine is one state that has sought to harmonize statutory definitions of “employee” and “independent contractor” in the interest of consistency.²³⁹ Maine “has adopted a single, uniform standard for determining employment status under unemployment insurance, workers’ compensation, and other employment laws.”²⁴⁰ This common definition—which is used for the purposes of workers’ compensation,²⁴¹ unemployment insurance,²⁴² and in employment practices²⁴³—replaces the multiple tests previously used . . . and seeks to eliminate the prior confusion experienced by businesses when they received different determinations as to whether a worker was an employee or independent contractor from state agencies enforcing employment laws.”²⁴⁴

Maine’s efforts at harmonization have focused on the definition of “independent contractor” in its workplace law statutes.²⁴⁵ In 2012, the legislature passed “An Act to Standardize the Definition of ‘Independent Contractor,’”²⁴⁶ which amended the definition of “independent contractor,” under Maine’s employment practices law,²⁴⁷ unemployment

237. *Id.* Another state that has taken a more aggressive approach to consolidating and harmonizing its statutes is Montana, which “eliminated state horizontal test conflict by adopting a single two-part test.” *Id.* Montana’s “employee” test is limited to a set of five workplace laws: workers’ compensation, unemployment, wage and hour, human rights, and tax. *Id.* at 233. While Montana’s approach achieves uniformity, it creates certain conflicts between state and federal laws, particularly in the area of taxation. *Id.* at 235.

238. *Ives Camargo’s Case*, 96 N.E.3d 673, 682 (Mass. 2018).

239. *Id.* at 683.

240. *Id.*

241. ME. STAT. tit. 39-A, § 102 (2017).

242. ME. STAT. tit. 26, § 1043 (2017).

243. ME. STAT. tit. 26, § 591 (2017).

244. *Employment Standard Defining Employee vs Independent Contractor*, BUREAU OF LABOR STANDARDS, MAINE DEP’T OF LABOR, https://www.maine.gov/labor/misclass/employment_standard.shtml [<https://perma.cc/EHV9-WTCX>].

245. 2012 Me. Legis. Serv. Ch. 643. *See also* Deknatel & Hoff-Downing, *supra* note 53, at 73 (“Maine’s change applied only to its workers’ compensation and unemployment insurance, but the state made its laws consistent with preexisting standards in other statutes, creating a matching standard across all laws.”).

246. Ch. 643.

247. ME. STAT. tit. 26, § 591.

law,²⁴⁸ and workers' compensation law.²⁴⁹ Additionally, this act created a separate misclassification statute²⁵⁰ establishing a penalty for the misclassification of employees as independent contractors in all sectors of the labor market.²⁵¹ The uniform standard is composed of two sets of criteria, both of which must be met in order for a worker to be classified as an independent contractor.²⁵² The first set of criteria are as follows:

- (a) The individual has the essential right to control the means and progress of the work except as to final results;
- (b) The individual is customarily engaged in an independently established trade, occupation, profession or business;
- (c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
- (d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
- (e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted[.]²⁵³

The second set of factors concern manner of payment, whether the work is "outside the usual course of business for which the service is performed," among others.²⁵⁴ This hybrid test, bearing qualities of both the common law of agency test and the economic realities test,²⁵⁵ is less simple than the ABC test,²⁵⁶ creating a set of mandatory criteria in place of the ABC's general presumption of employment.

Maine's common definition of "independent contractor" also allows for greater consistency in handling claims under Maine's workplace laws. The state's standard independent contractor test creates a set of required criteria rather than factors to be weighed for both workers'

248. ME. STAT. tit. 26, § 1043.

249. ME. STAT. tit. 39-A, § 102.

250. ME. STAT. tit. 26, § 591-A.

251. "An employer that intentionally or knowingly misclassifies an employee as an independent contractor commits a civil violation for which a fine of not less than \$2,000 and not more than \$10,000 per violation may be adjudged." *Id.*

252. 2012 Me. Legis. Serv. Ch. 643.

253. ME. STAT. tit. 26, § 1043.

254. *Id.*

255. *See supra* Section I.B.2.

256. *See supra* Section I.B.3.

compensation²⁵⁷ and unemployment.²⁵⁸ Although the test does not create a presumption of employment,²⁵⁹ as the independent contractor statutes of other states do (including Massachusetts), an employer seeking to contest the these factors have not been met still has the burden of doing so.²⁶⁰ “The burden of proof is on the employer to establish . . . the relationship for purposes of the Act [is] one of ‘employment.’”²⁶¹ There is a similar burden under workers’ compensation law. However, the workers’ compensation law differs from the unemployment law in that it provides certain exceptions to employee status in addition to the independent contractor test in the statute.²⁶² So the employer, not the employee, must carry the burden of establishing that a worker is an independent contractor and not an employee.

Maine’s approach is practical, providing a consistent standard for determining worker status under remedial statutes meant to provide workers benefits and protections.²⁶³ However, its approach is not entirely uniform. Nonetheless, the state’s efforts at harmonization in defining worker status across multiple workplace statutes “keep in mind the explicit legislative mandate for [the courts] to construe the law liberally in favor of the workman.”²⁶⁴

B. *Uniformity Under the ABC Test in Massachusetts*

Camargo’s conundrum demonstrates that Massachusetts must combat the incongruities in its workplace laws.²⁶⁵ Maine provides an example of efforts to achieve uniformity.²⁶⁶ However, Massachusetts

257. *Madore v. Liberty Nat’l Bank*, 289 A.2d 36, 38 (Me. 1972) (noting, however, that the burden shifts to the worker to prove he is an employee and not an independent contractor where there is no history of “regular work under his general employment” with the employer); *Murray’s Case*, 154 A. 352, 353 (Me. 1931).

258. *Sinclair Builders, Inc. v. Unemployment Ins. Comm’n*, 73 A.3d 1061, 1066 (Me. 2013).

259. *Deknatel & Hoff-Downing*, *supra* note 53, at 71.

260. *Sinclair*, 73 A.3d at 1066.

261. *Id.*

262. ME. STAT. tit. 39-A, § 102 (2019).

263. *Miller*, *supra* note 62, at 232–35 (noting that in choosing “between a state tax test that is uniform with other state laws but inconsistent with federal tax law, and a state tax test that is uniform with federal tax law but inconsistent with other state tests[. . .]neither is ideal, but the latter is preferable.”).

264. *In re Dudley*, 256 A.2d 592, 594 (Me. 1969).

265. *See supra* Part II.

266. *See supra* Section III.A.

could realize even greater consistency by applying the ABC test uniformly across the Commonwealth's workplace laws.

Maine provides one common definition of "independent contractor" for the purposes of workers' compensation and unemployment insurance.²⁶⁷ Massachusetts should consider a similar path. However, Maine's definition of "independent contractor" differs from Massachusetts's definition. In Massachusetts, the definition of "independent contractor" under section 148B, an ABC test, establishes presumption of employee status.²⁶⁸ Statutory presumption of employment can "root out common misclassification tactics."²⁶⁹ As such, "presumption could be a powerful tool for realigning the interests of workers and subcontractors and for protecting the interests of workers without placing the burden of asserting such claims on their shoulders alone."²⁷⁰ In essence, worker status statutes that presume workers to be employees are more protective of workers:

Irrespective of variations in the substantive standards applied to overcome it, the presumption effectively shifts the burden for establishing a legitimate independent contracting relationship from the worker to the employer. By placing the onus on employers to proactively establish their workers as independent contractors, the presumption transforms the assessment of independent contracting status.²⁷¹

Rather than adopting the criteria of Maine's definition, the Massachusetts legislature should keep the current ABC test under section 148B, the Massachusetts independent contractor statute. However, the legislature should extend the ABC test to define worker status across all workplace laws. This includes chapter 152, the Massachusetts workers' compensation law, where no presumption of employee status exists but for a few excepted circumstances within the statute.²⁷² This would create a uniform definition of independent contractor across the Commonwealth's workplace laws.

This suggestion is supported by the fact that the Commonwealth's current statutory scheme creates an unfair imbalance relating to the presumption of employment, as the presumption exists under the

267. See *supra* Section II.A.

268. MASS. GEN. LAWS ch. 149, § 148B (2019).

269. Deknatel & Hoff-Downing, *supra* note 53, at 72.

270. *Id.*

271. *Id.* at 71.

272. See *supra* Section I.B.

unemployment statute and in section 148B but does not under chapter 152. As the amicus brief filed on behalf of the claimant in *Camargo* points out, there is a lack of harmony and thus consistency in the current statutory scheme because of this distinction.²⁷³ The amici argue that “[e]xtending this presumption to c. 152, along with the substantive test contained in c. 149, § 148B is not inconsistent with the history of the workers’ compensation law and would harmonize the statutes in keeping with their purpose.”²⁷⁴

There are several counterarguments to this approach. First, a uniform definition of “employee” could lead to over-inclusivity,²⁷⁵ meaning that more workers may be misclassified as employees and therefore receive the benefits and protections reserved for employees. On the other hand, the ABC test has been criticized for its lack of flexibility, a consequence due in part to its simplicity.²⁷⁶ Its three prongs have been considered “[f]riendly to judges, workers, and businesses compared to the complexity”²⁷⁷ of the current alternatives. At the same time, the test is “deceptively simple,” its practical application demonstrating its rigidity.²⁷⁸ Ultimately, the legislative purpose of workplace laws is to ensure workers are protected.²⁷⁹ The interest in serving that legislative purpose should outweigh the interest in avoiding the potential for over-inclusivity.

However, some legitimate policy reasons exist for maintaining different definitions due to the distinct differences of various workplace laws.²⁸⁰ In *Camargo*, for example, the majority explains that

[the] lack of uniformity [] reflects differences in the particular laws. The laws governing workers’ compensation, unemployment insurance, minimum wages, and tax withholding serve different, albeit related, purposes. Each involves a complex allocation of costs and benefits for individuals, companies, and State government itself.²⁸¹

273. *Camargo’s* Brief, *supra* note 184, at 16.

274. *Id.* at 8–9.

275. *Sunshine*, *supra* note 53, at 236.

276. *Pearce & Silva*, *supra* note 80, at 28–29.

277. *Id.* at 28.

278. *Id.* at 29.

279. See Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor’s Policy Making in the Courts*, 65 Fla. L. Rev. 1223, 1278 (2013).

280. *Miller*, *supra* note 62, at 232 (observing that “[f]or example, policy makers may view discriminatory labor practices differently than tax collection responsibilities, thus creating a more expansive test for the former.”).

281. *Ives Camargo’s Case*, 96 N.E.3d 673, 680 (Mass. 2018).

Nonetheless, the court fails to adequately explain both this “complex allocation” and the justification for the plurality of standards.²⁸² Furthermore, there is some scholarly support for the assertion that the “uniformity that the ABC Test can bring to the definitions across all relevant laws [can] help provide consistent expectations that are simpler to comply with for employers and workers.”²⁸³

The advantages of providing different definitions of worker status in different workplace laws “must be weighed against the benefit of easy application” of those laws.²⁸⁴ Even in the presence of legitimate policy concerns, the policy of maintaining fairness to workers should outweigh the policy reasons in favor of facilitating administrative ease for state governments and employers. *Camargo* clearly demonstrates the lack of, and need for, “easy application” of the Commonwealth’s current tests for determining who is an “employee” and who is an “independent contractor,”²⁸⁵ which makes the risk of misclassification, and thus the risk to workers, far higher than it should be.

CONCLUSION

Camargo is a missed opportunity for the SJC. By deferring to agency judgment and declining to take judicial responsibility, the SJC has endorsed and affirmed a fractured system whereby “the same worker can be an employee for one purpose but an independent contractor for another.”²⁸⁶ The court failed to clarify the incongruities of the current standards, assigning the problem to the legislature. The impact of the *Camargo* decision will likely be significant, workers’ access to and understanding of their benefits likely to decrease; instances of misclassification likely to increase. Nevertheless, a path forward must be paved. The uniform application of the ABC test across the Commonwealth’s workplace laws provides a path forward—a way to ensure the Commonwealth’s workers are better protected than the current “patchwork” system allows.

282. *See supra* Section II.B.

283. Pearce & Silva, *supra* note 80, at 29.

284. Miller, *supra* note 62, at 232.

285. Ives *Camargo*’s Case, 96 N.E.3d 673, 683 (Mass. 2018).

286. *Id.* at 682.