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I. Introduction

Recently, the Equal Employment Opportunity Commission (EEOC) issued revised enforcement guidelines that could have significant implications for law firms and other professional organizations.[1] Specifically, the guidelines may increase the likelihood that partners will sue their firms under the Age Discrimination in Employment Act (ADEA) if their firm maintains a policy that forces them to retire at a certain age.[2] Firms that are wary of this risk can greatly reduce their potential liability by reassessing certain policies.[3] Conversely, individuals who attain partner status should recognize that their position within the firm significantly affects their legal rights.

Congress passed the ADEA in 1967 for the purposes of promoting the "employment of older persons" and prohibiting "arbitrary age discrimination in employment."[4] The Act protects individuals in an employment relationship who are at least forty years of age.[5] In enacting it as a sister statute to Title VII of the Civil Rights Act of 1964, Congress incorporated Title VII's substantive prohibitions verbatim into the ADEA.[6] Moreover, because both statutes have similar purposes and provisions, cases interpreting the language of one are persuasive authority for interpretation of the other.[7] When it passed Title VII, Congress also created the EEOC to serve as the main administrative and enforcement agency of the Act.[8] Eventually, the EEOC also assumed administrative and enforcement power over the ADEA.[9]

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1. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (addressing federal employment discrimination law coverage of "partners, officers, members of boards of directors, and major shareholders").

2. *See* Martha Neil, *Subjective Status: EEOC Rules May Make an 'Employee' Out of a Law Firm Partner, and Open the Door to Discrimination Suits*, A.B.A. J., July 2001, at 42, 43 (speculating on potential of more partners bringing suits against law firms).

3. *See id.* at 42 (cautioning that revised EEOC standards may force firms to reconsider mandatory retirement policies).

4. Age Discrimination in Employment Act, 29 U.S.C. § 621(b) (1994).

5. *See id.* § 631(a) (setting age limits for application of Act).

6. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII").

7. *See* Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986) (discussing nearly identical provisions and purposes in Title VII, Fair Labor Standards Act, and ADEA).

8. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1994) (creating EEOC and defining enforcement powers).

9. *See* Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978) (transferring all ADEA administrative and enforcement functions vested in Secretary of Labor or Civil Service Commission to EEOC).

The ADEA and Title VII speak only in terms of unlawful *employment* practices, so courts accordingly have interpreted the plain language of the Act as applying solely to individuals who are "employees."[10] As a result, the lower federal courts and the EEOC recognize an exemption for bona fide partners, members of boards of directors, and major shareholders who do not qualify as "employees."[11] Instead, these individuals qualify as "employers" who own and manage a business, thereby falling outside the scope of federal protection.[12] In addition, the ADEA specifically states that nothing in its provisions prohibits compulsory retirement of "[b]ona fide executives and high policymakers" to whom the firm promises certain minimal retirement benefits.[13] Consequently, although mandating the retirement of employees such as law firm associates and "of counsel" is illegal under federal age discrimination law, requiring a bona fide partner to do so is not.[14]

For a number of years, however, courts have struggled to define exactly who is an employee/non-partner and who is a bona fide employer/partner under the Acts.[15] This is due to the fact that courts now generally accept that simply labeling a person "partner" will not allow a firm to avoid the Acts' prohibitions.[16] Therefore, liability hinges on defining "employee" for the purposes of the statute in question.[17]

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10. *See* Age Discrimination in Employment Act, 29 U.S.C. § 621(a)-(b) (1994) (referring only to age discrimination in employment context); *Hyland*, 794 F.2d at 796 (concluding that plain reading of ADEA indicates that protection extends only to individuals in direct employment relationship with employer).

11. *See* Wheeler v. Hurdman, 825 F.2d 257, 264 (10th Cir. 1987) (commenting on reluctance of courts to extend statutory employee protections to general partners); EEOC Compl. Man. (BNA) § 2-III (May 12, 2000) (explaining that "partners, officers, members of boards of directors, or major shareholders" generally are not employees).

12. *See Hyland*, 794 F.2d at 797 (reasoning that "their unique status as business owners and managers" dictates that true partners are not employees).

13. *See* Age Discrimination in Employment Act, 29 U.S.C. § 631(c) (1994) (listing requirements for exemption qualification).

14. *See* Neil, *supra* note 2, at 42 (explaining that compulsory retirement for partners is legal because they do not fall within scope of federal protection); Alan Ross Haguewood, Note, *Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 VAND. L. REV. 429, 438 (1998) (noting that courts generally agree that bona fide partners are not protected by ADEA).

15. *See* Haguewood, *supra* note 14, at 436 (commenting that failure of Congress to provide workable definition has resulted in great deal of litigation).

16. *See* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997) (holding that status determination cannot rest solely on basis of what partnership calls or declines to call a person). The *Serapion* court stated that "partnerships cannot exclude individuals from the protection of Title VII simply by draping them in grandiose titles which convey little or no substance." *Id.*

17. *See* Haguewood, *supra* note 14, at 436 (explaining that ADEA definition of "em-

The text of both Title VII and the ADEA offers no practical guidance, as it provides merely a circular definition of "employee."[18] Under both Acts, "the term 'employee' means an individual employed by an employer."[19] The definition of "employer" under both statutes is not circular, but is equally unhelpful: "a person engaged in an industry affecting commerce."[20] In response, the lower federal courts have developed an assortment of tests that can yield different results on similar facts.[21] The net effect is a body of case law that varies markedly among the federal circuits.[22] As a result, it is difficult for firms and individuals to predict how courts in different jurisdictions will view mandatory retirement policies that apply to all of a firm's offices, regardless of location.

This Note examines how the revised EEOC enforcement guidelines may lend clarity to the issue of who receives protection under federal age discrimination law. In approaching the issue, this Note analyzes the effect of the revised guidelines on two levels. On a theoretical level, it addresses how the EEOC finally may have given courts a uniform and workable framework for determining who is an employee.[23] On a pragmatic level, it cautions that law firms, other professional organizations, and individuals who work within them should assess how the guidelines pertain to their everyday professional lives.[24]

Part II of this Note begins with a survey of the various ways in which the federal courts deal with application of the ADEA exemption.[25] It traces the

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ployee" determines whom Act protects).

18. *See id.* (noting that "statute itself offers courts no guidance: it defines 'employee' in circular fashion").

19. Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1994); Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (1994).

20. Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1994); Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1994).

21. *See* Haguewood, *supra* note 14, at 436 (discussing how courts have employed different tests to reach different results on nearly identical facts).

22. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997) (endorsing totality of circumstances approach); Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1400-01 (11th Cir. 1991) (applying economic realities test by looking at "concepts of management, control, and ownership"); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (extending per se rule that all partners are not employees to shareholders of professional corporation).

23. *See infra* Part III (summarizing revised guidelines and discussing their significance and limitations); *see also* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (providing clear list of factors to consider with regard to federal protection of individuals).

24. *See infra* Part VI (offering recommendations for firms in light of revised guidelines); *infra* Part VII (arguing that individuals in firms should consider how guidelines might affect their ADEA status).

25. *See infra* Part II (discussing judicial approaches to ADEA exemption).

federal circuits' evolving approach to the problem, beginning with a per se rule that "labeled" partners do not receive protection under federal employment discrimination law and culminating with the most recent approach, which considers the totality of the circumstances in reference to the exemption.[26] Part III explores the effect of the revised EEOC enforcement guidelines on this area of the law as well as the potential implications they bring to law firms and other professional organizations.[27] Part IV analyzes the legal authority of EEOC guidelines generally and the degree of deference courts accord them.[28] Part V surveys several hypothetical situations that illustrate the possible effects of the revised guidelines.[29] Part VI offers recommendations that can help firms avoid liability through policy changes and protective measures.[30] Finally, Part VII concludes by arguing that the revised guidelines, although not dispositive, are an effective device for courts, employers, and employees to utilize in educating themselves about the scope of federal age discrimination protection.[31]

II. Judicial Approaches to the ADEA Exemption

The lower federal courts have used four main approaches in determining who is an employee for the purposes of the ADEA. A bright-line per se rule that partners are not employees under federal employment discrimination law dominated early litigation of the issue.[32] Courts later adopted an "economic realities" test that focuses on the degree to which an individual is economically dependent on the business in question and analyzes the business relationship from a common-law agency perspective.[33] More recent decisions illus-

26. *See infra* Part II (outlining four main judicial approaches to ADEA exemption).

27. *See infra* Part III (discussing significance and limitations of revised guidelines).

28. *See infra* Part IV (examining legal authority of EEOC guidelines within courts of law generally).

29. *See infra* Part V (offering hypothetical examples of how revised guidelines might affect status determinations).

30. *See infra* Part VI (providing suggestions to minimize liability under revised EEOC guidelines).

31. *See infra* Part VII (concluding that revised guidelines provide useful guidance in determining scope of federal age protection).

32. *See* Burke v. Friedman, 556 F.2d 867, 870 (7th Cir. 1977) (finding that partners' ownership and management of partnership categorically precludes them from obtaining Title VII "employee" status); *see also* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178-79 (7th Cir. 1984) (applying per se rule of *Burke* in finding that shareholders of professional corporation cannot be employees).

33. *See* Wheeler v. Hurdman, 825 F.2d 257, 271 (10th Cir. 1987) (examining whether individual is economically dependent on business to which he renders service). Other commen-

trate an "organizational form" test that bases the application of the ADEA exemption on the choice of form in which the business operates.[34] The final approach distinguishes between employee and partner on a case-by-case basis by looking at the totality of the circumstances.[35]

A. The Per Se Rule

In *Burke v. Friedman*,[36] the Court of Appeals for the Seventh Circuit endorsed a per se rule for determining employee status.[37] Under this approach, individuals with the title of "partner" are not employees under federal employment discrimination law.[38] *Burke* considered whether partners in a business association count towards the fifteen-employee threshold requirement for "employers" subject to Title VII.[39] The Seventh Circuit first looked

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tators note an approach that I will not discuss in any detail. *See* Randall J. Gingiss, *Partners as Common-Law Employees*, 28 IND. L. REV. 21, 21-22 (1994) (arguing that "entity" theory of partnership may make partners common-law employees under agency rationale). An extensive review of the common law as it applies to modern-day employment discrimination statutes is beyond the scope of this project. I have chosen the four approaches that I believe are the most widely accepted and relevant to my policy goals. The economic realities test that I will later discuss encompasses the common-law arguments that are relevant to this Note. In addition, I will discuss common-law arguments as they apply to the revised EEOC guidelines.

34. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1540 (2d Cir. 1996) (applying presumption that directors/shareholders in professional corporation are employees under ADEA).

35. *See* Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997) (endorsing "totality of the circumstances" test in which court primarily considers individual's degree of "ownership, remuneration, and management").

36. 556 F.2d 867 (7th Cir. 1977).

37. *See* Burke v. Friedman, 556 F.2d 867, 870 (7th Cir. 1977) (affirming district court's order to dismiss for lack of subject matter jurisdiction because defendant was not "employer" under Title VII). In *Burke*, the court addressed the issue of whether a business's partners count towards the fifteen-employee threshold required for actions against "employers" arising under Title VII. *Id.* at 868. Burke alleged that the public accounting firm for which she worked discriminated against her because of her sex. *Id.* The district court found that plaintiff's complaint lacked subject matter jurisdiction because the firm consisted of four partners and thirteen non-partners. *Id.* at 868-69. Accordingly, the firm lacked the requisite fifteen employees necessary to be an "employer" under Title VII. *Id.* Plaintiff asserted that the partners in the firm counted towards the total because they were also "employees" within the meaning of the statute. *Id.* at 869. The Seventh Circuit concluded that an individual is either a partner or an employee, but is never both. *Id.* As a result, the court affirmed the dismissal for lack of subject matter jurisdiction. *Id.* at 870.

38. *See id.* (refusing to regard partners as employees because partners manage business and share in profits and losses).

39. *See id.* at 868 (discussing whether partnership met Title VII fifteen-employee threshold).

to the terms of Title VII and the definition of "partnership" under the Uniform Partnership Act of 1914 (UPA).[40] Reasoning that the management of the business and the ability to share in profits and losses are central characteristics distinguishing partners from employees, the court concluded that a partner cannot also be an "employee" for Title VII purposes. Thus, the court affirmed the district court's dismissal of the complaint for lack of subject matter jurisdiction.[41]

The Seventh Circuit later reiterated this position and expanded the rule's scope, finding firms acting as professional corporations analogous to traditional partnerships and thus subject to the same conceptual dichotomy.[42] The per se rule centers on the notion that the roles of partners and employees are by nature mutually exclusive and are thus distinct concepts in light of Title VII.[43] The rule possibly reflects a presumption that partners direct the business while employees provide the business with services. Indeed, the *Burke* court used self-evident language when it stated that it could "not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."[44]

Although the Supreme Court of the United States has not directly addressed the issue, one leading case does appear to qualify the per se rule. In *Hishon v. King & Spalding*,[45] a majority of the Court concluded that Title VII protection may extend to the *selection* of partners because the opportunity to attain partnership status is usually a "term, condition, or privilege of employment" in a firm.[46] The Atlanta law firm of King & Spalding passed over

40. *See id.* at 869 (discussing Title VII definition of "employee" as "'individual' employed by an employer" and UPA definition of partnership as "association of two or more persons to carry on as co-owners a business for profit").

41. *Id.* at 869-70.

42. *See* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (finding no reason to treat shareholders in professional corporation differently under Title VII than partners in partnership).

43. *See* Leigh Pokora, Comment, *Partners as Employees Under Title VII: The Saga Continues*, 22 Ohio N.U. L. Rev. 249, 256 (1995) (discussing Justice Powell's concurrence in *Hishon v. King & Spalding*, 467 U.S. 69 (1984)).

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

45. 467 U.S. 69 (1984).

46. *See* Hishon v. King & Spalding, 467 U.S. 69, 76 (1984) (finding petitioner's claim for sexual discrimination during partnership selection process cognizable under Title VII). In *Hishon*, the Court considered whether a complaint alleging that a law firm discriminated under Title VII against a female associate when it declined to make her a partner must fail for lack of subject matter jurisdiction. *Id.* at 71. The district court dismissed the suit on the ground that Title VII did not "apply to the selection of partners by a partnership." *Id.* at 72-73. The United States Court of Appeals for the Eleventh Circuit affirmed, and the Supreme Court of the United

associate Elizabeth Hishon for partnership and ultimately terminated her employment.[47] She brought suit under Title VII, claiming that her denial was based on prohibited sex discrimination.[48] Hishon sought "declaratory and injunctive relief, backpay, and compensatory damages 'in lieu of reinstatement and promotion to partnership.'"[49] The district court dismissed the case for lack of subject matter jurisdiction, ruling that Title VII did not apply to the selection of partners, and the United States Court of Appeals for the Eleventh Circuit affirmed.[50]

The Supreme Court reversed and remanded the case, finding that Hishon had various cognizable claims under Title VII.[51] However, by resting its decision on "term, condition, or privilege" of employment grounds, the Court avoided the broader issue of whether partners may qualify as employees under certain circumstances.[52] Despite this narrower ground, the case foreshadowed later shifts in this area of the law by arguably facilitating the development of more liberal tests for application of the ADEA exemption. Justice Powell's *Hishon* concurrence, in particular, emphasized that the relationship among partners is not an "employment" relationship for the purposes of Title VII.[53] Although Powell stressed that the relationship between partnership and partner "differs markedly from that between employer and employee – including that between the partnership and its associates,"[54] he did remark in a

States granted certiorari. *Id.* at 73. The Court noted that once an employment relationship becomes contractual, Title VII's provisions govern the "terms, conditions, and privileges of employment." *Id.* at 74. Consideration for partnership, if part of the employment contract, is clearly such a benefit and thus falls within the scope of Title VII. *Id.* at 75. In addition, independent from any express or implied contractual right, an employer may provide employees with benefits that qualify as "privileges" of employment under Title VII. *Id.* Therefore, the Court concluded that Hishon stated a cognizable claim under Title VII, and the Court reversed and remanded for the development of facts that would indicate whether the partnership consideration was a term, condition, or privilege of an associate's employment at respondent's firm. *Id.* at 75, 78-79.

47. *Id.* at 72.

48. *Id.*

49. *Id.*

50. *Id.* at 72-73.

51. *See id.* at 78-79 (concluding that petitioner deserved "her day in court to prove her allegations").

52. *See* Gingiss, *supra* note 33, at 31 (noting that because Hishon was associate, Supreme Court never addressed whether there are circumstances under which partners could be employees); Haguewood, *supra* note 14, at 440 (noting that Supreme Court in *Hishon* did not address question of whether partners can ever qualify as employees).

53. *See Hishon*, 467 U.S. at 79 (Powell, J., concurring) (noting that opinion does not extend Title VII to "the relationship among partners").

54. *Id.* (Powell, J., concurring).

footnote that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'"[55] As a result, courts and commentators have interpreted Powell's concurrence in two ways. Some have used the opinion to justify the line of cases denying partners the right to seek redress under federal employment discrimination statutes,[56] while others have relied on the language in footnote two of the concurrence to support the argument that, in certain contexts, partners are de facto employees.[57]

B. The Economic Realities Test

Although *Hishon*'s effect on the issue of partners as employees is debatable, it is clear that courts gradually began to take a more sophisticated view of the partnership-employee relationship. For example, in *Wheeler v. Hurdman*,[58] the United States Court of Appeals for the Tenth Circuit declined to apply the formalistic per se rule and instead extended the "economic realities" test.[59] As its name implies, the test focuses on the actual pecuniary relationship between the business and the putative employee.[60] Originally, courts developed the economic realities test to distinguish between employees and independent contractors for the purposes of applying social legislation such as the Fair Labor Standards Act (FLSA).[61] The key question under the test is

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55. *Id.* at 79 n.2 (Powell, J., concurring).

56. *See* Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 215 n.6 (S.D.N.Y. 1997) (noting that some courts use Justice Powell's concurrence to support rigid distinction between partners and employees); Haguewood, *supra* note 14, at 440 (arguing that Justice Powell "validated the partnership exemption for federal employment discrimination laws").

57. *See* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997) (citing Justice Powell's concurrence as authority for looking beyond label that partnership places on person); Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 147 (S.D.N.Y. 1987) (noting that Justice Powell's concurrence provides support for rejection of per se rule).

58. 825 F.2d 257 (10th Cir. 1987).

59. *See* Wheeler v. Hurdman, 825 F.2d 257, 271 (10th Cir. 1987) (rejecting position that "economic realities test is categorically inapplicable to partnerships"). In *Wheeler*, the court addressed the issue of whether federal employment discrimination laws may apply to a plaintiff who was a general partner in a general partnership. *Id.* at 258. The district court denied defendant's motion to dismiss for lack of subject matter jurisdiction and certified the question of coverage under Title VII, the ADEA, and the Equal Pay Act for immediate appeal. *Id.* The Tenth Circuit ultimately reversed on appeal, but noted that its commitment to use of an economic realities test in "applying remedial social economic legislation" warranted application of the test on these facts. *Id.* at 277. However, applying a version of the economic realities test to the plaintiff, the court concluded that the district court erred in characterizing her as an employee. *Id.* at 276-77. Thus, the court reversed and remanded the case to the district court with instructions to dismiss the complaint for lack of subject matter jurisdiction. *Id.* at 277.

60. *See* Haguewood, *supra* note 14, at 450 (describing economic realities test).

61. *See* Christopher J. Henderson, Comment, *Employment Discrimination* – Wheeler v.

"whether the individual is economically dependent on the business to which he renders service."[62]

Joined by the EEOC, plaintiff Marilyn Wheeler argued that the economic realities test should extend to federal employment discrimination statutes because the remedial goals of the legislation were to end discrimination in the workplace in sweeping fashion.[63] As a result, the provisions of Title VII, the ADEA, and the Equal Pay Act should apply in all situations in which discrimination may arise in a business setting.[64] The court declined to take such a broad view of the Acts, pointing out that Congress specifically chose to limit each statute's reach to employment practices.[65] However, the court did examine the appropriateness of a modified economic realities test in certain situations in which the inquiry may disclose that a partner is not truly bona fide under the provisions of the Acts.[66] Under this test, relevant factors include the following: "(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work."[67] Applying these factors, the court concluded that there was no reason to believe that the plaintiff was not a bona fide partner.[68]

Wheeler reflected a willingness by at least one court to examine more closely the relationship between title and entitlement. The Tenth Circuit conceded that absolutes in this area of the law are difficult to sustain.[69] Significantly, the court treated Wheeler's claim as both a threshold jurisdictional question and one of substantive rights, thereby implying that such a claim could have merit under the right circumstances.[70]

Hurdman – *Who's the Boss? Partners as Employees Under Federal Employment Discrimination Laws*, 13 J. CORP. L. 1159, 1163-64 (1988) (discussing development of economic realities test).

62. *Wheeler*, 825 F.2d at 271 (quoting Doty v. Elias, 733 F.2d 720, 722-23 (10th Cir. 1984)).

63. *See id.* at 269, 275 (discussing plaintiff's and EEOC's policy arguments).

64. *See id.* at 275 (discussing plaintiff's and EEOC's argument that Acts should cover any individual susceptible to discrimination).

65. *See id.* at 275-76 (noting that Congress limited scope of statutes to employment situations).

66. *See id.* at 277 (noting that there may be circumstances in which economic realities test factors indicate that purported partnership is not bona fide).

67. *Id.* at 271.

68. *See id.* at 277 (distinguishing plaintiff's work environment from that of normal corporate employee).

69. *Id.* at 268.

70. *See id.* at 259 (addressing nature of motion under review).

1. Common-Law Agency Analysis as an Element of Economic Reality

Implicit in the economic realities test is a common-law agency inquiry that evaluates the degree of control the organization exercises over the individual.[71] Determining the degree of control is important, on the theory that "[e]mployees in the traditional employer-employee relationship are more vulnerable than partners in a partnership are to abuses."[72] An employer with the power to control (as the principal) under agency law has the power to dictate the terms and conditions of the employee's work (as the agent).[73]

The *Wheeler* court followed the modern trend of choosing not to focus on the distinction between "master" and "servant" that is found in the Restatement (Second) of Agency.[74] Nevertheless, the court discussed the inequality of bargaining power that can exist when an individual is dependent on a business.[75] Thus, although the master-servant terminology has largely fallen from courts' use, contemporary employer-employee relationships continue to raise vulnerability concerns. Specifically, employees are not in the same position as bona fide partners to "self-police" the employment atmosphere; an employee generally has no ability to direct the working environment.[76] This contrasts with the situation of a bona fide partner, who maintains a position of power among the other partners.[77] A partnership arrangement assumes that decisions are made through the consent of the partners.[78] Partners, at least in theory, would never agree to a condition that would hurt them personally at some point in the future.[79] Given these presumptions, a common-law agency analysis used together with the economic realities test may help to expose cases in which a "partner" is actually more like an employee.

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71. *See id.* at 268-69 (discussing plaintiff's characterization of test, which focused on organization's domination of individual).

72. *See* Robertson v. Alexander Grant & Co., 798 F.2d 868, 870 (5th Cir. 1986) (pointing to vulnerability employees face due to lack of control over pension benefits).

73. *See* RESTATEMENT (SECOND) OF AGENCY § 14 (1958) (recognizing principal's right to control conduct of agent regarding matters entrusted to agent).

74. *See* Wheeler v. Hurdman, 825 F.2d 257, 268 n.24 (10th Cir. 1987) (noting Supreme Court's decision to reject tests found in definition of "servant" in Restatement).

75. *See id.* at 269 n.25 (describing control of employment opportunities as linchpin of economic realities test).

76. *See Robertson*, 798 F.2d at 870-71 (discussing inherent "self-policing" nature of partnerships).

77. *See id.* at 870 (explaining self-policing function present in partnerships).

78. *See* Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984) (Powell J., concurring) (explaining that essence of partnership rests on notions of shared enterprise, common agreement, and universal consent).

79. *See* Robertson v. Alexander Grant & Co., 798 F.2d 868, 870-71 (5th Cir. 1986) (noting incentive among partners not to agree to potentially harmful provisions).

2. *Criticism of the Economic Realities Test*

As the *Wheeler* court noted, the economic realities test is not without its limitations.[80] Focusing on economic dependence with regard to traditional independent contractors (such as construction workers) makes sense because courts in those situations are distinguishing between individuals who are actually part of a business (employees) and those who are running a separate business (independent contractors).[81] In contrast, when a court uses the test in reference to individuals acting in a partnership setting, the court's focus on economic dependence is arguably neither useful nor appropriate.[82]

The nature of a professional partnership implies that even bona fide partners largely depend on the business for economic viability, and in no way raises the question whether they are in business for themselves.[83] On the contrary, a partnership by definition represents a conscious decision by a group of individuals to increase their economic potential through a joint venture "to carry on as co-owners a business for profit."[84] Therefore, courts are understandably wary of applying a test that disregards a central feature of partnership dynamics.[85]

Viewing attorneys as independent contractors outside of the purely economic sense is appropriate, as I will later discuss.[86] However, in narrow terms of economic dependence, the analogy to independent contractors is more tenuous.[87] Criticism such as this illustrates why courts and scholars in addressing the scope of federal employment discrimination statutes continue to search for paradigms beyond the economic realities test.

C. *The Organizational Form Test*

The rise of alternative business forms to the traditional general partnership offers external limited liability for contemporary professionals.[88] Lawyers,

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80. *See* Wheeler v. Hurdman, 825 F.2d 257, 271-75 (10th Cir. 1987) (noting shortcomings of economic realities test as applied to partnerships).

81. *See id.* (discussing use of economic realities test in context of distinguishing employees from independent contractors).

82. *See id.* at 272 (illustrating difficulty of using economic dependence inquiry to distinguish among people who are part of same enterprise).

83. *See id.* (noting that no partner is fully independent of partnership).

84. Uniform Partnership Act § 101(6) (1997).

85. *See* Pokora, *supra* note 43, at 258 (noting that economic realities test has gained more support in legal commentaries than it has in courtrooms).

86. *See infra* Part III.B (discussing focus on "independence" and "control" in revised EEOC guidelines).

87. *See* Wheeler v. Hurdman, 825 F.2d 257, 272 (10th Cir. 1987) (deeming independent contractor/employee factors useless in general partnership setting).

88. *See* James M. Grippando, *Don't Take It Personally – Limited Liability for Attorney*

doctors, accountants, and other professionals may significantly decrease liability exposure for their colleagues' actions by organizing themselves in arrangements such as professional corporations.[89] The beneficial aspects of this innovative form, however, have perhaps led some of its proponents to overlook the unfavorable *internal* liability implications that it may carry.

For example, the United States Court of Appeals for the Second Circuit has ruled that organizations that choose to act as professional corporations forfeit the right to assert the ADEA partnership exemption with regard to directors/shareholders.[90] In *EEOC v. Johnson & Higgins, Inc.*,[91] the court rejected the argument of the defendant, a private corporation, that it was exempt from the ADEA on a theory that directors/shareholders are analogous to partners.[92] Johnson & Higgins appealed the district court's decision to grant partial summary judgment in favor of the EEOC, based on the court's determination that the firm's mandatory retirement policy for directors at age sixty or sixty-two violated the ADEA.[93]

On appeal, the court relied on a prior Second Circuit decision that limited the partnership exemption to de jure partnerships.[94] Although recognizing that modern partnerships and closely held corporations are fairly indistinguishable in terms of their organization and operation, the *Johnson & Higgins* court rigidly adhered to a "choice of form" test.[95] Viewing the roles of corporate director/shareholder and partner as mutually exclusive under the ADEA, the court found no way to extend the partnership exemption to a corporate enterprise.[96] Under the *Johnson & Higgins* holding, once an organization makes the decision to incorporate, it cannot then argue that it is exempt from the ADEA on a theory that it is a de facto partnership.[97]

Shareholders Under Florida's Professional Service Corporation Act, 15 FLA. ST. U. L. REV. 279, 282 (1987) (commenting on limited liability regime for professionals under Florida Professional Service Corporation Act).

89. *See* Haguewood, *supra* note 14, at 432-35 (summarizing advent of hybrid corporate form).

90. *See* Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 798 (2d Cir. 1986) (treating decision to incorporate as dispositive).

91. 91 F.3d 1529 (2d Cir. 1996).

92. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537-40 (2d Cir. 1996) (analyzing theory of directors as employees under ADEA).

93. *See id.* at 1531 (summarizing case's procedural posture).

94. *See id.* at 1537 (noting court's previous refusal to extend partnership exemption to closely held corporations and other organizations) (citing *Hyland*, 794 F.2d at 797)).

95. *See id.* at 1537-39 (refusing to disregard incorporated form).

96. *See id.* at 1538 (refusing to recognize circumstances in which shareholders are concurrently partners).

97. *See id.* at 1537-38 (characterizing *Hyland* as good law and summarizing its implications).

Although *Johnson & Higgins* does prevent professional corporations from asserting the partnership exemption, it does not stand for the proposition that directors/shareholders in a professional corporation are always employees under the ADEA.[98] According to the court, common-law agency analysis reveals whether a director possesses attributes that make him or her an "employee" for the purposes of federal employment discrimination law.[99] As a result, professional corporations may still rely on an ADEA exemption in regard to *directors*, so long as the individual is not also an "employee" within the meaning of the Act.[100] The court cited a three-factor modification of the common-law agency test that examines the following: "(1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy."[101] The directors at Johnson & Higgins met these criteria mainly because they continued their duties as senior officers or managers in the firm following their selection as directors.[102]

The *Johnson & Higgins* case is significant because the court recognized a distinction between the duties that an individual's title implies and that individual's actual responsibilities within a business organization.[103] In doing so, the court went one step further than did the *Wheeler* court because it examined not only the fiscal realities of certain business relationships, but also the multi-faceted role that individuals frequently play within modern alternative business forms.[104] Notably, the court maintained that the firm could claim privilege to the ADEA exemption only "by severing the link between the individual's employee status and his director status."[105] When contrasted with the bright-line per se rule in *Burke*, *Johnson & Higgins* laid a foundation for judicial approaches that transcend mere labeling and the rigid partner-employee dichotomy.

D. *The Totality of the Circumstances Approach*

Just as the lines between partner and employee have become blurred by modern business arrangements, so too have the parameters of the previous tests I have discussed. The developing case law and scholarship surrounding this

98. *See id.* at 1539 (clarifying holding in *Hyland*).

99. *See id.* at 1538-39 (explaining alternate grounds by which professional corporations may assert ADEA exemption).

100. *See id.* at 1538 (discussing what circumstances may give rise to classifying director as employee).

101. *Id.* at 1539.

102. *See id.* (applying common-law agency test to firm's directors).

103. *See id.* at 1540 (characterizing company's directors as senior-level employees).

104. *See id.* (focusing on plaintiffs' dual status as employees and directors).

105. *Id.*

issue reveal instances in which elements of the different tests overlap.[106] Although title is no longer dispositive, courts still consider whether an individual's title is bona fide while imposing an economic realities test.[107] This is because courts are wary of organizations that may admit individuals into the partnership solely to avoid the consequences of federal employment discrimination law.[108] Similarly, the organizational form of a business plays a role in the economic reality of a given plaintiff, who is in turn subject to a common-law agency analysis.[109] Courts struggle to find the appropriate test to apply, paying lip service to the various alternatives, but ultimately focusing more on the underlying ramifications of their decisions.[110] Their dilemma, therefore, is finding a way to render decisions that are both results-oriented and principled in the sense of maintaining the important conceptual distinctions of partnership, agency, and employment discrimination law.[111] Whether a response to this complex array of theories or a by-product of it, a "totality of the circumstances" approach appears to have taken center stage in this debate.

The United States Court of Appeals for the Sixth Circuit, in the case of *Simpson v. Ernst & Young*,[112] dealt directly with the issue of whether partners are "employees" for the purposes of the ADEA.[113] Following the merger of accounting firms Arthur Young & Co. and Ernst & Whinney (now Ernst & Young), the new firm's Management Committee secretly voted to reduce "excess staff capacity" by five percent.[114] Simpson and all other similarly

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106. *See, e.g., id.* at 1539 (citing common-law agency test within context of organizational form analysis); Siko v. Kassab, Archbold & O'Brien, L.L.P., No. CIV.A.98-402, 1998 U.S. Dist. LEXIS 12153, at *15 n.4 (E.D. Pa. Aug. 5, 1998) (identifying no definitive test, but listing thirteen factors to consider); Pokora, *supra* note 43, at 259 (describing some courts' use of "hybrid" tests, which combine common-law agency analysis and economic realities test).

107. *See* Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987) (rejecting economic realities test in situations in which plaintiff is bona fide general partner).

108. *See id.* at 276 (concluding that partnerships are not free to label someone "partner" in order to avoid application of Acts).

109. *See* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997) (noting that "partnership cannot exclude individuals from the protection of Title VII simply by draping them in grandiose titles which carry little or no substance"); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539-40 (2d Cir. 1996) (analyzing economic relationship between director and professional corporation in applying common-law agency analysis).

110. *See Wheeler*, 825 F.2d at 269-74 (surveying tests, choosing to apply economic realities test, but criticizing ramifications of economic realities test if taken to logical extreme).

111. *See* Pokora, *supra* note 43, at 272 (advocating case-by-case application of common-law test as best method for balancing "partner" versus "employee" characteristics).

112. 100 F.3d 436 (6th Cir. 1996).

113. *See* Simpson v. Ernst & Young, 100 F.3d 432, 439 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997) (discussing threshold jurisdictional question of plaintiff's coverage under ADEA).

114. *See id.* at 440 (summarizing facts leading up to lawsuit).

situated partners had signed pre-merger agreements that stated that the merger would not result in major staff reductions and would produce equivalent or better retirement benefits for all concerned parties.[115] After the firm terminated him, Simpson brought suit under the ADEA, the Employee Retirement Income Security Act (ERISA), and a supplemental Ohio law that bars age discrimination.[116] He asserted that the defendant terminated him partly to deprive him of participation in the firm's new retirement plans.[117] The district court found that Simpson was an "employee" under the employment discrimination statutes, thereby entitling him to appropriate relief.[118]

In addressing the validity of Simpson's claim, the Sixth Circuit took particular interest in the firm's management committee.[119] The complex terms of the partnership agreement created an ambiguous business structure that effectively divested Simpson and other similarly situated "older" partners of all meaningful management participation in the firm.[120] Evidence showed that the ten- to fourteen-member committee exclusively directed "the firm's business, assets, and affairs."[121] Partners who were not committee members had no authority over such matters as personnel and partnership decisions, compensation structures and levels, inspection of the firm books and records, and voting for management committee membership.[122] The court concluded that partners in Simpson's position had "no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control . . . and no job security."[123]

The Sixth Circuit seemed more concerned with the equitable result that the facts demanded than with the formalities of the test it applied, noting the trial court's finding that Simpson was for all practical purposes "an employee with the additional detriment of having promised to be liable for the firm's losses."[124] Although acknowledging the existence of various tests, the court ultimately took a fact-specific approach that relied heavily on factors gleaned

115. *See id.* (detailing terms of pre-merger documents).

116. *See id.* at 439 (discussing procedural posture of case).

117. *See id.* (summarizing relief sought by plaintiff).

118. *See id.* (discussing result of cross-motions for summary judgment).

119. *See id.* at 440-41 (remarking on Committee's covert tactics); *see also* James B. Porter, Note, *Modern Partnership Interests as Securities: The Effect of RUPA, RULPA, and LLP Statutes on Investment Contract Analysis*, 55 WASH. & LEE L. REV. 955, 976 (1998) (analyzing *Simpson* in light of partnership agreement that plaintiff signed).

120. *See* Simpson v. Ernst & Young, 100 F.3d 432, 441 (6th Cir. 1996) (discussing how plaintiff was subject to near absolute control of committee).

121. *See id.* (summarizing trial judge's factual findings).

122. *See id.* (pointing to evidence that plaintiff was employee).

123. *See id.* at 442 (quoting district court's conclusions).

124. *Id.*

from the common-law principles codified in the 1914 UPA.[125] Focusing "on the particular circumstances of the case at hand," the court concluded that Simpson had a valid age discrimination claim entitling him to relief.[126]

In *Serapion v. Martinez*,[127] the United States Court of Appeals for the First Circuit also endorsed the totality of the circumstances approach.[128] Building on *Simpson*, the *Serapion* court provided a framework that focused on "overlapping categories" of "ownership, remuneration, and management."[129] However, as did the Sixth Circuit in *Simpson*, it warned that its list was non-exclusive, noting that "status determination under Title VII must be founded on the totality of the circumstances which pertain to a particular case."[130]

III. The Ripple Effect of Simpson: *Revised EEOC Enforcement Guidelines for Determining Bona Fide Partner Status*

Whatever the jurisprudential implications of *Simpson* may be, many organizations have found its practical implications difficult to swallow. Along with Ernst & Young, sixteen major law firms joined as *amici curiae* in unsuccessfully petitioning the Supreme Court for certiorari.[131] Likely underly-

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125. *See id.* at 443-44 (cautioning that list was not exhaustive).

126. *See id.* at 443 (endorsing case-by-case approach).

127. 119 F.3d 982 (1st Cir. 1997).

128. *See* Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997) (using totality of circumstances test to determine Title VII status). In *Serapion*, the First Circuit considered whether "Title VII's employment-related shelter might in certain circumstances extend" to a law firm partner. *Id.* at 984. Margarita Serapion alleged that three of her law firm partners "never intended that a woman would achieve parity" with her male colleagues, in spite of attaining partnership status in the firm. *Id.* at 984-85. When the firm dissolved and reorganized in response to her refusal to sign an agreement that would have diminished her authority significantly, she sued alleging violations of Title VII. *Id.* at 986. The district court granted the defendants' motion for summary judgment, holding that Serapion was not an "employee" for Title VII purposes and was therefore ineligible to seek redress under the Act. *Id.* On appeal, the First Circuit cited *Simpson* and determined that Title VII protection might extend to partners under the right conditions. *Id.* at 990. The court noted that the factual circumstances of particular cases determine the appropriate emphasis placed on each of the three overlapping categories it listed. *Id.* Stressing the factors of "ownership" and "remuneration" in regard to the plaintiff, the court pointed out that she received an equity interest in the firm and very generous fringe benefits. *Id.* at 991. As for the "management" category, she enjoyed significant voting rights in the firm's two principal governing bodies. *Id.* Finding that no reasonable fact-finder could conclude that the plaintiff was not a bona fide partner, the court affirmed the district court's decision to grant summary judgment for the defendants. *Id.*

129. *Id.* at 990.

130. *Id.*

131. *See* Ernst & Young v. Simpson, 520 U.S. 1248, 1248 (1997) (granting motion of law firms for leave to file brief as *amici curiae*, denying petition for writ of certiorari).

ing the concern of Ernst & Young and the law firms was a realization that the lower federal courts have moved toward a more malleable framework that acknowledges the inequalities within modern professional organizations.[132] The hierarchy of large firms today leaves many individuals with relatively weak bargaining power, thereby unable to "self-police" despite attaining partner status.[133] In a world of seven-to-ten-year "up or out"[134] partnership tracks, it is very likely that many prospective partners feel pressured to forfeit some of their rights in exchange for the perceived professional satisfaction and stability that partner standing brings.[135] However, as the *Simpson* court alluded to, the fact that these individuals still agree to assume liability for the firm's debts makes for what some might call a "raw deal."[136] Law firms, other professional organizations, and prospective partners should realize that these trends have not gone unnoticed by the EEOC.

As mentioned earlier, the EEOC from time to time has taken a stance in the courts on the issue of the ADEA status of partners.[137] In addition to bringing suits and appearing as *amicus curiae* in the past, the Commission has expressed its official position in its Compliance Manual, which in turn has largely reflected the prevailing precedents of the lower federal courts.[138] However, recently revised EEOC enforcement guidelines take a more proactive stance by not only relying on precedent but also attempting to shape policies in their own right.[139] Through the guidelines, the EEOC for the first

132. *See* Dawn S. Sherman, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee Under Title VII?*, 6 WM. & MARY J. WOMEN & L. 645, 659-62 (2000) (discussing policies underlying recent decisions).

133. *See* Porter, *supra* note 119, at 975 (suggesting that inferior bargaining power may explain why prospective partners agree to partnership agreements that deny them many traditional aspects of partner status).

134. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 315-16 (1985) (explaining "up or out" policies as ones under which associates either make partner or leave firm involuntarily).

135. *See* Porter, *supra* note 119, at 975 (noting how prospective partners feel forced to sign partnership agreements that strip them of rights).

136. *See* Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996) (quoting district court's observation that under partnership agreement, plaintiff was not bona fide partner but was liable for firm's actions).

137. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537-38 (2d Cir. 1996) (detailing EEOC's involvement in case); Wheeler v. Hurdman, 825 F.2d 257, 258 n.2 (10th Cir. 1987) (explaining granting of permission to EEOC to appear as *amicus curiae*).

138. *See* 144 1-98 EEOC Compl. Man. (CCH) § 605-E ¶ 2179, 2325, 2325 (explaining that Justice Powell's concurrence in *Hishon* mirrors Commission's position that all aspects of employer-employee relationship must be considered).

139. *See* EEOC Compl. Man. (BNA) § 2-III(A)(6)(a) (May 12, 2000) (setting forth criteria for exemptions from ADEA's prohibition on compulsory retirement).

time provides a definitive list of attributes that an individual should possess in order to qualify for the partnership exemption.[140] Thus, the Commission has now made clear both its understanding of precedent and its view as to how future courts should assess the structure of modern partnerships.

A. Summary and Significance of the Revised Guidelines

In the revised guidelines, the EEOC endorses a totality of the circumstances approach that turns on whether an individual is subject to an organization's control.[141] If the organization controls the individual, he or she is not a "partner."[142] In determining who is subject to such control, the Commission lists as factors the following:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
- Whether and, if so, to what extent the organization supervises the individual's work
- Whether the individual reports to someone higher in the organization
- Whether and, if so, to what extent the individual is able to influence the organization
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
- Whether the individual shares in the profits, losses, and liabilities of the organization[143]

In addition to stipulating who is not a "partner," the guidelines provide another list that prescribes who is an "employee" in the sense that the individual is in an employment relationship.[144] The guidelines give no indication of the relative weight of any of the factors, nor do they require a plaintiff to meet all or even a majority of the criteria.[145]

The guidelines go on to discuss expressly the application of the ADEA to compulsory retirement policies for "bona fide executives and high

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140. *See id.* § 2-III(A)(1)(d) (listing factors to consider with regard to coverage of "partners, officers, members of boards of directors, and major shareholders").

141. *See id.* (discussing application of guidelines to "partners, officers, members of boards of directors, and major shareholders").

142. *See id.* (providing that individual is not partner whom organization controls but instead "employee").

143. *Id.*

144. *See id.* § 2-III(A)(1) (discussing whom Equal Employment Opportunity statutes protect).

145. *See id.* (emphasizing that list is not exhaustive). The guidelines state that "the determination must be based on all of the circumstances in the relationship between the parties." *Id.*

policymakers."[146] These individuals are exempt from ADEA protection if the employer establishes that the individual:

- Manages the organization or a department or subdivision of the organization;
- Directs the work of at least two other employees;
- Has authority to hire or dismiss other employees or his/her suggestions as to personnel decisions are given particular weight;
- Customarily and regularly exercises discretionary powers; and
- No more than 20 percent of his/her work time (or 40 percent if s/he is in a retail or service establishment) is devoted to activities unrelated to those described in requirements 1 through 4 above . . . .[147]

In light of *Johnson & Higgins*, the preceding section could have significant implications for firms that choose to act as professional corporations. Specifically, this section points out that executives and high-level policymakers meeting these requirements are subject to an exemption, so long as they do not also hold positions within the organization that fall outside that exemption.[148] If they do hold such positions, the organization may not force them to retire.[149] As evidenced in *Johnson & Higgins*, firms that delegate multiple responsibilities to senior-level members must recognize the potential liability associated with that type of internal structure.[150]

All of this indicates that the Commission is taking notice of the movement towards larger, more centralized firms, even if legally organized as partnerships.[151] For example, the EEOC likely realizes that within the hierarchy of a 700-attorney law firm it is simply unfeasible to allow every partner a voice in key management decisions.[152] Nor is it practical for the firm to grant every partner an equity interest in the organization, as indicated by the increase in two-tiered partnership tracks and other unconventional firm arrangements.[153]

146. *See id.* § 2-III(A)(6)(a) (providing guidance for applying ADEA exemption for "bona fide executives and high-level policymakers").

147. *Id.*

148. *See id.* (explaining that individual holding two or more positions is still subject to the exemption if both positions are executive or high policymaking positions).

149. *See id.* (discussing requirements for ADEA exemption).

150. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1540 (2d Cir. 1996) (finding that firm could claim exemption only by severing link between director status and employee status).

151. *See* Neil, *supra* note 2, at 43 (citing firm size as factor that could encourage EEOC to treat "partner" as employee).

152. *See id.* (contrasting management structure of large firms with that of small firms).

153. *See* Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal*

However, along with these realities comes a responsibility for the firm to reassess its policies with regard to those partners with less power.[154] Furthermore, if courts choose to view these guidelines deferentially, the EEOC may have created a tool for evaluating the necessary elements of partner and employee status. Armed with that tool, the EEOC and prospective plaintiffs may find it easier to bring suit and ultimately recover damages against organizations that fail to reconsider their policies.[155]

B. Potential Limitations of the Revised Guidelines

In spite of the Commission's attempt to clarify its position and shed clearer light on this issue, the revised guidelines are not without flaws.[156] The guidelines take the position that, if an organization controls an individual, then that individual is not a partner.[157] By failing to offer insight as to how to assess the listed factors or to assign relative weight to any of them, however, the EEOC may have created ambiguity in other respects.[158] The fuzzy distinction made between one who "acts independently and participates in managing the organization" and one who is "subject to the organization's control" is typical of this ambiguity.[159]

The EEOC guidelines describe these attributes disjunctively, implying that they are mutually exclusive.[160] If the Commission is referring to "independence" and "control" in the agency law sense, the terms are not so cut and dry. As a preliminary matter, it is clear that attorneys are almost always agents, but never employees/servants of their clients.[161] Clients do not physically

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Profession: The Advent of Temporary Lawyering, 66 NOTRE DAME L. REV. 359, 368-70 (1990) (discussing law firms' departure from traditional career track through use of "non-equity" partnership status, "of-counsel" designations, and "staff attorneys").

154. *See* Neil, *supra* note 2, at 42 (commenting on need for firms to reassess policies in light of recent changes in firm structure and EEOC guidelines).

155. *See id.* (suggesting that revised EEOC guidelines may make it easier for law firm partner to be classified as employee under ADEA).

156. *See id.* (describing guidelines as product of EEOC's attempt to make "compliance manual simpler and easier to understand").

157. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (explaining determination that EEOC investigator should make).

158. *See id.* (noting that other factors in relationship between parties may affect determination).

159. *See id.* (distinguishing between partners and employees based on degree of control).

160. *See id.* (noting circumstances where "partners, officers, members of boards of directors, and major shareholders" will qualify as employees).

161. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (discussing master-servant relationship); *see also* ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED

control how an attorney does his or her job.[162] Instead, attorneys act as independent contractors who attempt to follow their clients' wishes but who ultimately exercise their own professional judgment.[163] Furthermore, under the "entity theory" adopted by the 1997 UPA, a partnership is an entity capable of having a separate existence apart from its partners.[164]

That being established, in a partnership setting a bona fide partner has a great deal of autonomy in regard to clients and other third parties. The partner is an agent of the partnership as an entity, but also maintains the ability to make professional decisions free from the influence of the other partners and, in that sense, is an independent contractor in relation to both the client and the firm.[165] However, the organization as an entity (through the other bona fide partners acting as the principal) maintains the right to "control" how the partner behaves by setting standards to abide by when representing the partnership, based on the partner's ability to bind the organization when the partner acts as its agent.[166] In addition, the firm may set internal standards, such as minimum billable hours, to determine partner compensation and bonuses.[167]

In contrast, non-partners are independent contractors only in relation to their clients. Like all attorneys, they possess a sense of professional autonomy while still acting as agents who respect their clients' wishes.[168] Despite this, the organization as an entity (through the bona fide partners acting as the principal) largely dictates the working conditions of a non-partner.[169] This is

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BUSINESSES AND CLOSELY HELD CORPORATIONS § 2.6 (1996) (providing example of when attorney is not agent).

162. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining servant as agent whose "physical conduct in the performance of the services is subject to" master's control).

163. *See id.* § 2(3) (defining independent contractor as "person who contracts with another to do something but who is not controlled by the other").

164. *See* Uniform Partnership Act § 201(a) (1997) (defining nature of partnership); *see also* Gingiss, *supra* note 33, at 25-26 (commenting on aggregate versus entity theories of partnership).

165. *See* Uniform Partnership Act § 301(1) (1997) (classifying each partner as agent of partnership).

166. *See id.* (providing that acts of partners carried on in ordinary course of partnership business normally bind partnership).

167. *See* Edward S. Adams & Stuart Albert, *Law Redesigns Law: Legal Principles as Principles of Law Firm Organization*, 51 RUTGERS L. REV. 1133, 1143 (1999) (noting that business-like nature of law firms results in measuring attorney's success by ability to meet internal performance standards).

168. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 267-68 (1985) (analyzing agency-law-based duties that associates owe to clients).

169. *See id.* at 260-61 (commenting on ability of law firm to give associates assignments and to direct how and when work is done).

because the organization, in addition to setting internal standards of behavior, maintains the right to control a non-partner's *physical* conduct in the performance of his or her job, thus making the non-partner an employee/servant in relation to the organization itself.[170]

It is this distinction between a principal's customary right to control any type of agent in the abstract sense and a principal's more extensive right to control the physical conduct of an employee/servant that the guidelines fail to clarify or recognize.[171] Furthermore, the implication that the attributes of "independence" and "control" are mutually exclusive represents too simplistic a view of agency law as it applies to attorneys acting in a partnership setting.[172] As I have discussed, all attorneys, whether bona fide partners or not, are both "independent" and "controlled" on some level.[173] The vague nature of the guidelines' control-oriented standard potentially could place almost any person working in a partnership setting within the scope of federal protection.[174] The same criticism applies to the economic realities test, as the *Wheeler* court observed.[175] I will clarify these points later in my hypothetical illustrations and conclusion sections,[176] but for now they will suffice to illustrate the potential shortcomings of the revised EEOC guidelines.

IV. Legal Authority of EEOC Guidelines: Do Courts View Them Deferentially?

One key issue related to this topic is whether EEOC guidelines generally carry significant legal weight. In the past, courts addressing the issue of who receives protection under federal employment discrimination statutes have

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170. *See id.* at 261 (describing associate as agent and servant of law firm, subject to control of partners); *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (noting master's right to control servant's physical conduct).

171. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (discussing concept of "control" without clarifying its meaning).

172. *See supra* notes 161-71 and accompanying text (analyzing attorney's dual roles as agent and independent contractor).

173. *See* Gerry Malone, *Balancing Autonomy and Accountability*, LAW PRAC. MGMT., Oct. 1997, at 22, 23 (discussing how lawyers cling to idea of personal autonomy while recognizing measure of accountability to others in firm).

174. *See* Pokora, *supra* note 43, at 269 (criticizing idea of affording bona fide partners protection under Title VII).

175. *See* Wheeler v. Hurdman, 825 F.2d 257, 272-73 (10th Cir. 1987) (asserting that under version of economic realities test proposed by plaintiff and EEOC virtually every partner could be employee for purposes of discrimination statutes).

176. *See infra* Parts V and VII (providing hypothetical situations and conclusions in light of revised enforcement guidelines).

pointed to the language of EEOC guidelines, but usually within the context of citing consistent precedent as well.[177] Thus, the ability of the recently revised guidelines to influence the state of the law in this area depends largely upon the willingness of courts to view them somewhat independently of judicial precedent.

EEOC guidelines are written with the EEOC investigator rather than the courts in mind.[178] As a result, they take on a tone that is uniquely administrative as opposed to statutory.[179] Apart from this, however, the Supreme Court on more than one occasion has indicated that EEOC guidelines and similar agency interpretations may carry significant legal authority.[180]

A. Cases Showing Deference to EEOC Guidelines and Similar Agency Interpretations

In *Griggs v. Duke Power Co.*,[181] the Court stated that EEOC guidelines are entitled to "great deference."[182] A group of black employees at Duke Power Company brought suit under Title VII, alleging unlawful racial discrimination in the company's employee selection process.[183] The employees challenged a policy that required a high school education and successful performance on two professionally prepared aptitude tests for hire or promotion to any of the company's more desirable positions.[184] Both the district court and the court of appeals found that Title VII applied only to purposeful racial discrimination, and both courts therefore refused to reach the merits of the case.[185]

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177. *See Wheeler*, 825 F.2d at 270 (citing factors from EEOC administrative decision published in 1985 EEOC Employment Practice Guide); Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 797 (2d Cir. 1986) (discussing standard set forth in 1985 EEOC Employment Practice Guide).

178. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (listing factors that investigator should consider).

179. *See id.* (defining covered individuals by first asking rhetorical question: "Who is an 'Employee'?").

180. *See* EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 121-22 (1988) (deferring to EEOC's interpretation of Title VII provision); Albemarle Paper Co. v. Moody, 422 U.S. 405, 434 (1975) (endorsing approach taken by EEOC guidelines); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (noting that EEOC guidelines are "entitled to great deference"); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (according "great deference" to EEOC guidelines).

181. 401 U.S. 424 (1971).

182. *See* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (endorsing EEOC guidelines' interpretation of Title VII provisions).

183. *See id.* at 426 (explaining Title VII's mechanism for class action enforcement suits).

184. *See id.* at 427-28 (describing company's employment policies and practices).

185. *See id.* at 428-29 (explaining procedural posture of case and reasoning of lower

In addressing the issue of Title VII's scope, the Supreme Court first looked to the EEOC Guidelines on Employment Testing Procedures.[186] The Court justified this approach by reasoning that the Commission's enforcement responsibilities result in the issuance of such guidelines, which effectively represent the administrative interpretation of Title VII.[187] Notably, the Court went further and stated that because the legislative history of Title VII supported the Commission's construction, there was "good reason to treat the guidelines as expressing the will of Congress."[188] By giving the guidelines considerable deference, the Court went on to reverse the decision of the court of appeals on the grounds that employee aptitude tests must have a demonstrable relation to the performance of the job.[189]

Griggs is noteworthy because of the approach the Court used. The case opened the door for a new theory of discrimination, "disparate impact" (non-intentional discrimination), in the process giving countless plaintiffs a new avenue of relief.[190] It is telling in itself that the Court's decision turned largely on the substantive dimensions of EEOC guidelines. However, without expressly distinguishing *Griggs* or its progeny, the Court more recently has tempered its tone with regard to EEOC and administrative guidelines in general.[191]

U.S. v. Mead Corp.[192] did not deal with an EEOC guideline, but it did clarify the Court's general approach to administrative agency interpretations.[193]

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courts).

186. *See id.* at 433-34 (characterizing EEOC guidelines as administrative interpretation).

187. *See id.* (placing guidelines in context of administrative process).

188. *Id.* at 434.

189. *See id.* at 436 (explaining ramifications of decision for use of employee tests).

190. *See* Christopher Dee, Comment, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. CHI. L. REV. 957, 959-61 (1987) (summarizing effect of *Griggs* and noting attractiveness of disparate impact claims to plaintiffs). Under the theory of disparate impact, a plaintiff need not show proof of discriminatory intent. *Id.* at 959-60. A prima facie case requires only a showing that a particular policy has "a discriminatory effect on members of a protected class." *Id.*

191. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (indicating no heightened deference to agency guideline when Congress did not delegate power to promulgate rules or regulations); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976) (determining that EEOC guidelines in question merited little deference).

192. 533 U.S. 218 (2001).

193. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (summarizing holding). In *Mead*, the Court considered what amount of judicial deference to afford to a tariff "ruling letter" issued by the Customs Service. *Id.* at 221, 225-26. Ruling letters represent the "official position of the Customs Service with respect to the particular transaction or issue described therein." *Id.* at 222 (internal quotations omitted). Mead Corporation imported small

The United States Government sought review of a decision by the United States Court of Appeals for the Federal Circuit that gave no deference whatsoever to a "ruling letter" issued by the Customs Service.[194] In overturning the court of appeals, the Supreme Court identified varying levels of judicial deference applicable to administrative agency interpretations.[195]

The Court reserved the highest level of deference for instances in which it appears that the agency promulgated an interpretation in exercise of powers delegated to it by Congress to make rules that carry the force of law.[196] This requires a showing that the agency engaged in formal adjudication or notice-and-comment rulemaking or that it acted in accordance with some other signal of comparable congressional intent.[197] In those cases, a reviewing court must accept the agency's position unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[198] However, even if those circumstances are not present, the agency's interpretation is not automatically beyond the province of judicial consideration.[199]

"day planners" into the United States and sought to avoid having them classified as "bound diaries" under the Harmonized Tariff Schedule of the United States. *Id.* at 224-25. Avoiding the classification would make the items free from any duties, whereas classifying them as such would subject them to a tariff of four percent. *Id.*

The company filed suit in the Court of International Trade, which ruled for the Government without considering the issue of judicial deference. *Id.* at 225. On appeal, the United States Court of Appeals for the Federal Circuit reversed, holding that Customs classifications rulings do not fall under the highly-deferential standard announced in the landmark case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. Id.* at 226. Finding that the rulings did not carry the force of law, the court rejected the agency's classification. *Id.* On appeal, the Supreme Court pointed out that the majority of its cases applying *Chevron*-level deference involved "the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230. However, the Court cautioned that administrative formalities were not required elements of *Chevron*-level deference. *Id.* at 231. Instead, courts should focus on congressional intent and look for circumstances reasonably suggesting that Congress wanted to delegate interpretational authority. *Id.* The Court found no such indications in this case, but explained that an administrative agency's interpretation, whatever its form, may merit lower-level ("some," "persuasive," etc.) deference given the agency's expertise in certain matters. *Id.* at 230-32. As a result, the Court vacated the judgment of the court of appeals and remanded the case for further proceedings consistent with its opinion. *Id.* at 239.

194. *See id.* at 226 (discussing procedural posture and lower court's ruling).

195. *See id.* at 236-37 (recognizing varying levels of judicial deference and rejecting Justice Scalia's "either-or" approach in dissent).

196. *See id.* at 226-27 (describing circumstances warranting *Chevron*-level deference).

197. *See id.* at 227 (summarizing holding in regard to *Chevron*-level deference).

198. *See id.* at 229 (explaining standard for reviewing courts) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)).

199. *See id.* at 232 (cautioning that decision does not preclude courts from according *some* deference to agency interpretations).

Without a clear showing of formal process or comparable action, a court may view the agency's interpretation with a proportionate level of lowered deference.[200] In light of the agency's expertise, available information, and prior interpretations, the court may attach an appropriate level of merit to the position of the agency.[201] This level of merit could range from according the agency's position "some deference" to giving it "persuasive force."[202] Because the circumstances showed that the Customs Service's ruling letter clearly did not demand the highest level of deference, but may have deserved some form of lowered consideration, the Court vacated the judgment of the court of appeals and remanded the case for further proceedings.[203]

B. Analysis: EEOC Guidelines as Persuasive Authority

EEOC guidelines most appropriately fall within the lowered deference classification in *Mead* for three reasons. First, they are not the product of formal adjudication or notice-and-comment rulemaking.[204] Second, there is no alternate way of gleaning comparable congressional intent to delegate broad rulemaking power because the Commission primarily is not a rulemaking agency.[205] It is an independent regulatory agency, entrusted mostly with enforcement of federal employment discrimination laws and the promotion of employer-employee conciliation efforts.[206] Third, although the Commission primarily is not a rulemaking agency, the text of the ADEA does specifically enable it to issue rules, regulations, and exemptions necessary or appropriate for carrying out the Act.[207] Thus, a decision by the Commission to issue enforcement guidelines rather than formally update its rules, regulations, or exemptions likely means that the guidelines in question do not carry

200. *See id.* at 234-35 (discussing circumstances in which courts may give deference below level of *Chevron*).

201. *See id.* (describing framework for courts to consider when faced with interpretation outside scope of *Chevron*).

202. *See id.* at 235-36 (reasoning that multifarious levels of administrative action require varying degrees of deference).

203. *See id.* at 238-39 (summarizing ramifications of Court's decision).

204. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (noting that "Congress, in enacting Title VII did not confer upon EEOC authority to promulgate rules or regulations pursuant to that Title").

205. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(g) (1994) (defining authority of EEOC and focusing primarily on enforcement powers).

206. *See id.* (defining EEOC's enforcement procedures and powers).

207. *See* Age Discrimination in Employment Act, 29 U.S.C. § 628 (1994) (authorizing EEOC to "issue such rules and regulations as it may consider necessary and appropriate for carrying out" the Act).

the force of law. Conceding these points is a necessary but not sufficient step in deciding how to assess appropriately EEOC guidelines in general.[208]

The next step, in light of *Mead*, is to consider the statutory circumstances and the breadth of possible agency action.[209] Although it is clear that Congress did not intend to give broad rulemaking power to the EEOC, Congress typically does not define precisely how it proposes to implement statutes that authorize administrative action.[210] *Mead* stressed the importance of recognizing that "[i]mplementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge" or "in a central board or office or in dozens of enforcement agencies dotted across the country."[211] Therefore, it is fully plausible that in choosing not to grant broad rulemaking power to the EEOC, Congress nonetheless granted it primary *implementation* power for federal employment discrimination acts such as Title VII and the ADEA.[212] The structure of the EEOC lends itself well to this scenario. The Commission's principal office in Washington, D.C. and its fifty field offices each have the responsibility of coordinating all federal equal employment opportunity regulations, practices, and policies for their respective jurisdictions.[213]

Accordingly, a logical way to view EEOC guidelines is as a legitimate exercise of the Commission's implementation power. Under the proportionality standard in *Mead*, this would entitle them to a fairly high level of judicial deference because the EEOC has a certain degree of implementation expertise that courts neither possess nor have the power to exercise.[214] Furthermore, when placed within the breadth of possible EEOC action, implementation falls relatively high on the spectrum, most likely just behind the Commission's enforcement power.[215] Although the Supreme Court has retreated from the

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208. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (noting that whether agency's interpretation is entitled to *Chevron*-level deference depends on whether Congress has given agency rulemaking authority or similar interpretational authority).

209. *See id.* at 236 (reasoning that "the breadth of the spectrum of possible agency action must be taken into account" in determining appropriate level of deference).

210. *See supra* notes 206-07 and accompanying text (describing how EEOC's organic statute makes no provision for rulemaking activities).

211. *Mead*, 533 U.S. at 236.

212. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(g)(3) (1994) (granting EEOC power to provide technical assistance to employers in their efforts to comply with Title VII).

213. *See id.* § 2000e-4(f) (declaring Washington, D.C. as location of EEOC's principal office, but authorizing Commission to meet or exercise its powers at any other location); *see also* "EEOC Enforcement Activities," *at* http://www.eeoc.gov/enforce.html (providing overview of Commission and its activities) (last visited Nov. 15, 2002).

214. *See supra* notes 200-02 and accompanying text (describing *Mead*'s proportionality standard).

215. *See supra* notes 209-13 and accompanying text (discussing *Mead*'s focus on breadth

"great deference" standard in *Griggs*,[216] together these factors present a strong case for viewing EEOC guidelines as persuasive authority deserving of measurable deference by the federal courts.

V. Hypothetical Illustrations

Assuming that EEOC guidelines merit at least persuasive force, one way to gauge how courts may view the revised guidelines is by applying them to hypothetical situations. The following fictional scenarios emphasize the attributes that the revised guidelines list for determining bona fide partner status[217] as well as "bona fide executives or high policymakers" status.[218] They also consider the previously discussed ambiguity in the revised guidelines' focus on the "right to control."[219]

Example 1

Michael Dimitruk, age sixty-two, carries the title of partner in a large full-service law firm. The firm has seven offices throughout the United States, with an approximate total of 500 attorneys. In his office of 125 attorneys, he serves on the recruitment and hiring committee and the associate development committee. Michael practices in the real estate section and decides what projects to work on, but does not head the practice group. He frequently asks associates to review his work, but the firm does not require him to send his work to any other partner for approval. The firm determines Michael's compensation solely on the basis of its net profits. Under the partnership agreement, his relationship with the firm only terminates voluntarily or for good cause.

Analysis of Example 1

Michael most likely is a bona fide partner. The organization cannot fire him; it can only terminate his relationship with the firm for good cause.[220] He

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of agency action and statutory circumstances, as well as significance of EEOC implementation activities).

216. *See supra* note 193 (noting post-*Griggs* Supreme Court declining to give substantial deference to EEOC guidelines).

217. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (listing factors to consider in determining "employee" status of "partners, officers, members of boards of directors, and major shareholders").

218. *See id.* § 2-III(A)(6)(i)(a) (listing requirements for "bona fide executives and high policymakers").

219. *See supra* Part III.B (explaining potential limitations of revised enforcement guidelines).

220. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (listing as factor organization's ability to hire or fire individual).

can influence the organization fairly extensively through his committee roles because they both involve significant decisionmaking.[221] He also maintains general autonomy over his work.[222] Although he does report to a superior, the head of his practice group, his other attributes and the fact that he shares in firm profits probably outweigh this factor.[223] If the firm forces Michael to retire under these circumstances, it is unlikely that he will have an ADEA claim.

Example 2

Chris Wiech, age forty-one, carries the title of partner in the same office of the same large full-service law firm for which Michael works. He serves on the community service committee. Upon making partner one year ago, Chris entered a "probationary" period during which the firm maintains the right to terminate him without cause. During this period, he draws a base salary, but also receives a share of the firm's profits for bringing in clients. Following the end of his probationary period, the firm will decide whether to make him a full equity partner. Chris practices in the corporate finance section of the firm, receiving priority projects from higher-level partners. When there are relatively few priority projects or all of them are complete, he may take on projects of his choosing. Chris works closely with two high-level associates, but he does not supervise them or approve their work. Instead, they assist him with the priority projects he receives, which are then subject to approval by the higher-level partners. If he does not make full equity partner at the end of the probationary period, the firm will retain him under the same terms and conditions in which he currently operates.

Analysis of Example 2

Chris most likely is not a bona fide partner and is instead an employee. The organization can fire him without cause[224] as well as dictate the parameters of his work on a number of levels.[225] The committee on which he sits may influence the outside community, but does not have very much internal influence on the organization itself.[226] Chris' lack of supervisory power over the two associates also reflects his inability to influence the firm.[227] Although he

221. *See id.* (listing individual's ability to influence organization as factor).

222. *See id.* (listing as factor extent to which organization supervises individual's work).

223. *See id.* (listing as factors whether individual reports to superior and whether individual shares in organization's profits, losses, and liabilities).

224. *See id.* (listing as factor organization's ability to hire or fire individual).

225. *See id.* (listing as factors extent to which organization controls individual's work and supervises individual).

226. *See id.* (listing as factor individual's ability to influence organization).

227. *See id.* (same).

receives a share of the organization's profits, this figure is proportionate to the amount of business that he brings to the firm. Therefore, salary remains his primary source of compensation, as it does with associates in the firm.[228] If the firm forces him to retire under these circumstances, he will likely have an ADEA claim.

Example 3

Mary Bonds, age fifty-six, carries the title of partner in a securities litigation boutique firm. The firm has one office in New York City with twenty-five attorneys, ten of whom carry the title of partner. It has a loose management structure, with no committees or identifiable administration apart from one attorney with the title of "managing partner." Taking pride in the firm's "team environment," all of the partners and associates assist each other with cases. The firm does not divide its practice into specialized sections because it focuses only on securities litigation. Partners choose cases on the basis of priority and interest. The firm offers two compensation packages for partners. Those partners choosing to bill a minimum of 2000 hours per year share equally in the firm's profits. Alternatively, partners choosing to bill a minimum of 1650 hours per year receive a base salary, with bonuses for every additional 100 hours billed. Mary has chosen the second compensation package for the last ten years.

Analysis of Example 3

Mary most likely is a bona fide partner. This hypothetical displays how firm size is a factor in status determinations.[229] The firm's non-hierarchical approach presents a number of ramifications. First, it indicates that despite the fact that Mary sits on no committees and in no designated management position, her influence over the organization is relatively high due to its small size.[230] In addition, it shows that she effectively reports to no one higher in the firm.[231] Furthermore, although the other attorneys review her projects, this is a product of the firm's "team atmosphere" and not of a rigid supervisory structure.[232] Mary's compensation package represents a deliberate choice by her to

228. *See id.* (listing as factor individual's share in organization's profits, losses, and liabilities).

229. *See* Neil, *supra* note 2, at 43 (discussing how movement toward larger law firms may prompt increase in partner discrimination suits).

230. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (listing as factor individual's degree of influence over organization).

231. *See id.* (listing as factor whether individual reports to superior).

232. *See id.* (listing as factor extent to which organization supervises individual's work).

work fewer hours in exchange for lower compensation, as part of a voluntary agreement with the firm. The agreement does nothing to alter her partner status; it only provides her with an alternative that she chose to exercise. The revised guidelines respect this sort of agreement between the parties.[233] If the firm forces Mary to retire under these circumstances, it is unlikely that she will have an ADEA claim.

Example 4

William Jowers, age fifty-three, carries the title of director/shareholder in a mid-size full-service law firm. The firm regards William as a partner; however, it assigns the label of "director/shareholder" to partners because it operates as a professional corporation. In addition to his duties as a director/shareholder, he serves as the firm's vice president. William practices in the firm's bankruptcy section. Over the years, his duties as vice president have taken time away from his law practice. William increasingly spends the majority of his time dealing with administrative matters for the firm, such as public relations and charitable activities. The firm determines his compensation based on a share of its net profits and an annual evaluation by the other directors/shareholders of his performance as vice president. Two years ago, the firm's directors created and adopted a manual entitled: "Policies and Procedures for Attorneys to Follow When Representing the Firm." All attorneys at the firm, regardless of title, must respect its provisions.

Analysis of Example 4

It is not clear whether William is a bona fide partner or an employee. This hypothetical demonstrates how a firm's choice of business form can affect status determinations.[234] It also highlights the ambiguous nature of the "right to control" emphasis of the guidelines.[235] By placing William in the position of vice president, the firm has forced him to assume duties associated with an officer in a corporation. Thus, his numerous roles in the firm include that of a partner, director, shareholder, and officer. Normally, his status as a director/shareholder would make him exempt from ADEA protection because

233. *See id.* (placing emphasis on intent of parties as expressed in written agreements or contracts).

234. *See supra* Part II.C (discussing organizational form test used by courts); *see also* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538-40 (2d Cir. 1996) (concluding that firm that organized as private corporation was required to treat directors/shareholders as "employees" for ADEA purposes).

235. *See supra* Part III.B (discussing potential limitations of revised enforcement guidelines).

he would meet the requirements of a bona fide executive or high-level policy maker.[236] The large amount of time William spends in his role as an officer (vice president), however, may mean that he is devoting more than twenty percent of his time to activities unrelated to his role as a director/shareholder.[237] In addition, these administrative duties probably do not entail decisions of significant policy or influence.[238] Assuming the above, he would not qualify for the ADEA's "bona fide executives and high-level policymakers" exemption and thus would be protected as an employee.[239]

The firm also "controls" William in the abstract sense that it sets mandatory standards for him to abide by when representing the partnership.[240] However, it may or may not "control" him in the more extensive sense because it is not clear if and when the firm may physically dictate how he does his work. In particular, the firm cannot physically control his legal work as a partner in the bankruptcy section.[241] However, the firm very well may physically control his administrative work as an officer, particularly through the leverage it maintains through a review-based compensation system. His multiple roles, along with the guidelines' failure to clarify whether the focus is on control in the abstract sense or on physical control, leave us questioning where William's status lies.[242] If the focus is on the former, then he most likely is an employee.[243] If it is the latter, then his status rests on the degree to which the organization exercises physical control over him.[244] Therefore,

236. *See* EEOC Compl. Man. (BNA) § 2-III(A)(6)(a)(i) (May 12, 2000) (listing requirements for "bona fide executives and high policymakers").

237. *See id.* (mandating that no more than twenty percent of individual's work time apply to activities not related to management duties as described in previously listed requirements); *see also Johnson & Higgins*, 91 F.3d at 1539-40 (finding that plaintiff directors who devoted vast majority of time to positions as officers were protected by ADEA because of administrative nature of work).

238. *See* EEOC Compl. Man. (BNA) § 2-III(A)(6)(a) (May 12, 2000) (requiring that individual "regularly exercise [] discretionary powers" to qualify for bona fide executive exemption of ADEA).

239. *See id.* (describing criteria for ADEA exemption for "bona fide executives and high-level policymakers").

240. *See supra* text accompanying notes 166-71 (discussing distinction between principal's right to control partners in abstract sense and right to control non-partners in physical sense).

241. *See supra* accompanying note 165 (characterizing partners as independent contractors in relation to firm partnership).

242. *See supra* text accompanying notes 171-74 (noting guidelines' failure to define what type of control determination turns on).

243. *See* EEOC Compl. Man. (BNA) § 2-III(A)(1)(d) (May 12, 2000) (providing that individual who is subject to organization's control is employee).

244. *See id.* (same).

if the firm forces William to retire under these circumstances, it is difficult to conclude whether he will have an ADEA claim.

The preceding hypothetical examples illustrate how the totality of the circumstances affects outcomes under the revised guidelines.[245] Although no single factor is determinative or necessarily carries greater weight,[246] the *extent* to which a few factors exist can shape an individual's status. With this in mind, firms have several ways to minimize the likelihood of employer liability.

VI. Recommendations for Avoiding Employer Liability

The revised guidelines place responsibility in the hands of firms to avoid policies that arbitrarily discriminate on the basis of age or, alternatively, to take steps to shelter themselves from liability. The simplest, yet least attractive, option for firms is to cease all compulsory retirement practices regardless of status. Alternatively, firms could abolish all two-tiered partnership tracks, giving all partners an equity interest, a say in key management decisions, and autonomy over their work.[247] Given the logical improbability that firms will want to exercise these options and the impracticalities of doing so, Congress has provided them with an effective avenue for protection.

In 1990, Congress passed the Older Workers Benefit Protection Act (OWBPA) as an amendment to the ADEA.[248] Unlike the provisions of Title VII, the OWBPA specifically allows for waiver of ADEA rights, provided that the waiver meets certain requirements.[249] Waiver commonly occurs at the severance stage of an employment relationship, and the general rule is that individuals may not prospectively waive their rights under the federal employment discrimination acts.[250] The OWBPA's waiver provisions also address this issue, requiring that an agreement may not waive any rights or claims that may arise after execution of the waiver.[251] However, the Code of Federal

245. *See supra* text accompanying note 141 (characterizing approach taken by revised guidelines as totality of circumstances approach).

246. *See supra* text accompanying note 145 (noting revised guidelines' failure to address relative weight of factors).

247. *See supra* text accompanying notes 221-23 (hypothesizing that individual with role in management, autonomy over work, and equity stake in firm is bona fide partner under ADEA).

248. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621-626 (1994)).

249. *See* Age Discrimination in Employment Act, 29 U.S.C. § 626(f) (1994) (outlining requirements for waiver of ADEA rights).

250. *See* Adams v. Philip Morris, Inc., 67 F.3d 580, 584 (6th Cir. 1995) (explaining extension of Title VII prohibition on prospective waiver to ADEA).

251. *See* Age Discrimination in Employment Act, 29 U.S.C. § 626(f)(1)(C) (1994) (barring

Regulations explicitly maintains that these provisions do not bar "the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date."[252] Thus, through this exception, employers have an opportunity to protect themselves against future claims that may stem from compulsory retirement policies.

In the context of a law firm, waiver of ADEA claims could occur when the firm admits an individual to the partnership. As part of the partnership agreement, the firm could require the prospective partner to sign a waiver agreeing to retire at a specified age and releasing the firm from all ADEA claims related to its retirement policies. As a result, an individual's status at the time of mandatory retirement would matter less because the firm could argue that the waiver absolves it from liability. However, the Supreme Court has cautioned that such a waiver must satisfy all specified requirements of the OWBPA.[253] Specifically, the firm must ensure that the waiver is "knowing and voluntary."[254] The OWBPA provides a number of conditions that a waiver must satisfy in order to meet the "knowing and voluntary" standard.[255] If the waiver does not meet all of these conditions, it is voidable by the individual who signed it.[256]

A carefully drafted waiver provision placed in a partnership agreement could therefore give firms assurance that prospective partners cannot bring successful claims against them following retirement. This is also consistent with the revised guidelines' focus on the intent of the parties "as expressed in written agreement or contracts."[257] It is understandable that firms may want to avoid the chilling effect that these waiver provisions could have on camaraderie and morale within the organization. However, the limited liability regime within which most firms currently operate may already have similar

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waiver of rights that may arise in future).

252. 29 C.F.R. § 1625.22(c)(2) (2001).

253. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426-27 (1998) (noting that statutory command of OWBPA clearly mandates satisfaction of all requirements).

254. *See* Age Discrimination in Employment Act, 29 U.S.C. § 626(f)(1) (1994) (providing minimum requirements in order for waiver to be knowing and voluntary).

255. *See id.* (listing requirements such as forty-five day deliberation period for waiver in connection with exit incentive or other employment termination programs). The employer must also ensure that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled." *Id.* § 626(f)(1)(D).

256. *See* Wamsley v. Champlin Refining & Chem., Inc. 11 F.3d 534, 539 (5th Cir. 1993) (finding that waivers that fail to meet all requirements of OWBPA are voidable).

257. EEOC Compl. Man. (BNA) § (A)(1)(d) (May 12, 2000).

ramifications,[258] arguably making any effect waiver agreements might have on the dynamic of most firms negligible.

Furthermore, firms could minimize the harshness of waiver agreements by drafting them in similar fashion to early retirement incentive plans (ERIPs).[259] Under this scenario, prospective partners would come away with tangible advantages that go beyond typical retirement benefits.[260] Firms would have a great deal of leeway in determining what type of advantages to offer prospective partners to offset the effects of forced retirement. In addition, firms could allow individuals who choose not to sign waiver agreements the option of staying with the firm in employee positions such as "of counsel,"[261] with full with retention of ADEA rights. This would make waivers appear less like a coercive forfeiture of rights and more like a bargained-for exchange between the parties. Firm retirement policies would then take on both mandatory and voluntary components. They are mandatory in the sense that the waivers are prerequisites for admission to the partnership, but voluntary in the sense that individuals need not make an all-or-nothing choice between signing the waiver and leaving the firm altogether. More importantly, the voluntary element of these arrangements permits them to pass muster under the OWBPA.[262]

Although an increase in retirement benefits to partners will certainly cost firms money, it averts the expense and negative publicity of age discrimination suits. Additionally, the partnership can continue to reap the substantial fiscal rewards of having fewer and younger partners. Thus, both parties can exit the relationship amicably through the compromises they have made.[263]

258. *See* Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 408 (1998) (discussing concern that removal of vicarious liability threat in firms reduces incentives to create "extensive monitoring and mentoring systems"). To put it another way, modern firms may already act in a less "team-oriented" paradigm than they did in the past.

259. *See* Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)(B)(ii) (1994) (allowing employer to implement voluntary early retirement incentive plan if it is consistent with ADEA); *see generally* Samuel Issacharoff, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 814-15 (1997) (discussing use of ERIPs to counteract general ADEA prohibition on mandatory retirement).

260. *See id.* at 814 (characterizing typical ERIPs as one-time lump sum payments inducing older workers to retire early).

261. *See* Johnson & Coyle, *supra* note 153, at 369-72 (characterizing "of counsel" and non-equity partner positions as ones with no equity stake in firm but with job stability).

262. *See supra* notes 254-56 and accompanying text (explaining "knowing and voluntary" requirement for ADEA waivers of rights).

263. *See supra* text accompanying notes 259-62 (discussing conciliatory nature of proposed waiver agreements).

The preceding recommendations are neither firms' only options nor absolute guarantees against employer liability. However, as long as employers properly follow the OWBPA waiver requirements, they can confidently assume that traditional common-law contract defenses will not deem the agreements voidable.[264] Moreover, these recommendations represent ways in which firms can reassess their current policies and decide whether protective measures are right for them.

VII. Conclusion

As law firms and other professional organizations persistently grow in size and stature, it is likely that they will continue to face dilemmas associated with an increasingly older yet productive American workforce.[265] Both the lower federal courts and the EEOC are demonstrating a heightened awareness of this reality, as well as a readiness to view the legal rights of purported partners more flexibly. The EEOC currently is investigating the policies of one major law firm in Chicago[266] and has won an action in federal court to compel partial compliance with a subpoena requesting firm information and documents relevant to the issue of ADEA coverage.[267]

In light of all of this, firms should view the revised EEOC guidelines with both caution and acceptance.[268] By reflecting on what effect the guidelines may have on their policies, firms can choose which approaches effectively balance liability and internal relations concerns.[269] Prospective partners should use the guidelines to educate themselves on what rights they may forfeit and retain by entering the partnership, as well as how the EEOC and

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264. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998) (explaining that independent regime set up by OWBPA for assessing ADEA waivers forecloses general contract defenses).

265. *See* Haguewood, *supra* note 14, at 429 (noting companies' responses to increased ability of older Americans to remain productive members of workforce).

266. *See* Martha Neil, *Over the Hill, Out the Door?*, A.B.A. J., Feb. 2002, at 20, 20 (summarizing EEOC investigation of Sidley Austin Brown & Wood LLP after it demoted thirty-two older partners to "counsel" or "senior counsel" status and lowered firm's mandatory retirement age).

267. EEOC v. Sidley Austin Brown & Wood, No. 02-1605, 2002 U.S. App. LEXIS 22152, at *30 (7th Cir. Oct. 24, 2002) (holding that enough doubt existed regarding whether demoted individuals were covered by age discrimination law to warrant partial compliance with subpoena).

268. *See supra* Part III.A (discussing significance and ramifications of revised EEOC guidelines).

269. *See supra* Part VI (offering recommendations for minimizing liability while avoiding negative side effects on firm dynamics).

courts may respond to attempts to vindicate those rights.[270] Finally, although courts now have a sound means of quantifying status determinations,[271] they should approach this new framework thoughtfully. In particular, courts should resolve the ambiguity regarding the EEOC's emphasis on "control."[272] Courts should specifically place the focus on physical control by the organization over the individual rather than control in the abstract sense, thereby appropriately narrowing the breadth of the revised guidelines.[273] This type of initiative is not beyond the capacity of courts, due to the generally persuasive yet non-binding nature of EEOC guidelines.[274]

270. *See supra* notes 151-54 and accompanying text (commenting on changing structure of modern firms).

271. *See supra* Part IV.B (characterizing EEOC guidelines as persuasive authority deserving measurable judicial deference).

272. *See supra* text accompanying notes 171-74 (discussing revised guidelines' failure to clarify what type of control is relevant in determining employee/partner status).

273. *See supra* note 174 and accompanying text (noting that guidelines potentially place almost anyone in partnership setting within provisions of ADEA).

274. *See supra* Part IV.B (characterizing EEOC guidelines as having persuasive authority but not carrying force of law).

SYMPOSIUM

Civil Rights and Civil Liberties