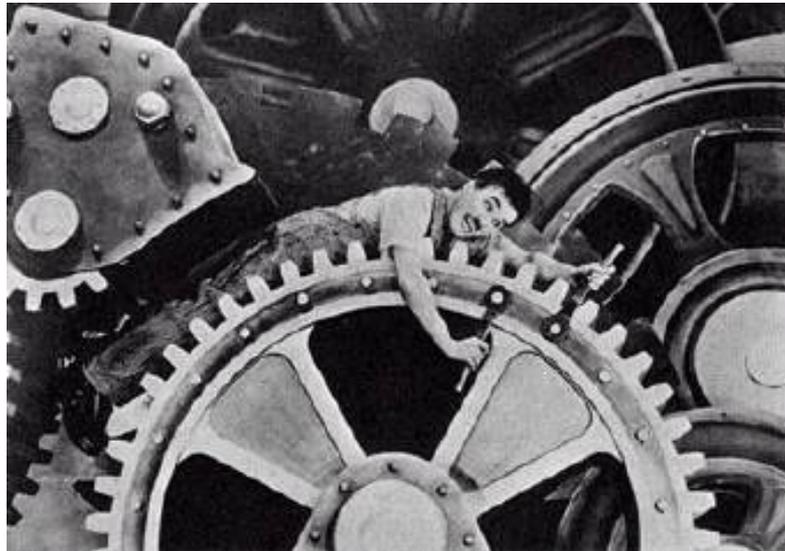


# *State Law Update*

**For the Texas Labor & Employment Law Section's  
September 2020 Webinar**



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# Worker Classification



**True or  
False?**

# Employee v. Independent Contractor: *Conflicting Results*

- *Perez v. Greater Houston Trans. Co.* (1st Dist.): issues of fact precluded SJ; **reversed** and remanded for trial.
- *Steele v. Greater Houston Trans. Co.* (14th Dist.): driver was independent contractor as matter of law; SJ **affirmed**.
- Both drivers *leased* vehicles and equipment from GHTC.
- Record showed *consequences* for downtime or rejecting fare in *Perez* case but not in *Steele*.



# *Modern Factors & Analysis* For Determining Worker Status

## Control Over Details

- Ask first, *what is left* to manage about the work?
- Are matters under worker control really *important*?
- I.e., *management* level?
- What *management skill* is required of a worker?
- “Client’s” standardization of details of “enterprise.”

## Indirect Levers of Control

- At will engagement, not contract, is the big lever.
- Does client *train* worker?
- Client’s dedicated team for oversight of workers.
- System of rewards and negative consequences to control productivity.
- Worker’s economic dependence on “client.”

# *Modern Factors & Analysis* For Determining Worker Status

## The worker's "business"

- What did worker have *before* this "contract?"
- *Hiring process*: same as for hiring employees?
- *Standardized adhesion* contract, like employment?
- What is there about the "business" to "*manage*?"
- Look at 1040 Schedule C. Does it look like business?

## Independence of the business

- What will worker have *after* this contract ends?
- Control over use of asset (e.g., use of the vehicle).
- Rights and *practicality* of servicing other "clients."
- Rights and *practicality* of hiring & delegating work.
- Is it *subsistence* work?

# *Stevenson v. Waste Management*

## The Effect of a *Recital* of Status

- A contract might include the parties' agreement that a worker is independent contractor, not employee.
- Such agreement is a *recital* of fact or law, *not binding* under contract law. See Restatement of Contracts § 218.
- Employer sought to rebut its *own recital*, citing its actual "control."
- Court of appeals: SJ for employer based on its *actual control reversed*. Recital is *some evidence*, creating issue of fact re status.



**An employer might regret classifying workers as non-employees.**

# Chapter 21 (Discrimination)



**Preemption of Torts Claims**

# Chapter 21 Preemption

## *Hoffman-La Roche* (Tex. 2004)

- Usual setting: Harassment and intentional infliction of emotional distress (IIED), assault or other tort based on same set of facts.
- *Hoffman-La Roche, Inc. v. Zelwanger* (Tex. 2004): ch. 21 *preempts* IIED tort claim as to the defendant *employer; supervisor* had not appealed.
- IIED is a *gap filler* unneeded if there is a statutory remedy.
- If “gravamen” of IIED tort is covered by ch 21 it’s preempted (at least if it’s against *employer*).



# Chapter 21 Preemption

## *Creditwatch v. Jackson* (Tex. 2005)

- Plaintiff sued employer *and manager* for harassment *and IIED*.
- Court: *IIED* claims preempted as to employer *and manager*.
- But possible *separate* rule for *individual* defendant not clearly raised or addressed by the Court.
- Court assumed “arguendo” ch. 21 would *not* preempt any other torts.
- Preemption still limited to outrage (because outrage is *gap filler* tort).

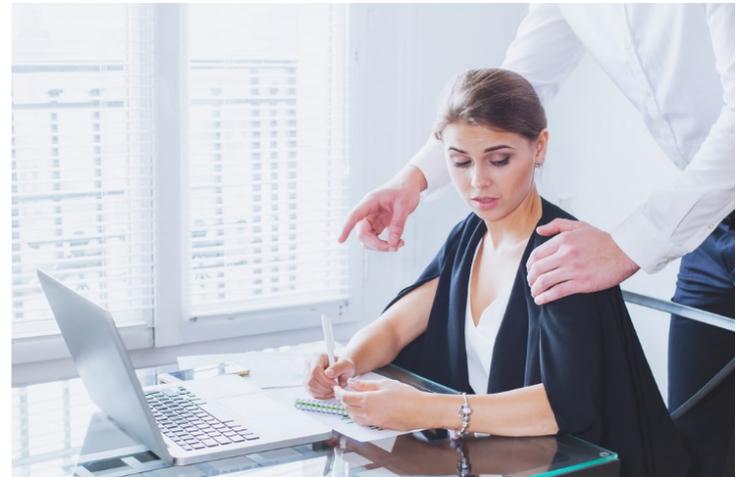


What about “battery?”

# Chapter 21 Preemption

## *Waffle House v. Williams* (Tex. 2010)

- Plaintiff included *negligent supervision* claim against *employer*.
- Preemption now applies to *other* torts if “gravamen” of claim is *harassment* prohibited by ch. 21.
- This case also included *assault*.
- Unwanted touching was assault *only* because *sexually* offensive.
- Expressly *disclaims* preemption as to an *individual* co-employee.



Generally offensive touching? Or *sexually* offensive touching?

# Chapter 21 Preemption

## *B.C. v. Steak n Shake (Tex. 2017)*

- Supervisor's *sexual assault* wasn't preceded by other harassment.
- Tort claim against *employer* was based on *vice principal* theory. A claim against individual defendant supervisor was nonsuited.
- No preemption: **no continuing course of harassment**; employer's liability is **direct** and not imputed; **egregiousness**; gravamen is assault, not "harassment."
- We can assume the tort claim against the supervisor would not be preempted.



**Entrapping and assaulting employee is not just "harassment," even if sexual**

# Chapter 21 Preemption

## *Solis v. S.V.Z. (14th Dist. 2018)*



Later, her mom will be serving the complaint

- Minor sued supervisor (assault); manager (aiding, abetting); employer (harassment and *vice principal-based* liability in tort)
- The supervisor *did not* assert preemption.
- A tort claim against a manager for aiding and abetting was rejected: no such tort.
- Tort claim against *employer* preempted: statutory rape in course of harassment.

# Chapter 21 Preemption

## *Roane v. Dean* (Austin 2020)

- Tort claim against *only the supervisor*, alleging intentional infliction of emotional distress.
- Majority: gravamen of claim against supervisor is harassment, and Ch. 21 preempts.
- Dissent (Justice Kelly): issue of preemption of IIED or other tort claim against the individual harasser has not been presented to or decided by Tex. Sup. Ct.



Next up for the Supreme  
Court of Texas?

# Chapter 21 Preemption

## *The Courts' Unfinished Business*

1. Preemption of tort claim against employer: when is gravamen of a tort claim sexual harassment under ch.21?
2. What about torts other than IIED (rape, assault, privacy)
3. Remember not all harassment is “because of sex.”
4. Does it matter whether employer is covered by ch. 21?
5. Does it matter if tort liability is direct (vice principal)?
6. Is tort claim against a harassing supervisor preempted to same extent, so that the harasser has *no* liability *at all*.