

5.10H AGENCY (Approved 04/2002; Revised 01/2025)¹

A. Employer/Employee

An employee is a person (or other entity) engaged to perform services for another, the employer, and who is subject to the employer's control or right to control the physical conduct required to perform such services. In determining whether a person or entity performing services is an employee, rather than an independent contractor or other relation, the following aspects may be considered:

- (1) the extent of control which, by agreement, express or implied, the entity for which the services are performed has the right to exercise over the details of the services performed;
- (2) whether one performing such services is engaged in an occupation or business distinct from that of the entity for which services are performed;
- (3) whether the services rendered are usually done under the direction of the employer in the particular locality, or whether such services are usually done by a specialist without such direction;
- (4) the skill required in performing the services;
- (5) whether the entity for which the services are performed supplies the instrumentalities, tools, and place of work, or whether the entity performing the services supplies those items;
- (6) the length of time anticipated for the performance of the services;
- (7) the method of payment;

¹ This charge was formerly designated as 5.10I.

- (8) whether the services to be performed are part of the regular business of the entity for which the services are performed;
- (9) whether the parties believe they are in the relationship of employer and employee;
- (10) whether the entity for which services are to be performed is in business; and
- (11) such other factors as may be reasonably considered in determining whether the entity for which the services are being performed controls, or has the right to control, the entity performing the services.

Cases:

Miklos v. Liberty Coach Co., 48 N.J. Super. 591 (App. Div. 1958); *Gilborges v. Wallace*, 153 N.J. Super. 121 (App. Div. 1977), *rev'd. in part on other grounds*, 78 N.J. 342 (1978).

Ordinarily the existence of an employer-employee relationship, in the past sometimes referred to as a master-servant relationship, is a matter of fact for a jury rather than law for a judge. *Bennett v. T. & F. Distributing Co.*, 117 N.J. Super. 439 (App. Div. 1971), *certif. denied*, 60 N.J. 350 (1972); *Gilborges v. Wallace*, *supra*. However, if there are no disputed facts or disputed inferences which may be drawn from undisputed facts concerning the relationship, the judge should determine whether or not there is an employer/employee relationship as a matter of law. *Marion v. Pub. Serv. Elec. & Gas Co.*, 72 N.J. Super. 146 (App. Div. 1962); *cf. Miller v. United States Fid. & Guar. Co.*, 127 N.J. Super. 37 (App. Div. 1974).

In *Frazier v. P.T.C. Excavations*, 2011 N.J. Super. Unpub. LEXIS 1155 (App. Div. May 6, 2011), the Appellate Division noted that "...control by the master over the servant is the essence of the master-servant relationship on which the doctrine of respondeat superior is based." *Carter v. Reynolds*, 175 N.J. 402, 410 (2003) (*quoting Wright v. State*, 169 N.J. 422, 436 (2001)). *Frazier*, *supra*, further cited *Galvao v. G.R. Robert Constr. Co.*, 179 N.J. 462 (2004), for the following: "[t]he

traditional ‘essence’ of vicarious liability based on respondeat superior relies on the concept of employer ‘control’ over an employee.” “Under the control test, ‘the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.’”

The Committee reported that the use of “master and servant” is anachronistic and sees no reason to refrain from using “employer and employee” in lieu of the older expression.

B. Respondeat Superior

1. When Agency is in Issue:

A principal, such as *[Defendant]*, may act only through natural persons who are its *[officers/employees/agents]*. Generally, any *[officer/employee/agent]* of an entity may bind that entity by acts and declarations made while acting within the scope of the authority delegated to the *[officer/employee/agent]* by the principal, or by acts and declarations made within the scope of the duties assigned to the *[officer/employee/agent]* of the principal.

So, if you find that an *[officer/employee/agent]* of *[Defendant]* acted negligently while in the scope of the *[officer’s/employee’s/agent’s]* duties or authority, that negligence is as a matter of law charged to the principal, here *[Defendant]*. If you so find, *[Defendant]* will be deemed negligent for the wrongdoing to the same extent as the *[officer/employee/agent]*.

2. When Agency Is Not an Issue:

Here, it is admitted that *[Individual Defendant]* was at the relevant time acting as an *[officer/employee/agent]* of *[Defendant Entity]*, and that the *[officer/employee/agent]* was acting within the scope of the *[officer's/employee's/agent's]* agency or employment. A principal or employer is legally responsible for the negligence of an *[officer/employee/agent]* while the *[officer/employee/agent]* acts within the scope of the *[officer's/employee's/agent's]* employment.

Therefore, if you find *[Individual Defendant]* negligent, you must find *[Individual Defendant's]* principal, *[Defendant Entity]*, negligent to the same extent.

C. Borrowed Employee

An employer is generally responsible for harm suffered by a plaintiff through any negligent work related to acts of its employees. In some situations, an employer known as a “general employer” loans one of its workers to another employer known as a “special employer” for defined tasks or purposes. Depending on certain factors to be discussed now, the general employer may be held responsible for harm suffered by the negligent work of the borrowed or loaned employee.²

² See *Pantano v. New York Shipping Ass'n*, 254 N.J. 101 (2023) (applying the multi-factor test of *Galvao v. G.R. Robert Construction Co.*, 179 N.J. 462, 471-73 (2004) to evaluate whether a worker who negligently caused a plaintiff's jobsite injury was a so-called “borrowed employee” of the plaintiff's own employer, and determining that application of the test is presumptively for

[Plaintiff] claims that *[Individual Defendant]* was negligent and was employed by *[Defendant Entity]* at the time of the harm. *[Defendant Entity]* disputes that *[Individual Defendant]* was its employee at the time the harm occurred to *[Plaintiff]*.

In order to determine if *[Individual Defendant]* was an employee of *[Defendant Entity]* at the time, there are a number of factors to consider. The first inquiry is that of control. There are four methods by which a plaintiff can demonstrate control by an employer.

The first is showing on spot control, which is the right to direct the manner in which the business shall be done and the result to be accomplished – or in other words, not only what shall be done, but how it shall be done.

As an alternative to direct evidence or on spot control, a plaintiff can show that an employer has broad control. There are three ways to demonstrate broad control:

- (1) the defendant directly or indirectly is the source of payment of the individual defendant;
- (2) the defendant furnishes the equipment to the individual defendant; or
- (3) the defendant has the right to terminate the individual defendant.

a jury to determine unless the evidence concerning the factors is so one-sided that it warrants judgment in a moving party's favor as a matter of law).

CHARGE 5.10H — Page 6 of 7

If *[Plaintiff]* has not proven by a preponderance of the evidence³ that *[Defendant Entity]* had on spot control or broad control, then *[Defendant Entity]* is not responsible for *[Individual Defendant's]* negligent conduct or the harm caused by said negligence. If this is your finding, you should cease deliberations on the question of whether *[Defendant Entity]* is responsible for the negligence and harm committed by *[Individual Defendant]*.

On the other hand, if *[Plaintiff]* has proven by a preponderance of the evidence that *[Defendant Entity]* had on spot or broad control, further analysis will be required and you will need to continue your deliberations

You will next need to determine if the work being done by *[Individual Defendant]* was within the general contemplation of the employer and whether the employer derived an economic benefit by loaning *[Individual Defendant]* to another. If you answer both of these inquiries yes, then *[Plaintiff]* proved by a preponderance of the evidence that *[Individual Defendant]* was an employee of *[Defendant Entity]*.

If, on the other hand, you answer that the employer either did not expect nor intend for *[Individual Defendant]* to perform the work or did not receive a benefit

³ The trial judge should change the burden of proof if a defendant raises this issue through a cross-claim or third-party claim.

CHARGE 5.10H — Page 7 of 7

from *[Individual Defendant's]* work, then *[Individual Defendant]* is not an employee of *[Defendant Entity]*.