Who counts as an employee for purposes of various state and federal statutes?  

State and federal laws often use a standard (not a rule) to supply the criteria for “employee.”

Who counts as an employee for purposes of various state and federal laws that afford various protections to employees but not to independent contractors?  Often state and federal statutes adopt, or have been construed to adopt, a version of a common law standard focused on the question: what kind or degree of control does the worker have over his or her labor?  This common law standard, as described in the Restatement (Second) of Agency § 220, examines ten factors, none of which are dispositive.  These factors include:

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

This Restatement provision counts as a standard because:

1. It sets forth a multi-criteria norm;
2. It supplies no rule or method for weighting the criteria;
3. Application of the provision requires attention to factual detail that varies from circumstance to circumstance.  This feature is often described as “fact-intensive” or “case-specific” or as “requiring case-by-case determination.”

Compare the “entire fairness test,” p. 595, that Delaware law applies when shareholders accuse corporate managers or boards of self-dealing.  The “entire fairness test” shares all three features: multi-criteria, no weights are assigned, and application is very fact-intensive.  But notice also that the “entire fairness test” has a fourth feature common to many standards: transparency to the norm’s background justification.  “The question is one of entire fairness,” p. 595.

1. Does the Restatement’s common law test for employee status, above, similarly reveal a background justification?  Why/not?
2. Do the standards for Title VII supervisor status proposed and rejected in Vance share the first three features with the Restatement’s common law test for employee status and Delaware’s “entire fairness test”?
3. Do the standards for Title VII supervisor status proposed and rejected in Vance share the fourth feature: transparency to the background justifications for treating harassment by supervisors differently from harassment by mere-co-workers?