No. 15-949

United States Court of Appeals for the Second Circuit

JOHN GRENAWALT, ON BEHALF OF THEMSEVLES AND ALL OTHERS SIMILARLY SITUATED, CARLOS MIRANDA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND JULIO ALICEA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff—Counter-Defendants--Appellant

v.

ALPHA OMEGA PROTECTION SERVICES CORP., GRACE DEPOMPO, GLAUDIUS, INC., AND CENTURIA INC.,

Defendants—Cross Claimants—Corss-Defendants—Appellees

AT & T MOBILITY, LLC,

Defendants-Appellee

On Appeal from the United States District Court for the Southern District of New York

***AMICUS CURIAE* BRIEF OF SEIU LOCAL 32BJ, URBAN JUSTICE CENTER, MAKE THE ROAD NEW YORK, AND THE NATIONAL EMPLOYMENT LAW PROJECT**

IN SUPPORT OF PLAINTIFFS—COUNTER-DEFENDANTS—APPELLANTS FOR REVERSAL

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STATEMENT OF INTEREST OF AMICI

Amici write not to repeat arguments made by the parties, but to shed light on the historical underpinnings of the broad definitions of employment in the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA"), and to urge this Court to apply the statute consistently with its history. *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29.[1]

SEIU Local 32BJ is a labor organization representing 145,000 office cleaners, apartment building workers, security officers, and other property services workers. 32BJ represents 24,000 security officers – more than any other labor organization. Local 32BJ's mission is to raise standards for all property service workers.

Founded in 1984, the Urban Justice Center is a New York City-based nonprofit organization that provides legal services, advocacy and outreach to the city's most vulnerable residents on issues relating to workers' rights, among others. The Urban Justice Center represents hundreds of workers each year, many of

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[1] Parties' counsel did not author this brief, nor did a party or any party's counsel contribute money intended to fund the preparation or submission of the brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

whom are directly employed by subcontractors and have not been properly paid for their work.

Make the Road New York (MRNY) is a non-profit membership organization with over 17,000 low-income members dedicated to promoting equal rights and economic and political opportunity for low-income New Yorkers. MRNY is committed to ensuring that the companies who depend on subcontracted workers' labor as an integral part of their businesses are held responsible for underpayment of wages and other violations.

The National Employment Law Project ("NELP") is a non-profit organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as *amicus* in numerous cases addressing the rights of subcontracted workers under state and federal labor laws.

SUMMARY OF ARGUMENT

FLSA's requirements are imposed on business owners where they "suffer or permit" work performed in their businesses, an expansive standard that goes far beyond the common law right to control. FLSA' s minimum standards are imposed

on a business despite its use of labor contractors and other intermediaries to secure workers. The District Court erred by creating a false dichotomy between legitimate subcontracting and employer liability that has no basis in the text or history of the FLSA, and should not be a consideration in any determination of employer status under the Act.

AT&T determined that it needed security guards in its stores, and decided to contract-out for those services to a number of different individuals and companies. It chose one contractor, Gladius, who in turn outsourced the job to an individual who incorporated a single-employee company, A-O, at Gladius' suggestion. When A-O went out of business, Gladius contracted with another subcontractor, Stone.[2] The district judge called this a "motley crew" of defendants.[3]

AT&T argues that it is not responsible for the wages and hours of the security guards that it stationed in its stores to observe and interact with its customers and where the loss of the guards' job placement with AT&T was, effectively, loss of employment. This outcome is inconsistent with the broadly-defined and unique capaciousness of the definition of employ under the FLSA.

ARGUMENT

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[2] Gladius also engaged with another sole-employee company called BBC Investments, and created another company Centuria, to handle the security contract with AT&T. *Amici* adopt the Statement of Facts from the Plaintiffs'-Appellees brief, and highlight only pertinent ones in this brief.

[3] Grenawalt v. AT&T Mobility, LLC, 937 F.Supp.2d 438, 440 (S.D.N.Y. 2013)

I. **Before adopting and then applying a test to determine whether a company like AT&T has "employed" security guards under the FLSA's broad "suffer or permit to work" definition, the source of these terms and their accepted meaning when adopted by Congress must be understood.**

This Court has acknowledged that the FLSA's "suffer or permit to work" definition is of "striking breath," the broadest ever used to encompass employment relationships, and encompasses relationships not considered "employment" under common law agency principles. *Barfield. v. New York City Health and Hospitals Corp.,* 537 F.3d 132, 141 (2d Cir. 2008). But, without knowing the origin and purpose of this language, it is not possible to know how broad the language is meant to be and what relationships it is intended to encompass. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987, J. Easterbrook, concurring).

The Supreme Court has explained that the "suffer or permit to work" definition of "employ" in section 203(g) of the law was taken from state child labor statutes that existed in most states and had been applied for many years before the FLSA was adopted in 1938. *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 728 (1947); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992). These state laws prohibited not just engaging or "employing" children to work, as those terms were understood at common law, but "permitting" or even "suffering" children to work "in or in connection with" certain businesses. Even when children were not engaged to work by the business itself, but were

employed by independent contractors at common law, the business was responsible if the work was performed in or in connection with such business, as described below.

The term "to suffer or permit to work" was almost universally established as a term of art under state child labor statutes when FLSA was enacted in 1938. Bruce Goldstein et al, Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 UCLA L. Rev. 983, 1089-1090 (1999). In construing a statute, courts must begin with the ordinary meaning of the language used. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992). When the language used in a statute has a common understanding, either at common law or in other statutes, it is presumed that the language is to have that same meaning, unless Congress specifically indicates otherwise.[4]

Because these terms applied to FLSA's child labor provisions, as well as to the minimum wage and overtime sections, the definitions should be applied as they

[4] See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.")

were under the identically-termed state child labor laws. The Supreme Court in *Rutherford* noted particularly that in addition to the minimum wage and overtime provisions of the FLSA, "…this definition applies to the child labor provisions of this Act." *Rutherford Food Corp. v. McComb*, 331 U.S. at 728.

A. **The state child labor laws prohibited allowing children to work "in or in connection with" a business, even where the children were not engaged to work by the business itself, but were employed by independent contractors.**

Congress ensured "sufficiently broad coverage" of the FLSA by including a definition of "employ" from state child labor laws[5] designed to reach businesses that used middlemen that illegally hired and supervised children.[6] Under these laws, it was - and remains today - no defense to say that the business owner was not responsible for the violations because the workers were employed by a separate business. To the contrary, for decades leading up to 1938 most states had statutes

[5] According to FLSA sponsor Senator Hugo Black, FLSA's administrative provisions "have been based upon the most carefully drawn State statutes which have already been before the courts. Perhaps the most important sections have been borrowed from the New York minimum wage statute." Hugo Black, Speech on NBC Radio 15 (June 7, 1937) (Papers of Hugo L. Black, Box 160, Senatorial File Labor Legislation-Radio, on file with the manuscript division, Library of Congress). The New York State Labor Law, in turn, stated, "'employed' includes permitted or suffered to work." 1921 N.Y. Laws ch. 50, 2(7). By 1938, 32 states and the District of Columbia included this definition. *Rutherford*, 331 U.S. at 728 n. 7.

[6] *Antenor et al. v. D & S Farms*, 88 F.3d 925, 930 (11th Cir. 1996) (*citing Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24.

prohibiting specified businesses from “employing” and also “suffering or permitting” the work of underage children “in or in connection with” their businesses,[7] with no exception for children employed by persons or entities considered independent contractors under common law agency principles.

If the work was incorporated into the business, it was “suffered or permitted” by the business owner and the owner was presumed to be in a position to ensure that the law was followed. This was especially true when the work was performed on the businesses’ premises.

Massachusetts’ child labor statute, for example, prohibited “the employment of a girl under 21 years of age or permitting her to work in, about, or in connection with” certain specified establishments after 10 o’clock in the evening. When a restaurant owner was convicted of child labor violations due to work performed by girls working for an independent contractor, the court held:

> The fact that the performers were employed by an independent contractor is not a defense. The offense was committed if the defendant permitted them to work in his establishment within the prohibited time.

Commonwealth v. Hong, 158 N.E. 759, 759-760 (Mass. 1927). Similarly, the Supreme Court of Montana held a company responsible for a child labor violation where work on the company premises was performed by the subcontractor of the

[7] 46 UCLA Law Review 983 at 1089-93 (1999).

company's contractor, two layers removed from the company under common law rules.

> Under our statute and those of similar import, it is held that the fact that the boy was employed by, and working for, an independent contractor, is immaterial; it is the fact that the child under the forbidden age is permitted to perform services or labor in a dangerous place which gives rise to liability or prosecution, and not the fact of hiring.

Daly v. Swift & Co. 300 P. 265, 268 (Mont. 1931).

Other examples of the application of this broad language come from child labor laws in New York State. The New York Court of Appeals held that the fact that a boy was himself an independent contractor at common law did not preclude finding a child labor violation by a construction company, because the law prohibited not just employing but also permitting or suffering a child's work. *Vincent v. Riggi & Sons, Inc*., 30 N.Y. 2d 406, 334 N.Y.S. 2d 406, 285 N.E. 2d 689, 691 (1972).[8] Perhaps the most renowned of state child labor cases upheld the conviction of a dairy for child labor violations, arising from the work of a child who assisted one of the dairy's milk delivery drivers off the dairy's physical premises. The New York child labor law provided:

No child under the age of fourteen years shall be employed or

[8] See also *Gorczynski v. Nugent*, 402 Ill. 147 (1948) (holding racetrack liable for child labor violations though the child was employed by an independent business entity working on racetrack premises).

> permitted to work in or in connection with any mercantile establishment [specified in the preceding section].

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 27 (1918). The Court explained that the child labor prohibitions went beyond rules governing employers at common law, saying, "he must neither create nor suffer *in his business* the prohibited conditions." *Id* at 29 (emphasis added).[9] The lower New York court also explained how the broad suffer or permit to work language of the child labor laws achieved its goal, noting the

> [p]urpose and effect … is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute

[9] The Court in *Sheffield Farms* explained how "sufferance" of the work of children is determined:

> The employer, therefore, is chargeable with the sufferance of illegal conditions by the delegates of his power. But to say that does not tell us how sufferance may be implied.
>
> Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence.
>
> Whatever reasonable supervision by oneself or one's agents would discover and prevent, that, if continued, will be taken as suffered. Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided. But where work is done away from the plant, the inference of sufferance weakens as the opportunity for supervision lessens.

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. at 27.

> does not exist. He is bound at his peril so to do. The duty is an absolute one, and it remains with him whether he carries on the business himself [or] entrusts the conduct of it to others.

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 167 N.Y.S. 958, 960 (N.Y.App. Div. 1917).

In another typical statutory example, Tennessee's child labor law read, in pertinent part:

> It shall be *unlawful for any proprietor, foreman, owner, or other person* to employ, permit, or suffer to work any child less than fourteen years of age *in, about, or in connection with any mill, factory, [or] workshop* ….

Act of June 30, 1911, ch. 57, § 1, 1911 Tenn. Pub. Acts 108, 108 as amended by Act of Sept.27, 1913, ch. 47, 1913 Tenn. Pub. Acts 574, 574 (First Extra Session) (emphasis added).

These statutes imposed liability on those in charge of facilities, that is, the "proprietor, foreman, owner or other person," whenever children worked "in, about, or in connection with" the specified facilities. This meant that the statute could not be evaded by having the children work for persons other than the proprietor.

This same "suffer or permit to work" breadth of coverage was adopted by Congress in the FLSA to achieve its desired results, i.e., the elimination of work performed for substandard wages, 29 U.S.C. §§ 206 & 207, and elimination of child labor nationwide, 29 U.S.C. § 212.

To eliminate such substandard work, businesses were thus made responsible for child labor violations and underpayment of minimum or overtime wages for *work performed in their businesses*, without regard for whether the work was performed by persons considered independent contractors at common law. When properly applied in accordance with its widely understood application when FLSA was enacted, the broad "suffer or permit to work" language from the child labor statutes accomplishes this result.

When Congress in the FLSA defined "employ" to "*include*" "to suffer or permit to work," it did what state child labor statutes had done: it included within its scope of coverage, not only the common law concept of "employ," but also the very broad concepts of "suffering" or "permitting" work to be done.

B. Consistent with its child labor background, FLSA's "suffer or permit to work" definition of "employ" makes the employees of some, but not all, independent contractors employees also of the contracting companies.

While FLSA's expansion of the common law scope of "employment" precluded a business from denying FLSA accountability simply by showing it had contracted with an "independent contractor" at common law, this expanded scope is not so broad as to make employees of all independent contractors also employees of the contracting business:

> There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees.

Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

Not all work performed under subcontracts is performed "in or in connection with' the contracting company's business. As explained by Judge Easterbrook, some independent contractors, rather than providing a labor force, provide instead "a defined product (such as a working elevator or a legal brief)" or engage in "a distinct activity--for example, plumbing repairs--conducted by an independent contractor who appears, does a discrete job, and leaves again." *Reyes, et al., v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007). In such cases, the work is not performed "in or in connection with" the contracting company's business; it is performed exclusively as part of the subcontractor's business.

Because the suffer or permit to work definition of "employ" encompasses work performed by some but not all subcontractors, this Court's role is to determine which subcontractors' employees are included and which are not. The import of this definition under child labor laws and guidance from the Supreme Court in *Rutherford* provides the test and a list of non-exclusive factors used to implement the test. As seen under the child labor laws, it is the objective economic reality of the relationships, not the subjective intent of the parties that counts.

C. **The bad motive or intent of the business in which the children worked was not relevant to showing a violation of child labor laws; even where children or their parents lied to business owners about their ages, the business owners were liable.**

Whenever an underage child was found to be working on the business premises or in connection with a business, the business owner was held responsible because he was required to ensure that the prohibited work did not occur. *People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co*., 121 N.E. 47 at 474. It was no defense to show that the business had been acting in good faith and had taken reasonable precautions to ensure that children were not being "employed," or even that the owner relied on the parents and children who lied about the children's age. *American Car & Foundry Co. v. Armentraut*, 73 N.E. 766, 768 (Ill. 1905) (refusing to instruct the jury that it was a defense that a 12-year-old boy misled his employer about his age). [10]

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[10] See also *Swift v. Illinois Cent. R.R. Co*., 132 F.Supp. 394, 398 (W.D. Ky. 1955) (under Kentucky child labor law, an employer is not relieved from liability because a child misrepresents his age); *De Soto Coal, Mining & Dev. Co. v. Hill*, 60 So. 583, 585 (Ala. 1912); *Inland Steel Co. v. Yedinak*, 87 N.E. 229, 236 (Ind. 1909) ("Appellant was bound at its peril to know that while in its service youth was not within the inhibited age."); *People v. Taylor*, 85 N.E. 759, 760 (N.Y. 1908) ("The owner, by or for whom the child is employed in violation of the statute, is liable, because such employment is prohibited. *The question of intent is immaterial*." (emphasis supplied)); *Krutlies v. Bulls Head Coal Co.,* 94 A. 459, 462 (Pa. 1915) ("[T]he act does not provide that employers shall not knowingly take into their service a minor under the prohibited age …"); and cases cited in 46 UCLA Law Review 983 at 1046-1047 n. 252 (1999).

As shown below in section II.D, the FLSA also does not consider the intent of the parties, or the reasoning behind a company's decision to contract, as a relevant consideration.

II. The Court should adopt a test for employer coverage that takes into account the historical meaning and intent of "suffer or permit."

A. To establish that AT&T "employed" the guards working in its retail stores, Plaintiffs may either meet the test for employment under the narrow common law test *or* the broad "suffer or permit to work" test.

The typical state child labor law prohibited businesses from employing children at common law or suffering or permitting the work of underage children. In adopting the first federal child labor law and setting minimum wage and overtime rules, the FLSA definition of employ established this same scope of coverage:

> "'employ' includes to suffer or permit to work."

29 U.S.C. §203(g). Thus, AT&T employed plaintiff security guards if it either employed them under common law agency principles or "suffered or permitted" them to work within the meaning of that term under state child labor laws.

As shown above, the test for application of state child labor statutes was whether the child's work was performed in or in connection with the business regulated, even if the child was engaged by and working for an independent

contractor. Drawing from this child labor heritage, the Supreme Court in *Rutherford* established the test for "suffer or permit to work" under the FLSA, corresponding to the state child labor laws. The test is whether the work of the plaintiffs – the security the guards in this case -- was performed as part of an integrated unit over which defendant (AT&T) had common control.

In 1947 the Supreme Court decided *Rutherford,* and to this day the *Rutherford* opinion is where the Supreme Court has most expansively discussed the meaning and scope of FLSA's definition of "employ." *Reyes, et al., v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007) ("*Rutherford Food* goes into more depth about this language than any other decision of the Supreme Court before or since."); *see also Zheng v. Liberty Apparel Company, Inc*., 355 F.3d 61, 69 (2d Cir. 2003). The Court in *Rutherford* noted that this definition of "employ" comes from state child labor statutes, *Rutherford Food Corp. v. McComb*, 331 U.S. at 728, and is "the broadest definition … ever included in one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945).

The question posed in *Rutherford* was whether persons, assumed to be "employees" of someone, were "employed" by the slaughterhouse in which they worked. The trial court had found that the workers were employees only of the chief boner (the contractor) and not the slaughterhouse (Kaiser), so the only issue to be

decided by the Supreme Court was whether the slaughterhouse had indeed "employed" the boners within the broad definition of that term in the FLSA.

The Court held that even where the slaughterhouse entered into a written contract with an "independent contractor," which then hired, fired, supervised, and paid his employees to "de-bone" beef within the slaughterhouse, the slaughterhouse was nevertheless a responsible employer under the FLSA. *Rutherford* thus held that, in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them. *Zheng v. Liberty Apparel Company, Inc*. 355 F.3d 61 (2d Cir. 2003)[11].

The *Rutherford* Court relied on certain facts, now described as "factors," in concluding that "the operations at the slaughterhouse constitute[d] an integrated

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[11] In *Zheng*, this Court relied on *Rutherford* and applied its factors to determine, in the Court's understanding of *Rutherford,* whether the apparel manufacturer had "functional" control over the work, even in the absence of "formal" control. While the Court in *Zheng*, without citing authority, suggested that FLSA's broad definition of "employ" was not intended to encompass contracting that had a legitimate business purpose and was only intended to reach subterfuges designed to circumvent the FLSA (355 F. 3d at 72, 76), this subjective approach, which could exonerate employers after examining their good and bad intentions, was disavowed by this Court in *Barfield. v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 146 (2nd Cir. 2008).

economic unit," so that meat boners were employees of the slaughtering plant under the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. at 726, 730.

Thus, *Rutherford* established the standard to be met by persons trying to show they were "employed" by a business entity operating through a subcontractor: whether plaintiffs worked in an integrated or "single operation under 'common control'" of the purported employer. *See Reyes, et al., v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007) (finding that *Remington's* raising of hybrid seeds was "a single operation under its 'common control'" and holding that the seed company "employed" field workers in light of the *Rutherford* factors, although its labor contractor had contracted to be the sole employer who hired, paid, and supervised the workers)[12].

The *Rutherford* test, which looks for a single economic unit under the common control of the defendant business, accurately reflects the approach taken

[12] In *Reyes, et al., v. Remington Hybrid Seed Co*., 495 F. 3d at 408, the Seventh Circuit applied the *Rutherford* factors to determine that the farm workers, though hired, fired and paid by a purported independent contractor who had signed an independent contractor agreement with *Remington Hybrid Seed*, were in reality working in "a single operation under 'common control'" of the seed company. *See also Antenor et al. v. D & S Farms*, 88 F.3d 925, 930-31 (11th Cir. 1996) ("In determining whether the operator suffered or permitted the boners to work, the [*Rutherford*] Court emphasized that the boners were "part of the integrated unit of production," citing *Rutherford*, 331 U.S. at 729); *Fahs v. Tree–Gold Co-op. Growers of Florida, Inc.,* 166 F.2d 40, 44-45 (5th Cir. 1948) (holding that the contractors and crewmembers' services "constituted a part of an integrated economic unit" controlled by the packinghouse operator).

under state child labor laws. There, businesses were accountable for child labor violations that occurred in, about or in connection with their business operations, without regard for whether the children were employed directly by independent contractors.

B. *Rutherford* referenced non-exclusive factors it used to determine whether the meat de-boners' work was performed as part of an integrated economic unit over which the defendant-slaughterhouse had common control.

As shown above, the *Rutherford* factors, which this Court adopted in *Zheng* as factors showing that the contracting company had "functional control" over plaintiffs' work,[13] were not applied in a vacuum, without considering the suffer or permit test to be met. No subterfuge was found in *Rutherford*; in fact the trial court had specifically found that "the contracts with Reed [the contractor] and his successors were not sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting Kaiser [the slaughterhouse] when it entered into the contract with Reed." *Walling v. Rutherford Food Corporation*, 156 F.2d 513, 518 (10th Cir. 1946). These findings were not disturbed by the 10th Circuit or the Supreme Court in reversing the legal conclusion drawn by the trial court.

Consistent with the state child labor origins of the "suffer or permit to work" definition, the *Rutherford* factors were used to determine whether the work was

[13] *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 70 (2d Cir. 2003).

performed as part of an integrated economic unit over which the defendant had common control. The factors considered in *Rutherford* were whether:

A. the workers did a specialty job on a production line,

B. the company had the same contract with each of the various intermediary "independent contractors,"

C. the workers worked on the company's premises using its equipment,

D. the workers did not have an independent "business organization" that could or did shift from one company to another,

E. the company's managers kept in close touch with the work being performed, and

F. the earnings of the workers, while not hourly wages, were determined by their piece work productivity and not by the business acumen of the contractors.

Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

The factors are not exclusive, *Rutherford* at 730, and the key to their application is the extent to which these or other factors help to determine whether the test is met: "Was plaintiff's work performed as part of an integrated economic

unit under the common control of the defendant?"[14] To be held accountable, the business need not have hired the workers, set their pay, paid them or even provided

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[14] This test and the *Rutherford* factors are more specific than but consistent with the US DOL joint employment regulation that was adopted largely to provide guidance on when two distinct employers should be considered one joint employer for the purpose of aggregating weekly hours of work, entitling workers to overtime pay.

> "[A]ll joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions." 29 C.F.R. § 791.2(a). The regulation states that "a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

29 C.F.R. § 791.2(b). Paragraph (2) tracks FLSA's section 203(d) and paragraph (3) seems to encompass the import of the *Rutherford* test under section 203(g), making workers employees of any entity that has "common control" over their employment.

This regulation has been applied to security guards finding they were jointly employed. *Schultz v. Capital Intern. Sec., Inc*., 466 F.3d 298 (4th Cir. 2006).(A security firm and its client were joint employers of security agents hired to protect the client. The court considered the employment arrangement in light of the joint employment interpretive regulations, finding that the agents performed work ''which simultaneously benefit[ted]'' both the firm and the client. 29 C.F.R. § 791.2(b). Moreover, the entire employment arrangement fit squarely within the third example of joint employment at 29 C.F.R. § 791.2(b)(3): the client and the

the day-to-day supervision of the work. *Id* at 724-25. *See also Walling v. Rutherford Food Corporation*, 156 F. 2d 513, 514-15 (10th Cir. 1946). If the work is integrated into the process of providing the goods or services of the business, that business must ensure such products or services are not produced using child labor or by paying less than the established minimum wage and overtime pay for hours worked over 40 in a workweek. The factors are used to determine whether such economic integration is present. Consistent with state child labor laws, where economic integration exists, the business is presumed to have the ability to ensure compliance with the FLSA.

C. Economic reality is an analytical method, not a test for determining employer status under the FLSA.

Instead of examining the background and meaning of the statutory definition of "suffer or permit to work," courts in this Circuit and elsewhere have simply asserted that the "test" for determining whether an entity "employs" under the FLSA is the "economic reality" test.[15] "Economic reality" appears nowhere in the FLSA statute or the state child labor cases, and derives instead from U.S. Supreme Court cases deciding coverage under the National Labor Relations Act (*National Labor Relations Board v. Hearst Publications, Inc*, 322 U.S. 111) and the Social Security

firm were ''not completely disassociated with respect to the employment of [the agents],'' and the client ''share[d] control of the [agents]'' with the firm.)

[15] *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 142 (2nd Cir. 2008) (applying both "formal" and "functional" control factors).

Act (*United States v. Silk)*, each of which have the common-law definition of employment. It was first mentioned in a FLSA case in the *Goldberg v. Whitaker House Cooperative* case, which cited to *Silk*, a non-FLSA case.

As shown above, the test for determining whether a contracting business "employs" a person working for a subcontractor is whether the work was performed as part of an integrated economic unit under the common control of the contracting business. *Rutherford*, 331 U.S. at 730. A search for "economic reality" cannot itself be a FLSA test, because a search for "reality" gives no guidance about the facts that matter.

> To state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves. There must be some ultimate question to answer, factors to balance, or some combination of the two.

Solis v. Laurelbrook Sanitarium and School, Inc., 642 F. 3d 518, 522-23 (11th Cir. 2011).

The mere presence of economic reality does not mean such reality explains whether plaintiff is an employee of defendant in a FLSA case. As Judge Easterbrook has written,

> [i]t is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope.

Sec'y of Labor v. Lauritzen, 835 F.2d at 1539 (7th Cir. 1987) (Easterbrook J., concurring).

Though not a test for FLSA employment relationships, "economic reality" is an important concept to be used in applying FLSA's employment definitions. It is a direction to fact finders to resist using technical concepts, contractual language, subjective intent, or labels given by the putative employers to their workers, and instead to look to the objective reality of the working relationships. *Usery v. Pilgrim Equipment Co., Inc*. 527 F.2d 1308 (5th Cir. 1976). "Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative." *Real v. Driscoll Strawberry Associates, Inc*., 603 F.2d 748 (9th Cir. 1979) ("…the subjective intent of the parties to a labor contract cannot override the economic realities.)"

This accepted method of analysis is yet another reason why the Court should ignore the subjective intent of contracting businesses in subcontracting their work and consider instead facts showing whether the work is actually being performed as an integrated part of the contractor's business.

D Neither the "legitimate" business purposes underlying contracting, nor the subjective intent of the contacting business was considered in *Rutherford*, nor is such a consideration found in either state child labor cases or in the goals Congress sought to achieve in the FLSA.

The *Rutherford* Court did not rely on a finding that the subcontracts between the slaughterhouse and the chief boners were a subterfuge or that they had no legitimate business purpose. To the contrary, as shown above, the trial court in *Rutherford* had found "that the contracts with Reed and his successors were not sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting Kaiser when it entered into the contract with Reed." *Walling v. Rutherford Food Corporation*, 156 F. 2d 513, 518 (10th Cir. 1946). *See Barfield*, 537 F.3d 132, at 143. (*Zheng* factors do not require a sham arrangement in order to find employer status).

Under the child labor laws good faith and lack of knowledge of the age of the child, even after being lied to by the child and the child's parent, were no defense. Subjective intent of the business owner was not a relevant consideration under these laws. *See, supra* at section I.C.

As described above, Congress imported the broad "suffer or permit to work" definition of employ to place responsibility broadly on those with the ability to ensure the conditions were met. Congress did not suggest at any place in the text of the FLSA that the broad definition of employ should be subordinated where a company has legitimate business reasons for contracting out some of its functions.

Though Congress has carved out dozens of exceptions to coverage in the Act,[16] no exception is made for "legitimate" as opposed to "illegitimate" contracting by companies, and an employer's intent with respect to its contracting relationships is therefore irrelevant. *See, e.g. Partida v. Brennan* 492 F.2d 707 (5th Cir. 1974) (holding that intent to evade FLSA plays no role in determining laundromat attendees' employee status under FLSA); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969) (rejecting the shrimp company's argument that it was not liable because it had no actual knowledge of its employees' age, because this argument would "place[] the employment relationship, and through it the very coverage of the Act itself, at the mercy of an employer's subjective understanding.")

Indeed, when Congress wanted intent to be considered in the application of the FLSA, it so specified. Thus, the statute of limitations is extended for "willful" violations, 29 U.S.C. § 255(a); a defense is provided to an employer where its acts or omissions were "in good faith in conformity with" written regulations or interpretations of the Department of Labor, 29 U.S.C. § 259(a); and liquidated damages can be disallowed by the court where an employer can show it acted in good faith and had reasonable grounds to think its actions did not violate the Act. 29 U.S.C. § 260.

[16] *See*, principally, 29 U.S.C. § 213.

There is no historical, statutory, or judicial basis for a holding that legitimate contracting is not covered by the FLSA. To the contrary, "[t]he FLSA is designed to defeat rather than to implement contractual arrangements," if needed to secure compliance with the Act. *Lauritzen*, at 1544-45.

Finally, Courts are ill-positioned to determine to what extent a contracting relationship is legitimate or not. A business can easily recite an economically-sound reason to contract-out some of its functions, so that finding that a subcontract was "strategically-oriented" is simply a finding of good intent under another name. The FLSA does not consider those reasons to be relevant, and absent Congressional amendment, courts should not consider them.

III. **It is fair to hold employers like AT&T accountable because they can ensure that federally mandated working conditions prevail.**

Plaintiffs perform work that is an integrated part of AT&T's business. Perhaps the best evidence of this integration is that the work was performed in AT&T stores, with AT&T's managers controlling aspects affecting its customers, such as when to detain or exclude customers from its stores. Significantly, the guards could not move as a group to other clients, as shown by the fact that the subcontractor went out of business when its work with AT&T ended.

AT&T's decision to use a labor contractor to hire security workers in its retail stores is not improper under the FLSA. But contracting businesses like AT&T have FLSA obligations that do not end with the decision to contract out their work.

> The duty is an absolute one, and it remains with him whether he carries on the business himself of [sic] entrusts the conduct of it to others

People, on Inf. of Price, v. Sheffield Farms-Slawson-Decker Co., 121 N.E. at 474.

Holding businesses accountable for substandard conditions when workers are supplied by contractors will only discourage those contracting arrangements whose cost savings are attributable to substandard conditions. Subcontracting can and will continue – even when business owners are required to make sure their contractors comply with the law.

As explained below by Judge Easterbrook, indemnification agreements and holdbacks of payments are common and will offer protection, so long as the contracting company subs out work to a viable entity that can both defend any future litigation and also pay any resulting judgments. AT&T can investigate the wherewithal of its contractors and if it fails to do so, it is only fair that AT&T should suffer the consequences of its actions -- not the workers who were underpaid.

> If everyone abides by the law, treating a firm such as Remington as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator, such as Zarate, or one who plans to spurn the FLSA (as Zarate may have thought he could do), is

> Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor.
>
> *Reyes,* 495 F.3d at 409.
>
> [B]ut as between Remington and the workers Remington is in much the superior position to ensure Zarate's compliance with the FLSA….
>
> *Id.*

Here, the subcontractor for whom plaintiffs worked was not capitalized and cannot satisfy claims of unpaid overtime. It fair to hold AT&T responsible for these wages if AT&T suffered or permitted plaintiffs to work under FLSA's broad concept of "employ."

Commonly, firms monitor subcontractors' compliance with laws, execute indemnification agreements with subcontractors to protect against liability, and engage in a range of less formal measures reflecting their responsibility for working conditions. [17] These precautions are a natural component of any modern business that wishes to compete within the law.

CONCLUSION

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[17] Cynthia Estlund, "*Rebuilding the Law of the Workplace in an Era of Self-Regulation*," 105 COLUM. L. REV. 319 (2005) (cataloguing rise of business self-regulation).

This Court should reverse the trial court, and let plaintiffs have a trial to demonstrate that they were "employed" by AT&T, which should therefore bear responsibility for the unpaid wages.

Dated: August 6, 2015 Respectfully submitted,

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