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Wage and Hour Division
U.S. Department of Labor, Room S-3502
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Washington, D.C. 20210

Comments on RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act.

Dear Ms. DeBisschop:

The National Employment Law Project (“NELP”) submits these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking regarding the standard for determining joint-employer status. RIN 1235-AA26; Fed. Reg. Vol. 84, No. 68 (Apr. 9, 2019) (“NPRM”). NELP is a non-profit research and policy organization with 50 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation’s labor and employment laws, and that all responsible employers comply with those laws, including the child labor, minimum wage and overtime protections of the Fair Labor Standards Act (“FLSA” or “Act”). NELP has litigated directly on behalf of subcontracted workers, submitted amicus briefs in numerous joint employer cases, testified in Congress regarding the importance and scope of the FLSA’s employment coverage, and is an expert in outsourcing’s magnitude and its impacts. NELP and our constituents have a direct and sustained interest in a fully-enforced FLSA, an act that is particularly relevant to the low-wage workers who comprise a disproportionate and growing share of the workforce. We appreciate the opportunity to comment on the proposed regulations.

Our comments will address six primary points:

1. Joint employment is an important part of the FLSA and other labor and employment laws, because it ensures compliance and employer accountability where companies decide to outsource their workers.

2. USDOL's proposed interpretation is contrary to the FLSA, Supreme Court and Circuit court authority because it ignores the statutory definition of "employ," contained in 29 U.S.C. §203(g).
3. The proposed interpretation misapplies the only definition it does consider in 29 U.S.C. §203(d).
4. The FLSA's coverage is not determined by common-law employment relationships, and this proposed interpretation is narrower than even the common-law.
5. Outsourced work is pervasive in low-wage jobs, and the DOL's proposed test would leave behind workers in high-growth sectors with high rates of wage theft, contrary to the purposes of the FLSA.
6. The proposed interpretation will negatively impact small businesses, who would be left to go it alone.

I. Introduction

The FLSA contemplates that more than one employer can and should be held responsible for its provisions when a company decides to outsource all or a portion of its workforce to staffing companies or other subcontractors. Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

The FLSA was passed to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions," *Rutherford*, 331 U.S. at 727, A.H. *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract").

The Department's proposed interpretation is contrary to law because it ignores the plain language of the FLSA's definition of "employ," which "includes to suffer or permit to work," 29 U.S.C. §203(g), and ignores U.S. Supreme Court and federal Circuit court authority interpreting the Act. Instead, the interpretation describes a set of narrow factors taken from a cramped version of the more narrowly-scoped common law, which is not the test for employment coverage under the FLSA, and in so doing prevents a consideration of factors that have historically been deemed critical to determining whether an employment relationship exists. Effectively, the proposed interpretation would exclude even those parties sharing control over essential terms and conditions of employment, which would be impermissible under even the narrowest version of a common law test, and by extension the much more expansive FLSA. If finalized in its proposed form, this standard would not be "in accordance with law," and therefore in violation of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A).

The DOL seeks to narrow its joint employment standard at a time when companies in low-wage sectors are increasingly using temporary and staffing agencies to source their labor. Outsourced work is a pervasive part of the low-wage economy today, and workers' experiences in outsourced industries demonstrate that the proposed rule would be contrary to the purposes of the Act. The number of workers employed by temporary staffing agencies has increased dramatically, especially in low-wage occupations. In many fast-growing industries – including warehouse and logistics, janitorial, hospitality, waste management, and manufacturing – outsourcing has become deeply entrenched. Companies that hire their workers via subcontractors or temp agencies should not be able to skirt the Act simply because they have contracted with another to source their workers. The DOL should not adopt a standard that incentivizes outsourcing employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create. Such a standard would degrade these workers' labor conditions, permit wage theft and unlawful child labor, and deprive them of their statutory rights.

The proposed interpretation would also adversely affect small business. The rule would leave small businesses to satisfy the Act alone, in situations where they may not be able to ensure compliance without involvement of the larger lead or contracting employer. The proposed rule pushes liability onto smaller companies and places small businesses at a competitive disadvantage.

II. Joint Employment is a Part of Most Labor and Employment Laws to Ensure Compliance and Employer Accountability When Companies Decide to Outsource.

Since at least 1947, the Supreme Court have recognized that a group of workers may have more than one employer on a particular job, and that in such instances both employers must comply with the child labor, minimum wage, and overtime provisions of the FLSA. Such “joint employment” can exist where an employer contracts with a staffing or temp agency or other subcontractor to bring in labor to work at the company. Although joint-employer claims do not arise that often, where the issue has arisen, the Department and the courts have applied the FLSA to specific facts, aimed at answering the question whether two or more companies employ the workers under the Act's broad definitions, which state that “employ includes to suffer or permit to work.” 29 U.S.C. §203(g). These claims arise because the workers seeking fair pay or child labor or overtime protections cannot get the protections from just one of the companies at their workplace; without multiple employers, the FLSA's remedies and future compliance would be thwarted.¹

¹ It is worth noting that there are not very many joint employer cases overall, as compared to other FLSA cases, despite the DOL's and corporate representatives' pronouncements that the joint employer question is harming business (“[Uncertainty regarding joint liability] could impact the other person's willingness to engage in any number of business practices” NPRM at 14047). NELP's research and case compendium of joint employer cases shows that the majority arise in FLSA cases brought by agricultural workers, and over half of all cases do not result in a finding of joint and several liability.

As the Department explained in its January 2016 Administrator’s Interpretation on Joint Employment, the Wage & Hour Division “may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.” Administrator’s Interpretation No. 2016-1, *Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act*, at 2.²

The FLSA has since its inception created broad employer coverage to ensure that companies that use temporary or staffing agencies or other labor contractors care about the working conditions in their business and can properly compensate workers, ensure child labor and overtime protections.³

Contrary to the Department’s statement that this interpretation will have no economic impact on workers, 84 Fed. Reg. at 14053, this NPRM will take away long-held rights of workers to recover unpaid wages from their employers that use fly-by-night, undercapitalized contractors.⁴ And it will incentivize companies to restructure and outsource parts of their business to avoid liability for the workers they suffer or permit to work.

III. DOL’s Unique Claim that FLSA Section 203(g) Does Not Authorize Finding Joint Employment Conflicts with the Statute and Controlling Court Authority.

A. The well-known meaning of “to suffer or permit to work” in 1938 is binding on the DOL.

The DOL claim that only FLSA’s definition of “employer” found at Section 203(d)⁵ authorizes a finding of joint employment under the FLSA is a unique interpretation of the law that conflicts with statutory language, its accepted historical underpinnings, controlling Supreme Court precedent, and decades of the Department’s own interpretations. The statute’s definition of

² The 2016 AI was taken down from the DOL’s website without explanation in June 2017; it is appended to these comments as Appendix B. For a US Department of Labor ebulletin about the 2016 guidance, *see*, e.g., <https://content.govdelivery.com/accounts/USDOL/bulletins/13145f4>.

³ Bruce Goldstein et al, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1065 (1999) (noting that subcontracted garment sweatshops were among the ills the FLSA intended to address via its broad definitions of employment.)

⁴ See, e.g., Griffith, K. L. (2019). The Fair Labor Standards Act at 80: Everything old is new again [Electronic version]. *Cornell Law Review*, 104(3), 115-118; 101-150 (tracing Congressional intent to sweep broadly in FLSA’s definitions to include subcontracting employers to ensure adequate wages. As the author concludes at 116, “the legislative history consistently shows an intent to make sure that the FLSA has blanket-type coverage of the low-wage workforce and that there are not loopholes in coverage that create incentives for businesses to splinter off work.”)

<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2341&context=articles>

⁵ “‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee....”

“employ” – “employ includes to suffer or permit to work” at 29 U.S.C. §203(g) – is extremely broad language. Its meaning was well known when adopted by Congress in 1938, and the same language in child labor laws had been used regularly to hold business owners liable for child labor where children had been hired and employed by others, including separate independent businesses and contractors.

The “suffer or permit to work” definition of “employ” in section 203(g) of the FLSA 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); 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).⁶ This definition is of “striking breadth,” the broadest ever used to encompass employment relationships, and includes relationships not considered “employment” under common law agency principles. *Barfield. v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141 (2nd Cir. 2008). This breadth in coverage was necessary to accomplish the FLSA’s goal, as stated by the Supreme Court:

Th[e] Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation... This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based on substandard labor conditions.⁷

Congress ensured “sufficiently broad coverage” by including coverage terms from state child labor laws, designed to reach businesses that use middlemen to illegally hire and supervise children.⁸ The history and functions of the “suffer or permit” language in the child labor laws

⁶ 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.”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Justice Frankfurter, “‘if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.’” Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 537 (1947)).

⁷ *Roland Electric Co. v. Walling*, 326 U.S. 657, 669-70 (1946). See also *Tony & Susan Alamo Foundation v. Secy of Labor*, 471 U.S. 290, 296 (1985) (quoting *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2nd Cir. 1999) (quoting *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2nd Cir. 1984); *Brock v. Superior Care*, 840 F.2d 1054 (2nd Cir. 1988).

⁸ *Antenor et al. v. D & S Farms*, 88 F.3d 925, 934 (11th Cir. 1996) (citing *Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24.

show 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). Most importantly, this broad language of “employ” is used in the FLSA to enforce the FLSA’s minimum wage and overtime protections against multiple entities, just as it is used broadly to enforce FLSA’s child labor provisions⁹

In all of these state child labor cases, a business was found to have violated the law by suffering or permitting a child’s work, where a party other than the business was that child’s employer at common law. Thus, when the “suffer or permit to work” language was included in the FLSA to protect children nationally and set a floor for wages for work done in commerce, it was well-known to broadly allow for joint responsibility of contractors and the businesses for whom they contracted and hired workers. The DOL’s proposed interpretation that ignores the “suffer or permit to work” language of section 203(g) and narrows derivative definition in 203(d) to a meaning it did not have in 1938 conflicts with statute.

B. DOL’s attempt to ignore the broad scope of “employ” in section 203(g) conflicts with controlling Supreme Court authority.

The Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 distinguished the broad definition of “employ” in the FLSA from undefined uses of the term “employee” in other federal statutes, limiting the narrow common law scope of such term to situations where Congress has not expressed its intention to go beyond the common law. *Id.* at 322-23.

The definition of “employee” in the FLSA derives from the child labor statutes, see *Rutherford Food*, *supra*, at 728, 67 S.Ct., at 1475, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). *Id.* at 326.

The first and still the definitive word on “joint employment” responsibility under the FLSA is *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), which is the U.S. Supreme Court case in which the definition of “employ” under the FLSA was most thoroughly discussed and which

⁹ Section 212 (c). “No employer shall employ any oppressive child labor in commerce...” See, e.g., *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1130 (Okla. 1913) (“[i]t positively prohibits the employment of children of this age to do this character of work, and then, in order to shut off the avenues of artifice, just as positively prohibits their being permitted or suffered to do such work.”); *Commonwealth v. Hong*, 158 N.E. 759, 759-760 (Mass. 1927); *Daly v. Swift & Co.* 300 P. 265, 268 (Mont. 1931); *Gorcynski v. Nugent*, 80 N.E. 2d 418 (Ill. 1948); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 111 (1912); *Vida Lumber Company v. Courson*, 112 So. 737, 738 (Ala. 1926); *Nichols v. Smith’s Bakery*, 119 So. 638, 640 (Ala. 1928); *People, ex rel. Price, v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25 (1918) 121 N.E. 474, 475. (New York appeals court concluded that the corporation’s failure to discover and prevent the employment of a child by one of its drivers was “sufferance” of the child’s work, resulting in its violation of the child labor law.)

sets forth the judicial test and factors used where an employee claims that not only her direct employer but also the company contracting with this employer has “employed” her within FLSA’s meaning.¹⁰ The question posed in *Rutherford* was whether persons, acknowledged to be “employees” of the contractor, were also “employed” by the slaughterhouse in which they worked.

The terms of the contract were that Reed should be paid for the work of boning an amount per hundredweight of boned beef, that he would have complete control over the other boners, who would be his employees.

Id. at 724-25 (emphasis supplied).

The trial court had found that the workers were employees only of the contractor and not the slaughterhouse (Kaiser)¹¹, so the only issue to be decided by the Supreme Court was whether the slaughterhouse had also “employed” the beef de-boners within the broad definition of that term in the FLSA.¹²

The Supreme Court held that even where the slaughterhouse entered into a written contract with an “independent contractor,” which then hired, fired, supervised, and paid its employees to “de-bone” beef, the slaughterhouse had nevertheless “employed” them under the FLSA. As later explained by the Second Circuit:

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.

¹⁰ *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.”)

¹¹ “All boners who worked with Reed [the chief boner] and his successors were employed by Reed or his successors, their hours were fixed by them, wages or division of compensation for the boning was arranged between Reed and his employees as they saw fit and at no time was the Kaiser Company ever consulted or advised with (sic), with reference to what would be paid to any boner or what hours any boner should work.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (Supreme Court Record at 150).

¹² As explained below, the Seventh and Second Circuits (*Reyes, et al., v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) and *Zheng v. Liberty Apparel Company, Inc.*, 355 F. 3d 61, 70 (2nd Cir. 2003); *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 146 (2nd Cir. 2008)) recognize that *Rutherford* is a joint employment and not an employee status case. The recent Fourth Circuit decision, *Salinas v. Commercial Interiors, Inc.* 848 F.3d 125 (4th Cir. 2017), acknowledges that *Rutherford* determined the slaughterhouse a joint employer with the chief de-boners, *Id* at 133-34, 138, but it also focuses on admittedly ambiguous language from the Tenth Circuit decision in *Rutherford* to find otherwise. *Id* at 138.

Zheng v. Liberty Apparel Company, Inc. 335 F. 3d 61 (2nd Cir. 2003) ¹³

The *Rutherford* Court relied on certain facts in concluding that “the operations at the slaughterhouse constitute[d] an integrated economic unit,” so that meat de-boners were employees of the slaughtering plant under the FLSA. *Rutherford*, 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.¹⁴ But instead of holding that employees of independent contractors *automatically* become joint employees of the firms for which these independent contractors supply labor, the Court has held that further inquiry is essential. *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 406 (2007); See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); see also *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

Thus, controlling Supreme Court and Circuit Court authority conflicts with DOL’s novel and unsupported proposition that the definition of “employ” in section 203(g) does not authorize a court to find joint employment. In fact, the central purpose of such language and its established understanding when inserted by Congress into the FLSA in 1938 was to do just that: to hold companies accountable for child labor (and minimum wage and overtime) violations even where the workers were directly hired, supervised, and paid by an independent contractor of that company.¹⁵

C. *Bonnette*’s restrictive common law control factors were not intended by the Ninth Circuit to be the test for FLSA joint employment, nor can they be a test, because FLSA’s definition of “employ” is far broader than the common law.

More than thirty-five years ago in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the Ninth Circuit affirmed a district court that had found the State of California a joint employer of in-home aides who provided home care services for California residents. The lower court had concluded that joint employment was established where the state “(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *Id.* at 1470. Reasoning that these factors had been among those used by other courts in joint employment cases and “[m]ore important, the[se] four factors are

¹³ In *Zheng*, the Second Circuit relied on *Rutherford* and applied *Rutherford*’s factors to determine, in the court’s understanding of *Rutherford*, whether the apparel manufacturer had “functional” control over the workers via its subcontractor, even in the absence of “formal” control.

¹⁴ *Reyes, et al., v. Remington Hybrid Seed Co.*, 495 F.3d at 408.

¹⁵ *Antenor et al. v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) (citing *Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24; 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).

relevant to this particular situation,” the Court noted that courts must consider “the circumstances of the whole activity” and that no set of factors is “etched in stone.” *Id.* at 1469-70.

As stated recently in Circuit courts, and as confirmed by the Ninth Circuit’s actions in subsequent joint employment cases, the four common-law control factors were simply present in the *Bonnette* case and their presence was sufficient, though not necessary, to find joint employment. *See Zheng v. Liberty Apparel, Inc.* 355 F.3d 61, 69 (2nd Cir. 2003) (discussing this distinction in its treatment of the four *Bonnette* factors in the Second Circuit).¹⁶ Recently, the Fourth Circuit also recognized that the Ninth Circuit itself does not adhere to *Bonnette*’s four factors, using instead “thirteen nonexclusive factors.” In the words of the Fourth Circuit,

[t]hese [four] factors reflect the common-law test for determining whether an agency relationship exists, which focuses on the putative principal’s “formal right to control the physical performance of another’s work.” citing *Zheng*, 355 F.3d at 69 (citing Restatement of Agency § 220(1) (1933)).

Salinas v. Commercial Interiors, Inc., 848 F. 3d 125, 136 (4th Cir. 2017).

In *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), the Ninth Circuit made it clear that the four *Bonnette* factors were not the only considerations for joint employment in a FLSA case. Presented with a joint employment question under both the FLSA and the AWP, which have identical definitions of “employ”, the Court found a grower a joint employer of farm workers, along with its farm labor contractor. Contrary to the approach of the DOL in this proposed regulation, the Court did not ground its FLSA joint employment decision on the FLSA definition of “employer” in section 203(d), but on the definition of “employ” in section 203(g).¹⁸

¹⁶ Explaining its earlier rulings that had relied on *Bonnette*, the Second Circuit Court said:

In those cases, we held only that the four factors applied by the District Court in this case can be *sufficient* to establish employer status. We did not hold, nor under *Rutherford* could we have held, that a positive finding on those four factors is *necessary* to establish an employment relationship.

Zheng v. Liberty Apparel, Inc. 355 F.3d 61, 69 (2nd Cir. 2003).

¹⁷ The Migrant and Seasonal Agricultural Protection Act, 29 U.S.C. secs. 1800 et seq.

¹⁸ In finding the grower and its farm labor contractor to be employers, the Ninth Circuit noted:

Congress expressly incorporated the FLSA definition of “employ” into the AWP. 29 U.S.C. § 1802(5). As already explained, the FLSA definition of employment is broad. Congress presumably knew what it was doing when it chose to borrow this concept from the FLSA. *Id.* at 641... The term “employ” has the same meaning under the AWP as under the FLSA. *Id.* § 1802(5). The term includes “to suffer or permit to work.” 29 U.S.C. § 203(g). Furthermore, the regulations implementing the AWP provide that “[j]oint employment’ under the [FLSA] is

Citing *Bonnette* for the proposition that “[a] court should consider all those factors which are “relevant to [the] particular situation” in evaluating the “economic reality” of an alleged joint employment relationship under the FLSA, the Ninth Circuit considered the four *Bonnette* factors, calling them the regulatory factors under the AWPA regulations, but also non-regulatory factors from other cases, including especially *Rutherford Foods* 331 U.S. at 640.¹⁹ There was no issue in *Torres-Lopez* as to the employee status of the workers; the question was only that of joint employment, the farmer along with the farm labor contractor.

These non-regulatory factors include:

- (1) whether the work was a “specialty job on the production line,” *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477;
- (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without “material changes,” *Id.*;
- (3) whether the “premises and equipment” of the employer are used for the work, *Id.*; see also *Real*, 603 F.2d at 754 (considering the alleged employee’s “investment in equipment or materials required for his task, or his employment of helpers”);
- (4) whether the employees had a “business organization that could or did shift as a unit from one [worksite] to another,” *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477;
- ...
- (7) whether there was “permanence [in] the working relationship,” *id.*; and
- (8) whether “the service rendered is an integral part of the alleged employer’s business,” *id.*

Torres-Lopez at 640.

Explaining the relevance of one of these factors to joint employment, the Court said the following, again citing *Rutherford* for this “joint employment” proposition:

Finally, considering whether the farmworkers perform “a

‘joint employment’ under the [AWPA].” 29 C.F.R. § 500.20(h)(4). *Id.* at 639.

¹⁹ The DOL NPRM also ignores binding Supreme Court authority in *Rutherford Food* by asserting that it did not decide the “joint employment,” (that the slaughterhouse as well as the chief boner “employed” the beef boners) of workers doing the boning of beef, but only that they were protected employees. Both the majority and dissent in *Torres-Lopez*, properly hold that *Rutherford* decided the issue of joint employment.

line-job integral to [the grower's] business” is relevant “because a worker who performs a routine task that is a normal and integral phase of the grower's production is likely to be dependent on the grower's overall production process.” *Id.* (citing *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477).

Id. at 641

Even Judge Aldisert, in dissent, applied many factors other than *Bonnette*'s limited control factors, including whether the work was performed as an integrated part of the alleged joint employer's business operation, once again citing *Rutherford* as authority for this joint employment factor under the suffer or permit definition of “employ:”

The [lower] court's reasoning here conflicts with Supreme Court and this court's teachings, as well as case law from other circuits. The Supreme Court has found evidence of a joint employment relationship where workers performed a discrete task in a larger production process. *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477 (“boners” hired by an independent contractor were employees of the slaughterhouse where they worked)(emphasis supplied). Our court and other courts of appeals have applied the same reasoning to agricultural workers. *See, e.g., Real*, 603 F.2d 748; *Antenor*, 88 F.3d at 937.

Id. at 649-50

In *Moreau v. Air France*, 343 F.3d 1179, 1188-89 (2003),²⁰ the Ninth Circuit once again declined an invitation to apply only the four restrictive *Bonnette* factors, applying instead also the additional factors it had used in *Torres-Lopez*, which comprise those factors considered by the Supreme Court in *Rutherford*.

Thus, the Ninth Circuit, from which the *Bonnette* factors originate, never used the factors and does not today use them as a test for joint employment. Because the presence of these four sets of facts evidences extreme aspects of common law control, they do of necessity show that a person is an employer of workers. But they cannot be the sole test for joint employment under the FLSA's broad statutory definitions, however, as recognized by the Ninth, the Second, and the Fourth Circuits, because they test for common law control.

²⁰ A case brought under the Family and Medical Leave Act, in which the definition of “employ” is also taken verbatim from the FLSA's section 203(g).

D. DOL’s proposed test for FLSA joint employment directly contradicts nearly all Circuit Court decisions.

Not only does DOL’s proposal conflict with controlling Supreme Court authority²¹ and Ninth Circuit joint employment decisions – from which DOL takes its four *Bonnette* factors – but the proposed test conflicts with nearly all other Circuit Court of Appeal FLSA jurisprudence. Both the Second and Fourth Circuits analyzed and discussed extensively FLSA’s joint employment test under the definition of “employ” at section 203(g), concluding that because the *Bonnette* factors determine the more narrowly-scoped common law employment, they cannot test for joint employment under the much broader FLSA scope of employment relationships.²² Similarly, the Seventh Circuit analyzed FLSA joint employment and applied *Rutherford Food* to hold that the seed company was a joint employer of farm workers, along with its farm labor contractor.²³

Both the Eleventh and the Fifth Circuits have extensive FLSA joint employment jurisprudence, but neither relies only on the four *Bonnette* factors in deciding FLSA joint employment cases.²⁴ The Eleventh Circuit recognizes that FLSA’s broad definition of employ is not limited to common law relations and uses eight factors to determine joint employment, three of which include ownership of the facilities where the work is performed, whether the work was integral to the business of the proposed joint employer, and what equipment and facilities were used to perform the work.²⁵

Where a plaintiff claims the company hiring his direct employer is a joint employer under the FLSA, the Fifth Circuit does not use a *Bonnette* test, but instead uses *Rutherford* derived factors. In *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973), the Court held that a packing shed employed field workers in addition to the crew leaders that hired, paid and provided most of their supervision in the fields. Citing *Rutherford* for the proposition that employees of independent contractors can be jointly employed by the contracting business, in this case the packing shed, *Id.* at 237, the Court applied the *Rutherford*-derived factors listed in *Wirtz*

²¹ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)

²² *Zheng v. Liberty Apparel Company, Inc.*, 355 F. 3d 61, 69 (2nd Cir. 2003) (“We did not hold, nor under *Rutherford* could we have held, that a positive finding on those four factors is *necessary* to establish an employment relationship”). *Salinas v. Commercial Interiors, Inc.*, 848 F. 3d 125, 137 (4th Cir. 2017) (We agree that *Bonnette*’s reliance on common-law agency principles does not square with Congress’s intent that the FLSA’s definition of “employee” encompass a broader swath of workers than would constitute employees at common law. *See Darden*, 503 U.S. at 326, 112 S.Ct. 1344”).

²³ *Reyes, et al., v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (“Just as in *Rutherford Food*, a firm hired a single person to supply a labor force rather than a defined product (such as a working elevator or a legal brief)”).

²⁴ *E.g., Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1287 (11th Cir. 2016) (“As noted above, the ‘suffer or permit to work’ standard has been recognized as one of the broadest definitions of “employ” possible.”); “When determining whether an employment relationship exists under this standard, courts are not guided by common law definitions of ‘employer’ and ‘employee.’” *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994).

²⁵ *Garcia-Celestino* at 1294.

v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968), to affirm the lower court’s joint employment decision. *Id.* at 237-38. The Fifth Circuit does use *Bonnette* factors in “statutory employer” cases, where, under section 203(d), a plaintiff claims a person is also his employer, because it has acted in the interest of an employer.²⁶ As explained below, other Circuit courts’ adjudications under 203(d) use slightly different factors, and almost always when deciding whether an individual is liable, along with the company the individual has operational control over.

The Tenth Circuit decided a FLSA joint employment case where the Department of Labor argued a farmer and his crew leader were joint employers of cucumber pickers, *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973). After quoting FLSA’s definitions of “employer” and “employ” the Court agreed that they go beyond the common law:

Referring to these definitions the court in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947), said: “This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”

Id. at 968.

The court concluded that under the FLSA, the farmer was a joint employer with the crew leader, because it had acted in the interest of the crew leader, who hired and supervised the workers.

The First and Third Circuits use *Bonnette* factors to determine joint employment, but the factors have been applied in cases where there was no need to examine additional factors that go beyond the boundaries of the common law. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998); *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012).²⁷ In *Baystate Alternative Staffing*, the First Circuit held that joint employment under the FLSA does not look to the common law test, but, nevertheless, concluded that “the factors used in *Bonnette*, 704 F.2d 1465, provide[d] a useful framework” for its

²⁶ *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012) (Applying *Bonnette*, the Court found that the four limited, control factors were not present, so that the part owner of the LLC was not plaintiff’s FLSA employer in addition to the LLC itself); *Martin v. Spring Break ‘83 Productions, L.L.C.*, 688 F.3d 247, 251 (5th Cir. 2012); *Orozco v. Plackis*, 757 F.3d 445, 448, 452 (5th Cir. 2014). Earlier Fifth Circuit statutory employer decisions under 203(d) used the generally accepted standard that an owner-operator of a company is jointly liable under the FLSA for damages if such person has operational control of the company. *See Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir. 1982), *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir. 1983), and *Donovan v. Grim Hotel Co.*, 747 F.2d 966 (5th Cir. 1984).

²⁷ Neither the Sixth nor the Eighth circuits have decided joint employment cases, other than “statutory employer” cases, finding a company owner/operator liable as acting in the interest of an employer under 203(d). *Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Chambers Const. Co v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956).

analysis. *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d at 675. As in *Bonnette* itself, the Court found that defendant could be held liable as an employer where it had hired the workers, set their pay and maintained their payroll. Thus, the presence of the *Bonnette* factors were sufficient to show joint employment by the temporary employment agency, and the Court had no occasion to find that the *absence* of the *Bonnette* factors required an inquiry into additional factors.

In an unusual factual circumstance where plaintiffs claimed a holding company was the joint employer of assistant managers of independent subsidiaries, the Third Circuit considered whether the parent company was an “employer” under 29 U.S.C. § 203(d), not as in *Rutherford* whether the company “suffered or permitted” the employees to work under 29 U.S.C. § 203(g). The Court looked to its holdings in cases determining common law joint employment under the National Labor Relations Act, *N.L.R.B. v. Browning–Ferris Indus. of PA.*, 691 F.2d 1117, 1123 (3d Cir.1982).and *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir.1983). Thus, the Court arrived at a common law approach to section 203(d), an approach that all courts have found untenable under the child labor-derived “suffer or permit to work” language of 203(g).²⁸

IV. The Department’s Sole Reliance on Section 203(d) is Misplaced.

The DOL’s sole reliance on the definition in 203(d) is misplaced for several reasons. 84 Fed. Reg at 14050 (“the textual basis for FLSA joint employer status is section 3(d), not section 3(e)(1) or 3(g).”) First, in order to determine whether an individual or entity is an “employer” under the Act, the first place to start is with the seminal definition of “employ” in 203(g): does the entity or individual “suffer or permit” a person to work? The definition in 203(d) potentially brings in additional employers – those that act “directly or indirectly in the interest of an employer in relation to an employee...,” but does not by itself define “employer” without reference to 203(g)’s definition of “employ,” just as the definition of “employee” at 203(e)(1) – “any individual employed by an employer” – requires reference to 203(g)’s definition.

Second, The DOL’s exclusive reliance on 203(d) in joint employment cases assumes that there is another employer who is an employer under the suffer or permit test. And while most joint employer cases do have another acknowledged employer, that is not always the case. There can be situations where all potential employers disclaim liability and, in those cases, how does one determine which potential employer is tested under 203(g) and which is tested under 203(d)? Joint employment does not identify primary and secondary employers, it identifies multiple employers who are jointly liable under FLSA and each of those employers must be identified using the same definition.

Third, most of the cases interpreting 203(d) consider instances where a “person” – natural or corporate – is sufficiently involved in a corporation’s day-to-day functions to be an “employer”

²⁸ *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012) (holding that Enterprise Holdings, Inc. was not the joint employer of assistant managers employed by its 38 subsidiaries).

under the FLSA. *See Falk v. Brennan*, 414 U.S. 190 (partnership engaged in managing apartment buildings and the apartment building owners were both “employers” of building maintenance workers within the meaning of 29 U.S.C. § 203(d) given the partnership’s “managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees”); *U.S. Dep’t of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (“one who . . . has a significant ownership interest in [the corporation], controls significant functions of the business, and determines salaries and makes hiring decisions has operational control and qualifies as an ‘employer’ for the purposes of the FLSA.”); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (owners actively engaged in the management, supervision and oversight of company’ affairs, including employee compensation and benefits, liable under FLSA); *Patel v. Wargo*, 803 F.2d 632, 637-38 (11th Cir. 1986) (corporate officer who is involved in day-to-day operation of employing entity may be liable as an employer under the FLSA); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (“[t]he overwhelming weight of authority [construing 203(d)] is that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation jointly and severally liable under the FLSA for unpaid wages.”)

This “operational control” test under 203(d) examines the extent to which the individual has control over the corporation such that his decisions and actions, on behalf of the corporation (e.g. “directly or indirectly in the interest of the employer”), can affect compliance with the Act (e.g. “in relation to the employee”). *E.g. Donovan v. Grim Hotel*, 747 F.2d 966, 972 (5th Cir. 1984) (“Alberding began and controlled the hotel corporations. He has held their purse-strings and guided their policies . . . [t]he hotels, speaking pragmatically, were Alberding’s and functioned for the profit of his family . . . [he] was the “top man””); *Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991) (“Schubiner was the chief corporate officer, had a significant ownership interest in the corporation, and had control over significant aspects of the corporation’s day-to-day functions, including determining employee salaries . . . [t]he evidence clearly demonstrates that Schubiner was the ‘top man’ at [the corporation], and the corporation functioned for his profit.”); *Herman v. RSR* 172 F.3d at 140 (“Because he controlled the company financially, it was no idle threat when he testified that he could have dissolved the company if Stern had not followed his directions”).²⁹

²⁹ “Control” for the purposes of the “operational control” test refers to the individual’s control over the corporate defendant-employer – not to the individual’s control over the workers directly. *See, e.g.*, as the Southern District explained in discussing the Second Circuit case *Herman v. RSR*, it was immaterial that the individual defendant in *Herman* “did not have direct control over the workers in question; instead, the Court looked at whether he had ‘operational control’ over the corporation.” *Ansoumana v. Gristedes Operating Corp.*, 255 F. Supp. 2d 184, 193 (S.D.N.Y. 2003) (rejecting individual defendants’ argument that because they did not directly control the workers, they were not individually liable for FLSA violations and finding individual defendants liable under Section 203(d) because they exercised operational management of the companies).

V. The FLSA’s Coverage is Not Determined by Common-law Employment Relationships, and the DOL’s Proposed Interpretation is Narrower Than Even the Common-law.

The NPRM narrows the FLSA test for employer to something narrower than the common law test and does not allow for a fact-finder to determine the critical aspects of an employment relationship. This interpretation is contrary to the statute and longstanding and established Supreme Court and Circuit case law.

As described above, the FLSA’s definitions of employment are broad. The “suffer or permit to work” definition of employment is “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong.Rec. 7657 (1938)). As the Supreme Court recognized, in enacting these expansive terms Congress sought to make business owners responsible for minimum labor standards for workers for whom they could easily disclaim responsibility at common law. The Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947), said: “This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.” The Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) notes the unique definitions in the FLSA, rejects the common-law standard for that Act, and requires that it be applied broadly.

Even after making *Bonnette’s* restrictive common law factors a test for a FLSA definition that all courts agree goes beyond the common law, DOL restricts the four factors more tightly than the common law, by requiring that the proposed joint employer actually *exercise* the power to hire and fire. The restrictive common law control test requires only a showing of the “right” to control, not its exercise. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (“under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished); Restatement (Second) of Agency § 220(2) (1958).

The common-law concept of “employ” is narrower than FLSA’s “suffer or permit” concept. While FLSA was designed to eliminate goods produced under substandard conditions, including with child labor, the common law definition of master/servant was not to offer protection to employees, but rather, to determine whether the master was liable to third parties for a servant’s negligent acts.³⁰ Thus, the common-law test for employment, and, accordingly, for tort responsibility, was whether the alleged “employer” had the “right to control the manner and means by which the product is accomplished.” *Reid*, 490 U.S. at 751-52; here the alleged master had the right to control details of the servant’s work and the work was performed negligently, it was fair to hold the master accountable.

³⁰ *Lauritzen*, 835 F.2d at 1544.

Certain factors were considered at common law to determine the existence of this relatively narrow employment relationship.³¹ Some courts use these same factors to determine the “strikingly broad” scope of FLSA coverage.³² This similarity suggests that application of some of the commonly-used “economic reality” factors may have focused too much attention on the right to control, a hallmark of common-law employment, rather than on whether the work is “suffered or permitted” by the business owner.³³ Because the common-law definition of employment is also included within the FLSA statutory definition, the factors relating to control are relevant and useful if they are present in the relationship; their absence, however, says little about whether the work was suffered or permitted.³⁴ When courts overemphasize those factors that are really only indicia of common-law control, they ignore the statutory language, the legislative history, and the remedial purposes of the statutory definitions.

By contrast, courts interpreting child labor statutes that used the “suffer or permit” language adopted in FLSA frequently held businesses accountable even when none of the common-law control factors were present.³⁵ Thus, the common-law test of the right to control has never limited the scope of FLSA accountability. The broader scope of responsibility under the FLSA reaches those who suffer or permit workers to work, in addition to those who control the workers under the narrower common-law test.

The Department’s NPRM narrows *Bonnette*’s common-law factors to an even narrower set, requiring that the control be exercised instead of retained, 84 Fed. Reg. at 14048. Under the DOL’s proposed interpretation, even many single-company direct employees would not be

³¹ *Reid*, 490 U.S. at 751-752.

³² In common-law cases, courts consider factors including whether the putative employer: (1) hires and fires the worker; (2) withholds taxes; (3) controls the manner in which the work is performed; (4) the skill required, and (5) the duration of work, among others. *See Reid*, 490 U.S. 730, 751-752 (1989). In FLSA cases, like *Bonnette*, 704 F.2d 1465 and *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), the Court considered some of the same factors, including (1) the nature and degree of control of the workers; (2) the degree of supervision of the work; (3) the power to determine rates of pay and how payments were to be made; (4) the right to hire and fire, and (5) preparation of payroll.

³³ “[The degree of supervision of the work], like the growers’ control over the workers, has more to do with common-law employment concepts of control than with economic dependence. Indeed, the ‘suffer or permit to work’ standard was developed in large part to assign responsibility to businesses which did *not* directly supervise the activities of putative employees.” *Antenor v. D & S Farms*, 88 F.3d 925, 933-935 (11th Cir. 1996).

³⁴ “[T]he . . . control factors should weigh little, if anything, in the ultimate [FLSA] joint employment determination.” *Lopez v. Silverman*, 14 F. Supp. 2d 405, 419 (S.D.N.Y. 1998). *See also Antenor*, 88 F.3d at 933-35.

³⁵ “Thus when one engages an independent contractor to perform certain work and the contractor employs infants in violation of the statute, the one engaging the contractor will be held to have violated the law in permitting the infant to do the work.” *Bernal v. Baptist Fresh Air Home Soc’y*, 87 N.Y.S. 2d 458, 464 (App. Div. 1949), *aff’d*, 300 N.Y. 486 (1949); *Sheffield Farms*, 121 N.E. 474 (N.Y. 1918).

considered employees, despite the fact that they would be considered employees under the common law agency doctrine.

Common-law agency principles are used to determine whether sufficient right to control resides in a putative joint employer. These vicarious liability principles were intended to deter torts and distribute liability to those who had the right to control the servant. These principles were referenced in a non-exhaustive list in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989):

We consider the hiring party's *right to control* the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (emphasis added).

The current DOL's proposal prohibits consideration of most of these Supreme Court-identified factors, all of which are used to determine whether two companies are common law employers. See NPRM at 14048. The DOL has no authority to so restrict settled law.

The Restatement (Second) of Agency, cited with approval in several U.S. Supreme Court cases interpreting the common law, includes many considerations that are broader and less formalistic than the current DOL test, and includes such factors as whether or not the one employed is engaged in a distinct occupation or business, and whether the work is a part of the regular business of the putative employer. Restatement (Second) of Agency § 220(2) (1958).

The common law test for employment and joint employment does not require control to be exercised, direct, and immediate; only that the proposed joint employer have the right to control how the work is done. See *Garcia-Celestino, et al., v. Ruiz Harvesting and Consolidated Citrus* 898 F.3d 1110, 1121 (11th Cir. 2018) (applying common law employer test in case involving workers employed under the H-2A program); *Browning-Ferris*, slip op. at 16 (“We emphasize that ‘it is the right to control, not the actual exercise of control, that is significant’”). The common law looks to the right to control because whether or not the employer actually exercises control over the work, the employer's authority over the work prevents another from deciding to render the service in a manner different from that which serves the employer. *Restatement of the Law: Employment Law*, American Law Institute, 2012, Section 1.04. An employer's retention of control over such things as termination of an employee, wage rates or extra hours, work changes, or inspection of a worksite – even when not exercised – can house sufficient control in an employer to create an employment relationship.

VI. The DOL’s Proposed Test Would Leave Behind Outsourced Workers in High-growth Sectors with High Rates of Wage Theft. The Resulting Lack of Employer Accountability is Contrary to the Purposes of the FLSA.

Corporate outsourcing is on the rise in low-wage sectors, and because workers in nonstandard or contingent jobs generally suffer wage penalties, fewer benefits, hazardous work, and less job security, employer accountability is paramount today.³⁶ This section will focus on one type of outsourcing that is particularly relevant for the proposed rule—the use of temporary and staffing companies—and the ways in which it degrades wages and working conditions, facilitates violations of the FLSA, and makes obtaining a meaningful remedy for aggrieved workers more difficult.

A. The number of workers employed by temporary staffing agencies has increased dramatically in recent years, especially in low-wage, “blue-collar” occupations.

The number of workers employed by temporary and staffing agencies has risen sharply in recent years. There are currently 3.1 million workers employed through temporary and staffing agencies, representing 2.4 percent of the workforce.³⁷ According to the American Staffing Association, during the course of a year, staffing companies in the United States hire more than 17 million temporary and contract employees who are then placed into jobs at another employer.³⁸ Since the end of the Great Recession in June 2009, staffing and temporary agency work—as measured both by the aggregate number of hours and total number of jobs (part-time and full-time)—has grown faster than work overall. Temporary and staffing agency work hours have grown 3.9 times faster than overall work hours, and temporary and staffing agency jobs have grown 4.3 times faster than jobs overall.³⁹

Temporary and staffing work has increased in low-wage, “blue-collar” occupations in particular, reflecting a shift in corporate use of temp and staffing agency placements in clerical work to more hazardous industries, such as construction, manufacturing and logistics. Between 2014 and 2017, of the ten occupations that added the most temporary and staffing workers, nine are low-wage.⁴⁰

³⁶ *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

³⁷ Dep’t of Labor, Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, Employment, Hours, and Earnings from the Current Employment Statistics Survey, NAICS Code 56132, April 2019, <https://data.bls.gov/timeseries/CES6056132001>.

³⁸ American Staffing Association, Staffing Industry Statistics, <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/> (last viewed June 6, 2019).

³⁹ NELP analysis of Current Employment Statistics, NAICS 561320, June 2009 to September 2018, available at <https://www.bls.gov/ces/data.htm>.

⁴⁰ NELP analysis of Current Employment Statistics, NAICS 561320, Detailed Occupations, available at <https://www.bls.gov/ces/data.htm>. Low-wage is defined as median hourly earnings below \$15 per hour.

Several of these occupations entail physically-demanding work with higher-than-average rates of workplace injuries.⁴¹ For example, the “Laborers and Freight, Stock, and Material Movers” detailed occupation, which is comprised of workers who manually move freight and stock, and whose injury rate is 3.4 times the average rate, saw an increase of over 61,000 temporary workers between 2014 and 2017. Temporary workers in this occupation have a median hourly wage of \$11.45, representing a 2.5 percent wage penalty relative to permanent, direct-hire workers.⁴²

Other types of outsourcing are also increasingly prevalent in low-wage, “blue-collar” industries. Outsourcing of janitorial services, for example, has grown dramatically over the past two decades, resulting in an estimated 37 percent of janitorial workers hired through labor contractors rather than directly by the company at which they work.⁴³ According to one study, janitors working for contractors or staffing firms experienced a 4 to 7 percent wage penalty relative to direct hires.⁴⁴ Similarly, 58 percent of security guard positions are outsourced, and, according to the same study, these outsourced positions have experienced an 8 to 24 percent wage penalty relative to direct hires.

B. In many fast-growing industries, outsourcing has become a deeply entrenched practice that can permit employers to avoid their legal duties to workers and degrade labor conditions.

By inserting temporary and staffing agencies and other types of subcontractors between themselves and workers, contracting companies can degrade work conditions and more successfully avoid liability for violations of workplace laws even as they benefit from and have the right to control the work itself. Because each level of a subcontracted structure requires a financial return for its work, the further down the subcontracted entity is, the slimmer the remaining profit margins. At the same time, the further down on a subcontracted structure an entity is, labor typically represents a larger share of overall costs—and one of the only costs in direct control by those entities. This creates incentives to cut corners, leading to violations of the

⁴¹ For example, the “Transportation and Material Moving Occupations” group includes warehouse workers and other types of laborers who manually move freight and stock. See U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2017, 53-0000 Transportation and Material Moving Occupations (Major Group), <https://www.bls.gov/oes/current/oes530000.htm>. OSHA identifies its “public warehousing and storage” industry group, which includes establishments engaged in the warehousing and storage of general goods, as one of the industries with a high injury/illness rate and a high proportion of severe injuries/illnesses. Occupational Safety and Health Administration, Target Industry Profiles, https://www.osha.gov/dep/industry_profiles/index.html.

⁴² NELP analysis of Occupational Employment Statistics, NAICS 561320, available at <https://www.bls.gov/oes/tables.htm>.

⁴³ Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research*, Inst. for Research on Labor and Emp’t, Jan. 2014, available at:

<https://cloudfront.escholarship.org/dist/prd/content/qt3hc6t3d5/qt3hc6t3d5.pdf?t=mzgg4c>.

⁴⁴ *Id.*

FLSA. FLSA violations related to subcontracting include, for example, failure to pay janitors, cable installers, carpenters, housekeepers, home care workers, or distribution workers the wages and overtime they had rightly earned—losses typically equivalent to losing three to four weeks of earnings.⁴⁵

Workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct-hires. Full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.⁴⁶ They also experience large benefit penalties relative to their counterparts in standard work arrangements. Over 50 percent of workers in standard arrangements receive an employer-provided health insurance benefit, compared to only 12.8 percent of temporary and staffing help agency workers. And while 46 percent of workers in standard arrangements are covered by an employer-provided pension plan, only 6.6 percent of staffing and temporary help agency workers are.⁴⁷

Manufacturing work—which historically has paid better than other types of “blue collar” jobs—has seen its compensation premium erode in part because of the increase in manufacturing companies hiring their workers through temp and staffing firms. According to a recent study, staffing and temporary help services provided 11.3 percent of all manufacturing employment in 2015, up from just 2.3 percent in 1989.⁴⁸ This increase in the staffing agency workforce lowered the manufacturing compensation premium by 4 percent.⁴⁹

Along with an erosion in wages, staffing and temporary agency workers typically work in more hazardous jobs than permanent workers. Yet, according to OSHA, temporary agency workers often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.⁵⁰

Workers hired by temporary and staffing firms are especially vulnerable to violations of workplace laws. Temporary staffing agencies consistently rank among the worst large industries for the rate of wage and hour violations, according to a *Pro Publica* analysis of federal

⁴⁵ Dep’t of Labor, Wage and Hour Division Data, <https://www.dol.gov/whd/data/index.htm>

⁴⁶ *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, National Employment Law Project, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

⁴⁷ *Id.*

⁴⁸ Lawrence Michel, *Yes, Manufacturing Still Provides a Pay Advantage, but Staffing Firms are Eroding It*, ECONOMIC POLICY INSTITUTE, March 12, 2018, available at <https://www.epi.org/publication/manufacturing-still-provides-a-pay-advantage-but-outsourcing-is-eroding-it/>

⁴⁹ *Id.*

⁵⁰ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers*, June 10, 2014, at 11, available at <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>

enforcement data.⁵¹ Competition among labor subcontractors is fierce, and these subcontractors—many of which are thinly-capitalized—often yield to the lead company’s control or illegally cut labor costs to keep their contracts.⁵² One staffing firm’s 2014 evaluation of the industry affirms this sentiment: “smaller to midsize firms often struggle in securing workers’ compensation insurance, capital to secure such insurance coverage, administrative capabilities to manage unemployment claims, and sources of funding accounts receivable.”⁵³

C. A strong joint employment standard is necessary to provide contracted workers with meaningful remedies for FLSA violations.

In fissured workplaces like temporary and staffing firms, it is often difficult to obtain a meaningful remedy for workers whose rights have been violated. According to one attorney who represents workers in FLSA actions, “[e]ven when labor services contractors and other middlemen companies have been caught committing flagrant violations of federal workplace statutes – and statistics compiled by the Department of Labor and state labor agencies demonstrate a stunningly high frequency of those violations – they are often judgment-proof or unable to pay a significant backpay award or other money judgment.”⁵⁴ The thinly-capitalized contractors can declare bankruptcy and the owners of the company can simply incorporate under another name to continue the business. Meanwhile the host company—the company for whose benefit the work is performed and who directly or indirectly controls the workers’ wages and working conditions—can simply cancel its labor services contract at the first sign of a problematic lawsuit and select a competitor contractor.

In at least two of NELP’s FLSA cases, our clients were unable to recover against their labor subcontractor employer, and without naming another employer would not have received unpaid minimum wages and overtime. In *Lopez v. Silverman*, 14 F.Supp.2d 405 (S.D.N.Y. 1998), garment workers hired by subcontracted operators to press and sew blouses sued the subcontractor and the jobber for unpaid minimum wages. The court awarded the plaintiffs a default judgment against the subcontractor, who never appeared in the action and ultimately disappeared, leaving the garment contractor as the sole defendant able to secure compliance with the FLSA. In *Ansoumana v. Gristedes Oper. Corp.*, 255 F. Supp. 2d 184, 193 (S.D.N.Y. 2003), one of the labor subcontractors used by grocery and pharmacy chains to recruit and hire delivery

⁵¹ Michael Grabell, *The Expendables: How Temps Who Power Corporate Giants are Getting Crushed*, PRO PUBLICA, June 27, 2013, <https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>

⁵² See David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It*, at 15 (2014).

⁵³ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers*, June 10, 2014, at 7, available at <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>.

⁵⁴ Testimony of Michael Rubin, Partner of Altshuler Berzon LLP, before the Subcommittee on Health, Employment, Labor and Pensions and the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives, Regarding H.R. 3441, the Save Local Business Act, Sept. 13, 2017.

workers for them disappeared, leaving the workers with no recourse for their unpaid wages except for the grocery store.

A recent case against Wal-Mart and its layers of contractors further illustrates the point. Wal-Mart owned four warehouse facilities in Southern California and contracted with Schneider Logistics to operate the warehouses. Schneider in turn contracted with two staffing companies that employed the workers at the facilities. In 2011, the warehouse workers sued the staffing companies and Schneider for a number of FLSA and other workplace law violations; the plaintiffs eventually added Wal-Mart as a defendant, alleging it was a joint employer. In denying Wal-Mart's motion for summary judgment, the court found significant indicia of Wal-Mart's control over the plaintiffs' working conditions, including that Wal-Mart personnel set and monitored productivity levels and operating procedures at the warehouses, instructed Schneider to reprimand workers who were not following Wal-Mart's procedures, directed Schneider to shift all workers to an alternative workweek schedule, and required Schneider to obtain Wal-Mart's approval before changing the amount paid to the staffing agencies. *Carrillo v. Schneider Logistics Trans-Loading and Distribution Inc., et al.*, No. 2:11-cv-8557 (CAS), 2014 WL 183956, at *3-*4 (Jan. 14, 2014). In 2015, the parties agreed to a settlement. According to an attorney who represented the workers, the two staffing companies could only afford to pay 7.5 percent of the judgment.⁵⁵ But, because the court took into account the realities of the workers' relationship with Schneider and Wal-Mart, the workers were able to obtain damages from these parties and be made whole.

Workers in fissured, low-wage jobs are precisely the ones that most require the protections of the FLSA. Absent a broad joint employer standard, companies will face incentives to contract out their labor needs—through the use of contractors, temporary staffing firms and other forms of outsourcing—in order to avoid accountability their workers, and workers will face significant barriers to obtaining a meaningful remedy for workplace violations.

See the *Appendix* to these comments for a description of outsourcing and job quality impacts in three different sectors: (1) warehouse and logistics; (2) janitorial services, and (3) construction.

VII. If Allowed to Stand, the Proposed Rule Will Adversely Impact Small Businesses, and Would Create an Incentive for More Companies to Outsource to Temp and Staffing Companies or to Lowest Bidders Without Compliance Concerns.

Contrary to statements by the Department, NPRM at 14053, small businesses will be substantially adversely affected by the proposed rule. In effect, small businesses will be left to ensure compliance with the Act alone, without any assistance from the larger employer, in situations where the smaller company may not be able to ensure compliance without the cooperation of the larger lead or worksite employer. Under the proposed narrow standard, small businesses that can't afford to subcontract out operations will be at a competitive disadvantage to large corporations that can and do outsource and underbid based on lower labor costs. Under the proposed rule, for example, a smaller temporary staffing agency seeking to remedy dangerous child labor conditions

⁵⁵ *Id.* at 10-11.

in a field would be solely responsible and liable, although certain aspects of the work relationship might be outside the company's control. If the small business is liable and not able to properly remedy the situation, it may be unable to operate, hurting small business owners and leaving workers and their families without relief. The proposed rule pushes liability onto smaller business owners and places small businesses at a competitive disadvantage.

VIII. Conclusion

Not surprisingly, representatives of big corporations are happy about this NPRM. Tammy McCutchen, a lawyer at the management-side law firm Littler Mendelson who was a Wage & Hour Division Acting Administrator in the George W. Bush administration, said she believed that the DOL and the National Labor Relations Board were “effectively synchronizing their joint-employment rules so that companies would face comparable standards of liability regardless of the type of violation.”⁵⁶

Of course, harmonizing the tests under the FLSA's broadest definition of employment with the common law scope under the NLRA is contrary to law.

Law 360 reported shortly after the rule was issued that Mark Kisicki, an attorney at Ogletree Deakins Nash Smoak & Stewart, said that the DOL's proposed rule “amounts to the best possible outcome employers could have expected,” adding “[n]ot surprisingly, the Trump DOL has proposed [a] rule that would be the most restrictive joint employer standard that I believe could survive under the FLSA consistent with the most restrictive standard that courts have applied under [Bonnette]. It's even a restrictive interpretation of the most restrictive standard that any of the federal circuits apply and it's at the opposite end of the spectrum of what the Obama DOL had provided.”⁵⁷

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. If there are legitimate reasons for subcontracting, it can and will continue – even if business owners are required to make sure their contractors comply with the law. The current USDOL should focus on promoting enforcement of minimum wage, overtime, and combating child labor in subcontracted work. This rule does the opposite and gives companies a roadmap for evasion.

Sincerely,

⁵⁶ Noam Scheiber, *U.S. Moves to Limit Wage Claims Against Chains Like McDonald's*, *The New York Times*, April 1, 2019, <https://www.nytimes.com/2019/04/01/business/economy/labor-department-joint-employer.html>

⁵⁷ Vin Guerri, *DOL Joint Employer Push Has Worker Advocates Up In Arms*, *Law 360*, April 1, 2019, <https://www.law360.com/articles/1144976/dol-joint-employer-push-has-worker-advocates-up-in-arms>.

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National Employment Law Project

Appendix A to Comments from National Employment Law Project

1. Warehouse and Logistics

Outsourcing has reshaped the warehouse and logistics industry with the use of “third party” logistics firms, highly integrated companies with the capacity to handle goods at several points in a supply chain. An estimated 90 percent of Fortune 500 companies operating within the United States contract with one or more third party logistics providers to handle their goods.⁵⁸ These logistics companies, in turn, contract with staffing agencies, which hire workers to unpack, load, and ship goods to retail facilities across the country,⁵⁹ and with truck driving and courier companies, to deliver the goods. Logistics firms encourage bidding wars among motor carriers and staffing firms, placing continual pressure on contractors to provide cheaper services. These lower rates are passed on in the form of decreased prices for truck drivers (who are often employed by thinly-capitalized subcontractors or misclassified as independent contractors) or decreased wages for warehouse workers.⁶⁰

Workers employed at the bottom of this supply chain face deteriorated working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners. As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level, more than one in ten had reported an injury on the job, and over 40 percent had not received necessary safety equipment.⁶¹ According to recent reports of a Verizon warehouse operated by XPO Logistics, the workers—many of whom are employed by temporary agencies—are required to lift and drag 45 pound boxes in a warehouse where the temperature can exceed 100 degrees.⁶² Several workers suffered miscarriages and one worker died after being denied requests for lighter duty or additional breaks.

Amazon is another well-known example of a giant corporation that has eroded working condition in its supply chains by putting competitive pressure on labor costs. Although Amazon operates many of its warehouses, it relies heavily on staffing firms to provide the labor. According to one estimate, staffing agencies employ up to half of the workers in Amazon’s

⁵⁸ Jennifer McKeivitt, *Fortune 500 Companies are Using 3PLs more, Study Finds*, SUPPLY CHAIN DIVE, May 30, 2017, available at <https://www.supplychaindive.com/news/third-party-logistics-3pl-increase-large-companies-2017/443710/>.

⁵⁹ Jason Rowe, *New Jersey’s Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers* (2012); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

⁶⁰ Michael Belzer, *Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process*, 23 JOURNAL OF LABOR RESEARCH 375 (2002).

⁶¹ Rowe, *supra* note 31.

⁶² Jessica Silver-Greenberg & Natalia Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, THE NEW YORK TIMES, Oct. 21, 2018; Micaela Watts, *Working Conditions in Memphis Warehouse Linked to Miscarriages*, NYT Reports, COMMERCIAL APPEAL, Oct. 22, 2018.

warehouses during the first ten months of the year—often in a “permatemp” status where workers may work for months or years without being offered a permanent positions—and employ up to three quarters of the workers in the final two months of the year.⁶³

This division in its labor force has allowed Amazon to avoid liability for exploitative workplace practices. For example, in 2010, two employees of Integrity Staffing Solutions who worked at Amazon warehouses filed a class action lawsuit against Integrity for back wages, arguing that they should have been compensated for the time spent going through security checks at the warehouse every day, which could take upwards of 30 minutes a day. The Supreme Court reversed the circuit court’s decision and ruled in Integrity’s favor. *Integrity Staffing Solutions v. Busk*, 574 U.S. ___ (2014). By inserting an intermediary between itself and its warehouse workers, Amazon took no action to ensure compliance with worker protections in its warehouses.

Amazon also outsources its delivery services to third party courier companies even though it maintains control over many of the exploitative workplace conditions faced by those companies’ delivery drivers. In 2016, for example, delivery drivers for two Amazon delivery services initiated a FLSA collective action against Amazon and the companies for failing to pay overtime.⁶⁴ The plaintiffs alleged that Amazon was a joint employer because, *inter alia*, they were trained by Amazon personnel, wore Amazon uniforms and drove trucks with the Amazon logo, and reported to an Amazon warehouse each morning where their trucks were loaded with Amazon merchandise and they received delivery instructions from Amazon personnel.⁶⁵

In 2017, delivery drivers filed a similar lawsuit against their delivery company and Amazon, alleging that the defendants violated the FLSA by paying them a flat rate per day regardless of the number of hours worked.⁶⁶ The complaint alleges that Amazon is a joint employer because it controls the “work activities, conditions, and management” of the delivery companies and their drivers.⁶⁷ The workers said that they were under such intense pressure to deliver high package volumes that they were unable to take breaks for meals or to use the bathroom.⁶⁸ The allegations in that lawsuit echo interviews with other Amazon drivers employed through couriers, who described a “lack of overtime pay, missing wages, intimidation, and favoritism,” as well as “a physically demanding work environment in which, under strict time constraints, they felt

⁶³ Olivia LaVecchia & Stacy Mitchell, *Amazon’s Stranglehold: How the Company’s Tightening Grip is Stifling Competition, Eroding Jobs, and Threatening Communities*, Institute for Local Self-Reliance, Nov. 2016, at 42, available at https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

⁶⁴ Amended Complaint, *Bradley v. Silverstar Ltd. et al*, No. 1:16-cv-10259 (N.D. Ill Jan. 24, 2017).

⁶⁵ *Id.* 11.

⁶⁶ Second Amended Class and Collective Action Complaint, *Hickman v. TL Transportation, LLC et al*, 2:17-cv-1038 (E.D. Pa. Nov. 1, 2018).

⁶⁷ *Id.* ¶ 34.

⁶⁸ Hayley Peterson, *More than 200 Delivery Drivers are Suing Amazon Over Claims of Missing Wages*, BUSINESS INSIDER, Sept. 13, 2018, available at <https://www.businessinsider.com/amazon-delivery-drivers-claim-missing-wages-lawsuit-2018-9>.

pressured to drive at dangerously high speeds, blow stop signs, and skip meal and bathroom breaks.”⁶⁹

Under the DOL’s proposed joint employer standard, Amazon may not be considered an employer of the temporary workers in its warehouses or the delivery drivers employed through third party delivery companies even though Amazon controls—and has the capacity to improve—these workers’ unfair and exploitative work conditions.

2. Janitorial Services

Outsourcing of janitorial services has exploded in recent years, along with the growth of other contingent work in the sector, such as franchising and independent contractor misclassification.⁷⁰ Under a typical model of outsourced labor in the janitorial industry, a lead company contracts with a janitorial company to provide maintenance services at the lead company’s facilities.⁷¹ The janitorial company generally hires a second-tier subcontractor to supply workers to clean the facilities. Often, these subcontractors can make a profit only by engaging in cost-savings strategies, including misclassifying janitors as independent contractors or selling “franchise” licenses to unwitting workers. *See, e.g., Awuah v. Coverall No. Amer.*, 554 F.3d 7 (1st Cir. 2006). Second-tier subcontractors shave labor costs by evading payroll taxes and workers’ compensation, minimum wage, and overtime requirements at the workers’ expense.⁷²

Job quality in the industry has decreased significantly since the emergence of these contracting and franchising models, and violations of basic labor law protections are now endemic in the janitorial industry. One study found that contracted janitors in California earned 20 percent less than non-contracted janitors (\$10.31 compared to \$12.85 per hour).⁷³ An academic survey of low-wage workers found that at least 26 percent of building service and ground service workers

⁶⁹ Hayley Peterson, *Missing Wages, Grueling Shifts, and Bottles of Urine: The Disturbing Accounts of Amazon Delivery Drivers May Reveal the True Cost of ‘Free’ Shipping*, BUSINESS INSIDER, Sept. 11, 2018, available at <https://www.businessinsider.com/amazon-delivery-drivers-reveal-claims-of-disturbing-work-conditions-2018-8>.

⁷⁰ *Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, National Employment Law Project, 9-10, available at <https://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/>.

⁷¹ *Id.*

⁷² David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (2011)(unpublished manuscript)(on file with (Boston Univ. School of Mgmt);NY TIMES, July 13, 2005, [REDACTED] at A19.

⁷³ Sara Hinkley, Annette Bernhardt and Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California’s Property Services Industry*, UC Berkeley Labor Center, at 4, March 8, 2016, available at <http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf>.

had not received minimum wage payments, and 71 percent had not received overtime pay. Over half did not receive required meal breaks.⁷⁴

A recent enforcement action by the California Labor Commissioner's office illustrates the problem.⁷⁵ Cheesecake Factory restaurants contracted janitorial services to Americlean Janitorial Services Corp., which subcontracted the work to Magic Touch Commercial Cleaning. Workers employed by Magic Touch worked from midnight to morning without breaks. Each morning Cheesecake Factory managers conducted walkthroughs to review the work and frequently added additional tasks for the janitorial workers, which resulted in each worker logging up to ten hours of unpaid overtime per week. Because a California law holds lead employers or worksite employers liable for subcontractors' workplace violations, the office issued citations against Cheesecake Factory, Americlean and Magic Touch. Under the DOL's proposed joint employer standard, however, Cheesecake Factory would likely not be considered a joint employer even though it exerts control over the work the janitors perform and the number of hours per day they work, among other indicia of control.

3. Construction

Outsourcing to the lowest bidder, and its attendant abusive employment practices, is prevalent in the construction industry. General contractors are responsible for overseeing the completion of a construction project, but they generally hire a series of subcontractors who specialize in a specific trade to perform the discrete components of the work on their site. The subcontractors and sub-subcontractors, in turn, typically hire the individual construction workers to do the job. The end result is often a complicated web of dozens of subcontractors engaged on one construction site.⁷⁶ General contractors interviewed for one study reported that as much as 95 percent of workers on their worksites were employed by subcontractors.⁷⁷

A recent report described the construction industry as "a fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators."⁷⁸ In this labor-intensive industry, general

⁷⁴ Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁷⁵ Press Release, California Department of Industrial Relations, *Labor Commissioners Office Cites Cheesecake Factory, Janitorial Contractors More Than \$4.5 Million for Wage Theft Violations*, June 11, 2018, available at <https://www.dir.ca.gov/DIRNews/2018/2018-40.pdf>.

⁷⁶ Deonata Smith, *Low rise: More way of homeownership, more consumers are choosing to rent or buy condos*, IBISWORLD INDUSTRY REPORT at 23611b. (June 2012).

⁷⁷ Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry*, at 11 (June 2009), http://www.workersdefense.org/wp-content/uploads/2013/04/Building-_Austn_Report-2.pdf.

⁷⁸ *Id.*

contractors place enormous pressure on subcontractors to reduce labor costs, sometimes so that they cannot meet basic labor standards.⁷⁹ While a competitive bidding process solely based on price may drive down short-term costs for developers, the practice also creates a race-to-the-bottom among subcontractors who cut costs at the expense of their employees' safety and wages.⁸⁰

Numerous studies of wage theft in the construction industry show high rates of labor standards violations. A leading survey of low-wage workers in New York, Chicago and Los Angeles found that 12.7 percent of workers in the residential construction industry experienced a minimum wage violation; 70.5 percent suffered an overtime violation; and 72.2 percent worked off-the-clock without receiving pay.⁸¹ Similarly, a study of the construction industry in Austin, Texas found one in five workers was denied payment for their work, and 50 percent were not paid overtime, while only 11 percent of workers reported that they were able to recover their unpaid wages.⁸² Violations are even higher among day laborers, whose lack of a stable worksite and community of coworkers has been cited by academics as a primary cause for the high incidence of wage theft.⁸³

Consistent with these findings, the reports of the New York Joint Enforcement Task Force cite numerous cases of construction workers who experience wage theft and have difficulty locating a responsible employer.⁸⁴ The United States Department of Labor's (DOL) Wage & Hour Division has named construction one of its top priority industries,⁸⁵ citing its high violation levels and use of subcontracting structures.

⁷⁹ See e.g. *Building Austin*, 3678,79

⁸⁰ *Id.* at 37.

⁸¹ Annette Bernhardt et al., *Broken Laws, Unprotected Workers* (2009), available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>
<http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

⁸² *Building Austin* at 17.

⁸³ *Day Labor in New York: Findings from the New York Day Labor Survey*, at 10 (Community Development Research Center and Center for the Study of Urban Poverty 2003) (finding that 50 percent of day laborers experienced non-payment of wages and 60 percent were paid less than agreed. The study's authors attributed the high rates of violations in large part to industry structures).^[c]

⁸⁴ New York Department of Labor, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, at 21 (February 1, 2010)<https://www.labor.ny.gov/ui/PDFs/2010Febreport%20with%20Cover%20to%20Paterson%20and%20Index.pdf>
<http://www.labor.ny.gov/ui/PDFs/2010Febreport%20with%20Cover%20to%20Paterson%20and%20Index.pdf>
<http://www.labor.ny.gov/ui/PDFs/2010Febreport%20with%20Cover%20to%20Paterson%20and%20Index.pdf>

⁸⁵ US Department of Labor, *Strategic Plan 2011-2016*
http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf.

In the construction industry, a broad joint employment standard is necessary to provide contractors with the proper incentives to ensure their contracted workforce is treated fairly and to ensure that construction workers who are the victims of wage theft can obtain a meaningful remedy.

Appendix B: USDOL Administrator's Interpretation on Joint Employment



Administrator's Interpretation No. 2016-1

January 20, 2016

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.

Through its enforcement efforts, the Department of Labor's Wage and Hour Division (WHD) regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers. More and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers. As a result, the traditional employment relationship of one employer employing one employee is less prevalent.¹ WHD encounters these employment scenarios in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries.

The growing variety and number of business models and labor arrangements have made joint employment more common.² In view of these evolving employment scenarios, the Administrator believes that additional guidance will be helpful concerning joint employment

¹ For example, a corporate hotel chain may contract out to another business the management, catering, or housekeeping services at one of its hotels. Workers who perform these services at the hotel may wear uniforms with the name of the hotel chain or the other business and may perform tasks dictated by the hotel chain, the other business, or both.

² WHD considers joint employment in hundreds of investigations every year. WHD has determined, for example, that maritime fabrication facilities jointly employed welders, pipefitters, and other workers hired by staffing agencies; that hotels and hotel operating companies jointly employed housekeeping and guest services workers hired by staffing agencies; and that growers and farm labor contractors jointly employed farmworkers. *See also Perez v. Lantern Light Corp.*, 2015 WL 3451268, at *17 (W.D. Wash. May 29, 2015) (finding that satellite television provider was a joint employer of the installers employed by the company with whom the provider contracted to install its services).

under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.*, and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801, *et seq.*³

Whether an employee has more than one employer is important in determining employees' rights and employers' obligations under the FLSA and MSPA. It is a longstanding principle under both statutes that an employee can have two or more employers for the work that he or she is performing. When two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA.⁴ Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.

Certainly, not every subcontractor, farm labor contractor, or other labor provider relationship will result in joint employment. This Administrator's Interpretation (AI) provides guidance on identifying those scenarios in which two or more employers jointly employ an employee and are thus jointly liable for compliance under the FLSA or MSPA. This AI first discusses the broad scope of the employment relationship under the FLSA and MSPA.⁵ It then discusses the concepts of horizontal and vertical joint employment and relevant joint employment regulations.

Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the

³ In June 2014, WHD issued Administrator's Interpretation No. 2014-2, "Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act" (Home Care AI), available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf. Although the Home Care AI was directed toward a particular employment scenario in a specific industry, the legal analyses in the Home Care AI and this Administrator's Interpretation are harmonious and are intended to be read in conjunction with one another.

⁴ In other words, each joint employer is individually responsible, for example, for the entire amount of wages due. If one employer cannot pay the wages because of bankruptcy or other reasons, then the other employer must pay the entire amount of wages; the law does not assign a proportional amount to each employer.

⁵ In July 2015, WHD issued Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (Misclassification AI), available at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. In the Misclassification AI, the Administrator also discussed the FLSA's broad statutory definitions; that AI addressed the issue of the misclassification of employees as independent contractors and provided guidance regarding determining whether a worker is an employee or independent contractor.

employee such that they jointly employ the employee. The analysis focuses on the relationship of the employers to each other. This AI explains that guidance provided in the FLSA joint employment regulation – which focuses on the relationship between potential joint employers – is useful when analyzing potential horizontal joint employment cases.

Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work. This other employer, who typically contracts with the intermediary employer to receive the benefit of the employee’s labor, would be the potential joint employer. Where there is potential vertical joint employment, the analysis focuses on the economic realities of the working relationship between the employee and the potential joint employer. This AI explains that guidance provided in the MSPA joint employment regulation is useful when analyzing potential vertical joint employment. The structure and nature of the relationship(s) at issue in the case, reflecting potentially horizontal or vertical joint employment or both, should determine how each case is analyzed.

I. The FLSA and MSPA Broadly Define the Employment Relationship and Thus the Scope of Joint Employment

The scope of employment relationships subject to the protections of the FLSA and MSPA is broad. The FLSA defines “employee” as “any individual employed by an employer,” 29 U.S.C. 203(e)(1), and “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee,” 29 U.S.C. 203(d). The FLSA’s definition of “employ” “includes to suffer or permit to work.” 29 U.S.C. 203(g). The “suffer or permit” definition of employment is “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong. Rec. 7657 (1938)). MSPA defines “employ” in exactly the same way as the FLSA, and the scope of employment relationships under MSPA is thus the same as it is under the FLSA. *See* 29 U.S.C. 1802(5) (“The term ‘employ’ has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)].”); 29 C.F.R. 500.20(h)(1); *see also* 29 C.F.R. 500.20(h)(2)-(3) (the terms “employer” and “employee” under MSPA are also given their meaning as found in the FLSA).

The FLSA and MSPA both “specifically cover ‘joint employment’ relationships.” *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996). The FLSA regulations explicitly state that a single worker may be “an employee to two or more employers at the same time.” 29 C.F.R. 791.2(a); *see also Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (“The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act.”). The MSPA regulations provide that MSPA’s definition of the term “employ” includes the FLSA’s joint employment principles. *See* 29 C.F.R. 500.20(h)(5); *see also Antenor*, 88 F.3d at 929 (MSPA makes clear that a worker can be jointly employed by more than one entity at the same time). “Joint employment under the Fair Labor Standards Act is joint employment under the MSPA.” 29 C.F.R. 500.20(h)(5)(i) (emphasis omitted).⁶

⁶ The Department amended the MSPA joint employment regulation in 1997.

The concept of joint employment, like employment generally, “should be defined expansively” under the FLSA and MSPA. *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *see also* Misclassification AI, 3-4. The concepts of employment and joint employment under the FLSA and MSPA are notably broader than the common law concepts of employment and joint employment, which look to the amount of control that an employer exercises over an employee. *See Antenor*, 88 F.3d at 933. Unlike the common law control test, which analyzes whether a worker is an employee based on the employer’s control over the worker and not the broader economic realities of the working relationship, the “suffer or permit” standard broadens the scope of employment relationships covered by the FLSA. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (FLSA’s definitions are “comprehensive enough to require its application” to many working relationships which, under the common law control standard, may not be employer-employee relationships); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (FLSA’s “suffer or permit” standard for employment “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”). The test for joint employment under the FLSA and MSPA is thus different, for example, than the test under other labor statutes, such as the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* Indeed, in FLSA and MSPA cases, “courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees.” *Antenor*, 88 F.3d at 933 n.10.

Moreover, prior to the FLSA’s enactment, “suffer or permit” or similar phrasing was commonly used in state laws regulating child labor and was “designed to reach businesses that used middlemen to illegally hire and supervise children.” *Antenor*, 88 F.3d at 929 n.5. A key rationale underlying the “suffer or permit” standard was that an employer should be liable for the child labor if it had the opportunity to detect work being performed illegally and the ability to prevent it from occurring. *See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29-31 (N.Y. 1918). Thus, the “suffer or permit to work” standard was designed to expand child labor laws’ coverage beyond those who controlled the child laborer, counter an employer’s argument that it was unaware that children were working, and prevent employers from using “middlemen” to evade the laws’ requirements.

In sum, the expansive definition of “employ” as including “to suffer or permit to work” rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.

II. Horizontal and Vertical Joint Employment Analyses in FLSA and MSPA Cases

The FLSA and MSPA regulations provide relevant and complementary guidance on joint employment. The structure and nature of the relationship(s) at issue should determine whether a particular case should be analyzed under horizontal or vertical joint employment, or both.⁷

⁷ Given the potential complexity of employment relationships, aspects of both horizontal and vertical joint employment may be present in a single joint employment relationship. For example, both forms of joint employment could potentially exist where two warehouses share employees and use a staffing agency to provide them with labor.

Joint employment may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. *See* 29 C.F.R. 791.2. This type of joint employment is sometimes referred to as horizontal joint employment. In a possible horizontal joint employment situation, there is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer. Thus, the focus of a horizontal joint employment analysis is the relationship between the two (or more) employers. The FLSA regulation provides guidance on horizontal joint employment. *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917-18 (9th Cir. 2003) (citing FLSA regulation). Examples of horizontal joint employment may include separate restaurants that share economic ties and have the same managers controlling both restaurants, *see Chao v. Barbeque Ventures, LLC*, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007), or home health care providers that share staff and have common management, *see A-One Med. Servs.*, 346 F.3d at 918.

Joint employment may additionally exist when an employee of one employer (referred to in this AI as an “intermediary employer”) is also, with regard to the work performed for the intermediary employer, economically dependent on another employer (referred to in this AI as a “potential joint employer”).⁸ *See* 29 C.F.R. 500.20(h)(5); *A-One Med. Servs.*, 346 F.3d at 917 (describing vertical joint employment as possible in circumstances where “a company has contracted for workers who are directly employed by an intermediary company”). This type of joint employment is sometimes referred to as vertical joint employment. The vertical joint employment analysis is used to determine, for example, whether a construction worker who works for a subcontractor is also employed by the general contractor, or whether a farmworker who works for a farm labor contractor is also employed by the grower.⁹ Unlike in horizontal joint employment cases, where the association between the potential joint employers is relevant, the vertical joint employment analysis instead examines the economic realities of the relationships between the construction worker and the general contractor, and between the farmworker and the grower, to determine whether the employees are economically dependent on those potential joint employers and are thus their employees. The MSPA regulation provides a set of factors to apply an economic realities analysis in vertical joint employment cases. Although they do not all apply the same factors, several Circuit Courts of Appeals have also adopted an economic realities analysis for evaluating vertical joint employment under the FLSA. Regardless of the exact factors, the FLSA and MSPA require application of the broader

⁸ Depending on the industry, the “intermediary employer” in a vertical joint employment relationship could be, for example, a staffing agency, farm labor contractor, subcontractor, or other labor provider, supplier, or broker, and the “potential joint employer” could be a parent corporation, farm owner, higher-tier contractor, or client of the staffing agency or labor provider, supplier, or broker.

⁹ As discussed below, a threshold determination in those examples would be whether the subcontractor or farm labor contractor itself is an independent contractor or whether it has an employment relationship with the general contractor or grower.

economic realities analysis, not a common law control analysis, in determining vertical joint employment.

The joint employment approaches described in the FLSA and MSPA regulations interpret the same definition of employment. MSPA borrowed the FLSA's definition of the term "employ" "with the deliberate intent" of adopting the FLSA's joint employer doctrine "as the 'central foundation' of MSPA and 'the best means by which to insure that the purposes of this MSPA would be fulfilled.'" 29 C.F.R. 500.20(h)(5)(ii) (quoting MSPA's legislative history); *see also* 29 C.F.R. 500.20(h)(5)(i) ("Joint employment under the Fair Labor Standards Act is joint employment under the MSPA.") (emphasis omitted). Therefore, the FLSA regulation is useful when analyzing potential horizontal joint employment cases, whether arising under the FLSA or MSPA. Likewise, the factors identified in the MSPA regulation are useful when analyzing potential vertical joint employment cases, whether arising under MSPA or the FLSA.¹⁰ This is not to say that the MSPA joint employment regulation itself applies in FLSA cases; however, the MSPA joint employment regulation and its economic realities factors are useful guidance in an FLSA case because of the shared definition of employment and the coextensive scope of joint employment between the FLSA and MSPA.¹¹ For the reasons explained above, including the common definitions, using the joint employment factors identified in the MSPA regulation in an FLSA case is consistent with both statutes and regulations. It is also consistent with WHD's prior guidance. *See* Home Care AI, 3 (economic realities factors identified in the MSPA regulation should be considered when determining joint employment under the FLSA, citing 29 C.F.R. 500.20(h)); May 11, 2001 WHD Opinion Letter (identifying MSPA regulation's economic realities factors as relevant factors when determining joint employment under the FLSA, citing 29 C.F.R. 500.20(h)) (available at 2001 WL 1558966). Many potential joint employment cases arising under the FLSA will involve vertical joint employment, and an economic realities analysis of the type described in the MSPA joint employment regulation should be applied in those cases.

A. Horizontal Joint Employment and the Association of Potential Joint Employers

¹⁰ Courts have long turned to an economic realities analysis in analyzing vertical joint employment under the FLSA. The MSPA regulation itself cites to FLSA cases in defining joint employment. *See, e.g.,* 29 C.F.R. 500.20(h)(5)(ii) (citing *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973)).

¹¹ In *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176-78 (11th Cir. 2012), the court applied an economic realities analysis primarily based on the pre-1997 version of the MSPA joint employment regulation and correctly recognized that "in considering a joint-employment relationship, we must not allow common-law concepts of employment to distract our focus from economic dependency." Yet, because the case arose under the FLSA, not MSPA, the court declined to use the factors in the current MSPA joint employment regulation despite the fact that the FLSA and MSPA define the scope of employment in the same way. *See id.* at 1177 ("Although [MSPA] defines joint employment by reference to the definition provided in the FLSA, that does not mean that the reverse holds true—that joint employment under the FLSA is invariably defined by [MSPA] regulations.").

Horizontal joint employment should be considered when an employee is employed by two (or more) technically separate but related or overlapping employers.¹² For example, the horizontal joint employment analysis would apply where a waitress works for two separate restaurants that are operated by the same entity and the question is whether the two restaurants are sufficiently associated with respect to the waitress such that they jointly employ the waitress; or where a farmworker picks produce at two separate orchards and the orchards have an arrangement to share farmworkers. In these scenarios, there would already be an established employment relationship between the waitress and each restaurant, and between the farmworker and each orchard. This joint employment analysis focuses on the relationship of the employers to each other.

In cases where joint employment is established, the employee's work for the joint employers during the workweek "is considered as one employment," and the joint employers are jointly and severally liable for compliance, including paying overtime compensation for all hours worked over 40 during the workweek. 29 C.F.R. 791.2(a).

Example:¹³ Casey, a registered nurse, works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week. If Springfield and Riverside are joint employers, Casey's hours for the week are added together, and the employers are jointly and severally liable for paying Casey for 40 hours at her regular rate and for 10 hours at the overtime rate. Casey should receive 10 hours of overtime compensation in total (not 10 hours from each employer).

In determining whether a horizontal joint employment relationship exists, the focus should be on the relationship (and often the degree of association) between the two (or more) potential joint employers with respect to the employee and all of the relevant facts of the particular case. See 29 C.F.R. 791.2(a). According to 29 C.F.R. 791.2(b), "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist" in situations such as: (1) arrangements between the employers to share or interchange the employee's services; (2) where one employer acts directly or indirectly in the

¹² Even where two establishments are sufficiently related that they are part of a single enterprise (as defined in 29 U.S.C. 203(r)(1)) for FLSA coverage purposes, a separate determination is necessary to determine whether the establishments are joint employers. See 29 C.F.R. 779.203; *A-One Med. Servs.*, 346 F.3d at 917 ("Whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers . . . are technically separate issues."). As explained by the case law, although the two analyses may require similar fact-finding and have similar considerations, determining that an employer is part of an enterprise to ascertain coverage under the FLSA is different from determining that the employer is a joint employer that is liable for minimum wages and overtime. See, e.g., *Patel v. Wargo*, 803 F.2d 632, 635 (11th Cir. 1986).

¹³ The addition or alteration of any of the facts in any of the examples in this AI could change the resulting analysis.

interest of another employer in relation to the employee; or (3) where the employers are associated “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.” *Id.* at 791.2(b). In *Schultz v. Capital International Security, Inc.*, for example, the court looked to the FLSA regulation and concluded that security workers were jointly employed by a security firm and the individual that the workers were hired to protect because the two employers were associated with respect to the employment of the workers and shared common control over them. *See* 466 F.3d 298, 306 (4th Cir. 2006) (“the entire employment arrangement fits squarely within the third example of joint employment in the regulation”). Specifically, the court explained that the employers were both involved in the hiring of the workers, played some role in scheduling, discipline, and terminations, and shared responsibility for supplying the workers with equipment. *See id.*

The following facts may be relevant when analyzing the degree of association between, and sharing of control by, potential horizontal joint employers:

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners);
- do the potential joint employers have any overlapping officers, directors, executives, or managers;
- do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- are the potential joint employers’ operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- does one potential joint employer supervise the work of the other;
- do the potential joint employers share supervisory authority for the employee;
- do the potential joint employers treat the employees as a pool of employees available to both of them;
- do the potential joint employers share clients or customers; and
- are there any agreements between the potential joint employers.

See, e.g., 29 C.F.R. 791.2(b); June 14, 2005 WHD Opinion Letter (identifying a number of the above facts as relevant in finding joint employment) (available at 2005 WL 6219105); April 11, 2005 WHD Opinion Letter (identifying a number of the above facts in finding joint employment) (available at 2005 WL 2086804); *Barbeque Ventures*, 2007 WL 5971772, at *1, 5-6 (separate legal entities who employed employees at five different restaurants were joint employers given common ownership, management and control; the same manager owned one legal entity, was the majority owner and manager of the other entity, and supervised the Area Director for all five restaurants). This is not an all-inclusive list of facts that could potentially be relevant to the analysis. Moreover, not all or most of the foregoing facts need to be present for joint employment to exist. Rather, these facts can help determine if there is sufficient indication that the potential joint employers are associated with respect to the employee and thus share control of the employee.

Joint employment does not exist, however, if the employers “are acting entirely independently of each other and are completely disassociated” with respect to an employee who works for both of them. 29 C.F.R. 791.2(a). In that event, each employer may disregard all work performed by the employee for the other when determining its own responsibilities under the law. *See id.* There are many workers who have multiple jobs with multiple employers who are not joint employers. For example, a high school teacher may also work a part-time job as an instructor for a standardized test preparatory company; the high school and the preparatory company would not be joint employers. In sum, the focus of the horizontal joint employment analysis is the degree of association between the two potential joint employers even if they are formally separate legal entities and the degree to which they share control of the employee.

Example: An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities (Employers A and B). The same individual is the majority owner of both Employer A and Employer B. The managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee’s hours. The two employers use the same payroll processor to pay the employee, and they share supervisory authority over the employee. These facts are indicative of joint employment between *Employers A and B.*

In contrast, an employee works at one restaurant (Employer A) in the mornings and at a different restaurant (Employer B) in the afternoons. The owners and managers of each restaurant know that the employee works at both establishments. The establishments do not have an arrangement to share employees or operations, and do not otherwise have any common management or ownership. These facts are not indicative of joint employment between *Employers A and B.*

B. Vertical Joint Employment and Economic Dependence on the Potential Joint Employer

The vertical joint employment inquiry focuses on whether the employee of the intermediary employer is also employed by another employer – the potential joint employer. In vertical joint employment situations, the other employer typically has contracted or arranged with the intermediary employer to provide it with labor and/or perform for it some employer functions, such as hiring and payroll. There is typically an established or admitted employment relationship between the employee and the intermediary employer. That employee’s work, however, is typically also for the benefit of the other employer.

In contrast to the horizontal joint employment analysis, where the focus is the relationship between the employers, the focus in vertical joint employment cases is the employee’s relationship with the potential joint employer and whether that employer jointly employs the employee. Examples of situations where vertical joint employment might arise include garment workers who are directly employed by a contractor who contracted with the garment manufacturer to perform a specific function, *see Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003); nurses placed at a hospital by staffing agencies, *see Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 143-49 (2d Cir. 2008); or warehouse workers whose labor

is arranged and overseen by layers of intermediaries between the workers and the owner or operator of the warehouse facility, *see Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc.*, 2014 WL 183956, at *9-15 (C.D. Cal. Jan. 14, 2014). *See also A-One Med. Servs.*, 346 F.3d at 917; *Lantern Light*, 2015 WL 3451268, at *3 (where company has contracted for workers who are directly employed by an intermediary, court applies vertical joint employment analysis to relationship between company and workers); *Berrocal v. Moody Petrol., Inc.*, 2010 WL 1372410, at *11 n.16 (S.D. Fla. Mar. 31, 2010) (vertical joint employment may exist when “an employer hires laborers through a third party labor contractor”).

A threshold question in a vertical joint employment case is whether the intermediary employer (who may simply be an individual responsible for providing labor) is actually an *employee* of the potential joint employer. Where there is vertical joint employment, there is likely a contract or other arrangement – but not necessarily an employment relationship – between the intermediary employer and the potential joint employer.¹⁴ If the intermediary employer is an employee of the potential joint employer, then all of the intermediary employer’s employees are employees of the potential joint employer too, and there is no need to conduct a vertical joint employment analysis. For example, if a farm labor contractor is not actually an independent contractor but is an employee of the grower (i.e., is economically dependent on the grower as a matter of economic reality), then all of the farm labor contractor’s farmworkers are also employees of the grower. *See* 29 C.F.R. 500.20(h)(4). Likewise, if a drywall subcontractor is not actually an independent contractor but is an employee of the higher-tier contractor, then all of the drywall subcontractor’s workers are also employees of the higher-tier subcontractor. In sum, it is critical to first determine whether the intermediary employer is an employee of the potential joint employer before proceeding with the vertical joint employment analysis.¹⁵

Once it is determined that the intermediary is not an employee, the vertical joint employment analysis should be applied to determine whether the intermediary employer’s employees are also employed by the potential joint employer. Because it is an employment relationship analysis under the FLSA or MSPA, the vertical joint employment analysis must be an economic realities analysis and cannot focus only on control. As WHD has explained, the Supreme Court and the Circuit Courts of Appeals apply an economic realities analysis to determine the existence of an employment relationship under the FLSA and MSPA. *See, e.g., Home Care AI; Misclassification AI; Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Cop, Inc.*, 366 U.S. 28, 33 (1961) (the economic realities of the worker’s relationship with the employer are the test of employment); 29 C.F.R. 500.20(h)(5)(iii). The particular economic

¹⁴ The contract between the potential joint employer and the intermediary employer may purport to disclaim or deny any responsibility by the potential joint employer as an employer. However, that type of contractual provision is not relevant to the economic realities of the working relationship between the potential joint employer and the employee.

¹⁵ The intermediary employer will be either an independent contractor or employee of the potential joint employer under the FLSA or MSPA. The Misclassification AI discusses the analysis for determining whether a worker is an employee or independent contractor. *See also* 29 C.F.R. 500.20(h)(4).

realities factors relied upon differ somewhat depending on the court, and courts routinely note that other additional relevant factors may be considered, but regardless, it is not a control test.

The MSPA regulation, describing seven economic realities factors in the context of a farm labor contractor acting as an intermediary employer for a grower, provides useful guidance to analyze any vertical joint employment case. *See* 29 C.F.R. 500.20(h)(5)(iv). These factors are probative of the core question of whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work. As courts have cautioned, the factors in an economic realities analysis should not be considered mechanically or in a vacuum; rather, they are guides for resolving the ultimate inquiry whether the employee is economically dependent on the potential joint employer. *See Antenor*, 88 F.3d at 932-33; Misclassification AI, 5-6.¹⁶ Accordingly, these factors should be applied in a manner that does not lose sight of that ultimate inquiry or the expansive definition of employment under the FLSA and MSPA. *See Antenor*, 88 F.3d at 932-33 (“the factors are used because they are indicators of economic dependence” and should be viewed “qualitatively to assess the evidence of economic dependence”). The seven factors are:

- A. Directing, Controlling, or Supervising the Work Performed. To the extent that the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer. The potential joint employer’s control can be indirect (for example, exercised through the intermediary employer) and still be sufficient to indicate economic dependence by the employee. *See Torres-Lopez*, 111 F.3d at 643 (“indirect control as well as direct control can demonstrate a joint employment relationship”) (citing pre-1997 MSPA regulation); *Antenor*, 88 F.3d at 932, 934; 29 C.F.R. 500.20(h)(5)(iv). Additionally, the potential joint employer need not exercise more control than, or the same control as, the intermediary employer to exercise sufficient control to indicate economic dependence by the employee.¹⁷

¹⁶ The vertical joint employment economic realities factors overlap some with the economic realities factors used to determine whether a worker is an employee or an independent contractor, as discussed in the Misclassification AI. However, the exact factors applicable when determining whether a worker is an employee or an independent contractor cannot apply in a vertical joint employment case because they focus on the possibility that the worker is in business for him or herself (and thus is an independent contractor). In a vertical joint employment case, the worker is not in business for him or herself, but is an employee of the intermediary employer, and may also be employed by the potential joint employer.

¹⁷ This point holds true for the vertical joint employment analysis in general. It is not necessary for the employee to be more economically dependent on the potential joint employer than the intermediary employer for there to be joint employment. *See Antenor*, 88 F.3d at 932-33. The focus is the employee’s relationship with the potential joint employer and not a comparison of that relationship with the employee’s relationship with the intermediary employer. *See id.*

- B. Controlling Employment Conditions. To the extent that the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer. Again, the potential joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.
- C. Permanency and Duration of Relationship. An indefinite, permanent, full-time, or long-term relationship by the employee with the potential joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue. For example, if the work in the industry is by its nature seasonal, intermittent, or part-time, such industry condition should be considered when analyzing the permanency and duration of the employee's relationship with the potential joint employer.
- D. Repetitive and Rote Nature of Work. To the extent that the employee's work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training, those facts indicate that the employee is economically dependent on the potential joint employer.
- E. Integral to Business. If the employee's work is an integral part of the potential joint employer's business, that fact indicates that the employee is economically dependent on the potential joint employer. Whether the work is integral to the employer's business has long been a hallmark of determining whether an employment relationship exists as a matter of economic reality. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947).
- F. Work Performed on Premises. The employee's performance of the work on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer. The potential joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the potential joint employer, as the lessee, controls the premises.
- G. Performing Administrative Functions Commonly Performed by Employers. To the extent that the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, those facts indicate economic dependence by the employee on the potential joint employer.

See 29 C.F.R. 500.20(h)(5)(iv).

Courts have applied many of the above factors to vertical joint employment scenarios in FLSA cases, though they have not explicitly relied on the MSPA regulation. *See, e.g., Carrillo v. Schneider Logistics*, 2014 WL 183956, at *6 (applying Ninth Circuit's joint employment

economic realities analysis). In *Carrillo*, for example, warehouse workers sued the companies that operated the distribution warehouses and the company that owned the warehouses. The owner of the warehouses argued that it was not a joint employer of the warehouse workers. In denying the owner's motion for summary judgment, the court noted that there was evidence of possible joint employment for the following reasons: the owner exercised control over the warehouse workers' employment conditions because it approved staffing levels at the warehouse, directed that employees be shifted to an alternative workweek schedule, closely monitored productivity levels, and established various operating metrics; the work was performed on premises owned or leased by the owner, who provided all of the equipment necessary to perform work at its warehouses; the work consisted primarily of conventional manual labor, requiring little skill; and the work was an integral part of the owner's corporate strategy. *See id.* at *9-15. As the court did in *Carrillo*, applying these or similar factors will help to determine whether the employee is economically dependent on the potential joint employer.

As noted, the economic realities factors to apply vary somewhat depending on the court, but any formulation must address the "ultimate inquiry" of economic dependence. In applying any other relevant factors, the broad scope of joint employment under the FLSA and MSPA must be recognized. For example, in analyzing joint employment, the Second Circuit applies six economic realities factors: (1) use of the potential joint employer's premises and equipment for the work; (2) whether the intermediary employer has a business that can or does shift from one potential joint employer to another; (3) whether the employee performs a discrete line-job that is integral to the potential joint employer's production process; (4) whether the potential joint employer could pass responsibility for the work from one intermediary to another without material changes for the employees; (5) the potential joint employer's supervision of the employee's work; and (6) whether the employee works exclusively or predominantly for the potential joint employer. *See Zheng*, 355 F.3d at 71-72.

The Ninth Circuit applies factors from different sources: *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (four factor test primarily assessing potential joint employer's control of employment conditions); the pre-1997 version of the MSPA joint employment regulation; and the eight economic realities factors set forth in *Torres-Lopez*, 111 F.3d at 640-41. *See, e.g., Lantern Light*, 2015 WL 3451268, at *2-17 (applying both the *Bonnette* and *Torres-Lopez* factors and finding that satellite television provider was a joint employer of the installers employed by the company with whom the provider contracted to install its services); *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d 1037, 1061-62 (D. Or. 2010) (applying both the *Bonnette* and *Torres-Lopez* factors). Thus, there are several formulations of the economic realities factors used to determine the employee's economic dependence on a potential joint employer that are consistent with the broad scope of employment under the FLSA.

Some courts, however, apply factors that address only or primarily the potential joint employer's control (power to hire and fire, supervision and control of conditions or work schedules, determination of rate and method of pay, and maintenance of employment records). *See, e.g., Baystate Alt. Staffing*, 163 F.3d at 675; *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012). This approach is not consistent with the breadth of

employment under the FLSA. “Measured against the expansive language of the FLSA,” addressing only the potential joint employer’s control “is unduly narrow” and “cannot be reconciled with the ‘suffer or permit’ language in the [FLSA], which necessarily reaches beyond traditional agency law.” *Zheng*, 355 F.3d at 69. Indeed, the Second Circuit explained that, although satisfaction of the four “formal control” factors can be sufficient to establish joint employment, it has “never held ‘that a positive finding on those four factors is *necessary* to establish an employment relationship.’” *Barfield*, 537 F.3d at 143 (quoting *Zheng*, 355 F.3d at 69) (emphasis in original); *see also Zheng*, 355 F.3d at 69 (“[T]he broad language of the FLSA, as interpreted by the Supreme Court in *Rutherford*, demands that a district court look beyond an entity’s formal right to control the physical performance of another’s work before declaring that the entity is not an employer under the FLSA.”). As explained above, the FLSA rejected control as the standard for determining employment, and any vertical joint employment analysis must look at more than the potential joint employer’s control over the employee.¹⁸

Example: A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers’ compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer’s schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor’s construction projects, whether through ABC Drywall or another intermediary. *These facts are indicative of joint employment of the laborer by the General Contractor.*

Example: A worker is hired by a farm labor contractor (FLC) to pick produce on a Grower’s farm. The FLC hired and pays the worker. The Grower dictates the timing of the harvest, which fields the worker should harvest, and the schedule each day. The work is unskilled, and any training is provided by the Grower. The Grower keeps track of the amount of produce that the worker picks per

¹⁸ *Enterprise Rent-A-Car* involved whether a parent company was a joint employer of its subsidiaries’ employees. *See* 683 F.3d at 464. The Third Circuit acknowledged the breadth of employment under the FLSA and that indirect control can show joint employment, but it nonetheless ruled that joint employment in that case was determined by whether the parent exercised significant control. *See id.* at 467-68. The Third Circuit recognized that the control factors “do not constitute an exhaustive list of all potential relevant facts” and should not be blindly applied; rather, a joint employment determination must consider the employment situation in totality, including the economic realities of the working relationship. *Id.* at 469 (emphasis in original). The Third Circuit seemed to leave open the possibility that, in a case involving an intermediary employer providing labor to another employer, it would consider applying economic realities factors beyond the control factors applied in *Enterprise Rent-A-Car* to determine whether that other employer is a joint employer.

hour. The Grower provides the buckets for the produce, transports the produce from the field, and stores the produce. The Grower pays the FLC per bucket of produce picked, and withholds money to cover workers' compensation insurance. The worker has been continuously working on the Grower's farm during the harvest seasons, whether through this FLC or another farm labor contractor. *These facts are indicative of joint employment of the worker by the Grower.*

Example: A mechanic is employed by Airy AC & Heating Company. The Company has a short-term contract to test and, if necessary, replace the HVAC systems at Condor Condos. The Company hired and pays the mechanic and directs the work, including setting the mechanic's hours and timeline for completion of the project. For the duration of the project, the mechanic works at the Condos and checks in with the property manager there every morning, but the Company supervises his work. The Company provides the mechanic's benefits, including workers' compensation insurance. The Company also provides the mechanic with all the tools and materials needed to complete the project. The mechanic brings this equipment to the project site. *These facts are not indicative of joint employment of the mechanic by the Condos.*

III. Conclusion

As a result of continual changes in the structure of workplaces, the possibility that a worker is jointly employed by two or more employers has become more common in recent years. In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases, particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer.

Whether to apply a horizontal or vertical joint employment analysis (or both analyses) depends on the circumstances of the case. The focus of a horizontal joint employment analysis is the relationship and association between the two (or more) potential joint employers, and the FLSA joint employment regulation provides guidance in evaluating such cases. The focus of the vertical joint employment analysis is the relationship between the employee and the potential employer and whether an employment relationship exists between them. The analysis must determine whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer. The economic realities factors in the MSPA regulation provide guidance for analyzing vertical joint employment cases, although additional or different economic realities factors that are consistent with the broad scope of employment under the FLSA and MSPA may be helpful as well.

WHD will continue to consider the possibility of joint employment to ensure that all responsible employers are aware of their obligations and to ensure compliance with the FLSA and MSPA. As with all aspects of the employment relationship under the FLSA and MSPA, the expansive definition of "employ" as including "to suffer or permit to work" must be considered when determining joint employment, so as to further the statutes' remedial purposes.