

A PRACTITIONER'S GUIDE TO JOINT EMPLOYER LIABILITY UNDER THE FLSA

*Richard J. Burch**

TABLE OF CONTENTS

I.	INTRODUCTION	394
II.	BACKGROUND FOR THE DEVELOPMENT OF THE FLSA	395
	A. <i>Working Conditions in the 1930s</i>	395
	B. <i>President Roosevelt's Proposal for Change</i>	395
III.	OVERVIEW AND PURPOSE OF THE FLSA.....	396
IV.	SECURING THE BENEFITS OF THE FLSA.....	400
	A. <i>The Expansive Nature of the Employment Relationship</i>	400
	B. <i>The Broader Reach of the FLSA As Compared to Other Remedial Legislation</i>	402
	C. <i>Effect of Contractual Relationships</i>	403
V.	JOINT EMPLOYER DOCTRINE	403
	A. <i>The Importance of the "Joint Employer" Doctrine</i>	403
	B. <i>The Economic Reality Test</i>	405
	C. <i>Factors Used to Determine Economic Reality</i>	407
	D. <i>Using the Interpretative Guidelines to Help Determine the "Relevant Factors"</i>	411
	1. Agreement Between Employers to Share Employee Services	411
	2. Employers Acting Directly or Indirectly in the Interest of Another Employer	412
	3. Employers who are not "Completely Disassociated" Sharing Direct or Indirect Control of Employee.....	413
VI.	SUMMARY	413

* Partner, Bruckner Burch, P.L.L.C., Houston, Texas; University of Houston Law Center, J.D., 1997.

I. INTRODUCTION

In 1938, Congress passed what can be described as the most ambitious and progressive piece of social welfare legislation ever implemented,¹ the Fair Labor Standards Act (“FLSA”).² The FLSA of 1938 was Congress’ first effort to establish minimum labor standards.³ Designed both to protect workers and to force employers to be reputable,⁴ the FLSA is impressive in its breadth. To ensure broad application of its protections, the FLSA extends liability for non-compliance with its terms beyond the bounds of ordinary employment.⁵

The purpose of this comment is to provide a quick reference to materials pertinent to the issue of the joint employer doctrine within the FLSA. Part II describes the historical background for the development of the FLSA. Part III gives an overview of the FLSA and explains the purpose behind its enactment. Part IV discusses the expansive scope of the FLSA. Part V evaluates the FLSA’s expansive definition of employment as specifically related to the “joint employer” doctrine. Part VI concludes with a brief summary of the issues touched upon by this comment.

1. See Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1004–05 (1999) (explaining that:

When enacted in 1938, the FLSA included interlocking definitions that Congress designed to bring within their sweep an incomparably broader spectrum of working people and employment settings than the common law or even many labor-protective statutes had ever covered).

2. Pub. L. No. 75-718, 52 Stat. 1060–69 (codified as amended at 29 U.S.C. §§ 201 *et seq.* (2000)).

3. See Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 419, 472 (2002) (providing a brief summary of the three primary purposes behind the FLSA in discussing how the expected cost of violating the statute is likely to vary with income).

4. See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (stating that:

The legislative history of the [FLSA] shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce).

5. See Goldstein et al., *supra* note 1, at 1004 (explaining that “[t]he reach of coverage went beyond employers to include any business owners suffering or permitting others to work,” and that “[t]he ‘striking breadth’ of the FLSA definition of ‘employ’ covers work relationships that were not within the ‘employer-employee category’ at common law”).

II. BACKGROUND FOR THE DEVELOPMENT OF THE FLSA

A. *Working Conditions in the 1930s*

To understand the “striking breadth” of the FLSA’s impact on employment relationships,⁶ it is helpful to understand the working conditions that brought about its passage. In the mid to late 1930’s, America was still in the clutches of the Great Depression. At times, more than 25% of the country’s available workforce was unemployed.⁷ Those fortunate enough to have a job at all often worked in deplorable conditions.⁸ In addition to the problem of child labor, long hours and substandard wages were common for many Americans.⁹ It was against this background that President Franklin D. Roosevelt submitted his proposal for change.

B. *President Roosevelt’s Proposal for Change*

In a message to Congress, President Roosevelt stated: “[o]ur nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and

6. *See id.*

7. *See* Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C.L. REV. 975, 1029 n.217 (2000) (quoting the *Introduction* to THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY (Michael D. Bordo et al. Eds., 1998)). As Professor Dilley noted:

In terms of its impact on economic performance, the depression was a disaster without equal in the twentieth century. The contraction phase of the depression, extending from August 1929 to March 1933, saw the most severe decline in key economic aggregates in the annals of U.S. business cycle history. Real GNP fell by more than one-third, as did the price level. Industrial production declined by more than 50%. Unemployment rose to 25 percent by 1933.

Id.; *see also* Lucy A. Williams & Margaret Y.K. Woo, *Doing Business in China and Latin America: Developments in Comparative and International Labor Law: The “Worthy” Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT’L L. 457, 494 n. 192 (1995).

8. *See* T.H. WATKINS, THE GREAT DEPRESSION: AMERICA IN THE 1930S 167 (Blacksie, Inc. 1993) (noting that “[e]ven in the best of times, wages had never managed to rise proportionately to the cost of living, hours remained long and hard, working conditions were typically abysmal, and in many industries factory work was only a little above the level of peonage”).

9. *See id.*; *Monohan v. County of Chesterfield*, 95 F.3d 1263, 1267 (4th Cir. 1996) (explaining that “[t]he FLSA was originally enacted in 1938 as the result of Depression era high unemployment and abusive working conditions,” and that “[t]he FLSA is clearly structured to provide workers with specific minimum protections against excessive work hours and substandard wages”).

396 *HOUSTON BUSINESS AND TAX LAW JOURNAL* [Vol. II

women a fair day's pay for a fair day's work."¹⁰ President Roosevelt went on to decry various existing labor practices, such as the use of child labor, the "chiseling" of workers' wages, and extended working hours.¹¹ Shortly thereafter, Congress held a number of proceedings and debates which focused on the effect of substandard labor conditions in the U.S.¹² One reason the Congressional committee offered in support of the press for federal legislation was that in the absence of such legislation "goods produced under substandard labor conditions in one state may, if protected by the failure of Congress to exercise its commerce power, flow freely into another state that attempts to maintain its fair labor standards."¹³ Thus, with the support of the President and of the largely democratic Congress, the Fair Labor Standards Act was passed.¹⁴

III. OVERVIEW AND PURPOSE OF THE FLSA

The FLSA establishes a minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.¹⁵ The policies behind the FLSA are expressed within the statute.¹⁶ For example, Congress sought to eliminate

10. H.R. REP. NO. 101-260, at 8-9 (1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 696-97.

11. *See id.* at 9, *reprinted in* 1989 U.S.C.C.A.N. at 697.

12. *See, e.g.*, 81 CONG. REC. 7652, 7672, 7885; 82 CONG. REC. 1386, 1395, 1491, 1505, 1507; 83 CONG. REC. 7283, 7298, 9260, 9265.

13. H.R. REP. NO. 75-2182, at 6 (1938).

14. *See* H.R. REP. NO. 101-260, at 9-10 (1989), *reprinted in* 1989 U.S.C.C.A.N. 690, 697-98.

15. *See* 29 U.S.C. §§ 206, 207, 211(c), 212 (2000); *see also* Bartlett, *supra* note 3, at 472-73 (summarizing the three primary purposes of the FLSA as: (1) establishing a minimum wage, which is currently \$5.15 per hour, and prohibiting wage differentials based on gender; (2) requiring premium pay for overtime work equal to one and one-half times the regular wage rate; and (3) restricting the ability of firms to employ children).

16. *See id.* § 202. Section 202 prescribes that:

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

conditions detrimental to the “health, efficiency and general well-being of workers.”¹⁷

Additionally, the judicial system has recognized these worthy goals. For example, in *Brooklyn Savings Bank v. O’Neil*,¹⁸ the United States Supreme Court noted that the “prime purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”¹⁹ The Supreme Court has also noted that Congress’ intent “was not to regulate interstate commerce as such . . . [but rather] to eliminate, as rapidly as possible, substandard labor conditions throughout the nation.”²⁰

However, Congress also intended for the FLSA to protect employers who comply with its terms.²¹ Indeed, without such

(b) It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Id.

17. *Id.*

18. 324 U.S. 697 (1945).

19. *Id.* at 707 n.18 (1945) (citing 81 CONG. REC. 7652, 7672, 7885; 82 CONG. REC. 1386, 1395, 1491, 1505, 1507; 83 CONG. REC. 7283, 7298, 9260, 9265 (1937–38)); *see also* H. REP. NO. 75-1452, at 9 (1937); S. REP. NO. 75-884, at 3–4 (1937).

20. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–10 (1950); *see also* 29 U.S.C. § 202(b); *supra* note 16 (quoting 29 U.S.C. § 202(b)).

21. *See Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 807–08 (D.C. Cir. 1983) (discussing that “[t]he language and history unmistakably evidence an intent to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force”); *see also* H.R. REP. NO. 75-2182, at 6–7 (1938). Legislators argued that under the new law:

No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.

Id. at 6–7; *see also Lerwill v. Inflight Serv., Inc.*, 379 F. Supp. 690, 696 (N.D. Cal. 1974) (stating that “[t]he Act serves a public and a private purpose. Its enforcement provisions are intended to protect workers and their families, whom the Act is intended to benefit, *see* 29 U.S.C. § 202 (1976), but it is also intended to protect employers who comply with its terms”), *aff’d sub nom.*, *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978); H.R. REP. NO. 87-75 (1961) (arguing that the Fair Labor Standards Amendments of 1961 “would increase the level of compliance with the statute, and would protect complying employers from the unfair wage competition of the noncomplying employers”); Goldstein et al., *supra* note 1, at 1003 (explaining that Congress’ primary purpose in enacting the FLSA “was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation,” and that the FLSA “was designed to benefit not only workers but also reputable employers, who, prior to the FLSA, had operated at a

protections, reputable employers would continue to suffer at the hands of unscrupulous “wage chisellers” whose products and services, produced in substandard conditions, could be offered at an unfair discount. Thus, it is clear that Congress sought to deny any competitive advantage to employers who would not adhere to the minimum standards of decency.²²

To achieve its goals, the FLSA placed a number of restrictions on employers. The FLSA sets a minimum hourly wage that workers must be paid.²³ To discourage employers from overworking employees and to encourage the hiring of additional employees to perform excess work, the FLSA also requires the payment of an “overtime premium” for hours worked in excess of forty hours in a given workweek.²⁴ Finally, to eliminate the

competitive disadvantage vis-à-vis their sweatshop competitors”).

22. See 29 U.S.C. § 202(a) (referring to the use of substandard labor conditions as “an unfair method of competition in commerce”); *supra* note 16 (quoting 29 U.S.C. § 202(a)); see also H.R. REP. NO. 101-260, at 8–10 (1989), reprinted in 1989 U.S.C.C.A.N. 696, 697–98.

23. See 29 U.S.C. § 206(a). Section 206(a)(1) states in pertinent part:

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) Except as otherwise provided in this section, not less than \$ 4.25 an hour during the period ending on September 30, 1996, not less than \$ 4.75 an hour during the year beginning on October 1, 1996, and not less than \$ 5.15 an hour beginning September 1, 1997[.]

Id.

24. See *id.* § 207. The maximum hours rules prescribed under section 207(a) for employees engaged in interstate commerce state in pertinent part:

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [effective Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Id. Furthermore, the rules under 29 U.S.C. § 207(b) state in pertinent part that:

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$ 1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

Id.

“evils” of child labor, the FLSA prohibits employers from employing underage children.²⁵ In the struggle to eliminate abusive working conditions and to raise the standard of living for all Americans, the FLSA has proven “to be wise and progressive remedial legislation for the welfare not only of our wage earners but of our whole economy.”²⁶

IV. SECURING THE BENEFITS OF THE FLSA

A. *The Expansive Nature of the Employment Relationship*

From the beginning, Congress and the courts realized that broad coverage under the FLSA is necessary to effectuate its humanitarian goals.²⁷ This expansive vision is reflected in the

25. See *id.* § 212 (2000) (Child Labor Provisions). Section 212 provides:

(a) Restrictions on shipment of goods; prosecution; conviction

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) Investigations and inspections

The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) Oppressive child labor

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(d) Proof of age

In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.

Id. (emphasis in original).

26. H.R. REP. NO. 101-260, at 10 (1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 698.

27. See 29 U.S.C. § 202 (identifying the policy of the Act as the rapid elimination of

language of the FLSA, which defines the employment relationship broadly at every turn. For example, the word “employ” is broadly defined to include “to suffer or permit to work.”²⁸ This definition, derived from child labor statutes,²⁹ is sufficiently comprehensive to “require its application to many persons and working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category.”³⁰

detrimental labor conditions); H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2816 (noting that the expansive scope of the Act was vital to the goal of eliminating substandard working conditions); *see also supra* note 16 (quoting 29 U.S.C. § 202); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–11 (1950) (noting that the goal of eliminating substandard conditions required broad coverage); *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669–70 (1946).

28. 29 U.S.C. § 203(g).

29. *See* Goldstein et al., *supra* note 1, at 1096 (explaining that “[t]he immediate source of the new language inserted into the FLSA appears to have been [the] child labor bill”).

30. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)). In the Administrator’s brief submitted in *Rutherford Food Corp.*, the Department of Labor observed that:

The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original . . . bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have the power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed “to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.” A broad definition of “employee,” including “any individual suffered or permitted to work by an employer,” subsequently took the place of this provision.

The words “suffer or permit to work” were plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act. This language was not new, and was not adopted without knowledge on the part of the legislators of its broad scope. It was taken verbatim from child labor statutes in force in numerous States and from the proposed Uniform Child Labor Law. The language had been interpreted by a number of State supreme courts as imposing upon a proprietor as nondelegable responsibility with respect not only to children directly employed by him but also to children whom he suffered or permitted to work in his business.

* * * *

That Congress, in adopting this language, intended that it should be given broad scope similar to the construction of the State child labor laws is further evidenced by the fact that this same definition in the Fair Labor Standards Act applies to the child labor standards as well as to the wage and hour standards prescribed in the Act.

Similarly, “employer” is defined so as to include “any person acting directly or indirectly in the interest of an employer in relation to an employee”³¹ “Person” is, in turn, defined as “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.”³² The United States Supreme Court has commented that the FLSA defines the employment relationship “expansively” and with “striking breadth.”³³ Judicial construction of this expansive definition makes clear “the FLSA statutory definition of an ‘employer’ is a *sui generis* concept” and is not limited by formalistic or common law definitions.³⁴ Instead, the FLSA definition of employer “must be liberally construed to effectuate Congress’ remedial intent.”³⁵

B. *The Broader Reach of the FLSA As Compared to Other Remedial Legislation*

Indeed, the broadness of the FLSA’s scope eclipses even that of other “remedial” legislation, such as the various civil rights acts. For example, most courts shield individual supervisors and managers from personal liability under Title VII of the Civil Rights Act³⁶ and the Age Discrimination in Employment Act.³⁷ However, the “overwhelming weight of authority” suggests that individual employees of a corporation may be held liable for violations of the FLSA.³⁸

Goldstein et al., *supra* note 1, at 1100 (quoting Brief for the Administrator at 27–29, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)).

31. 29 U.S.C. § 203(e)(1) (emphasis added). “Employee” is generally defined, in a somewhat circular fashion, as “any individual employed by an employer.” *Id.* There are additional definitions of “employee” for people employed by a public agency. *See id.* § 203(e)(2).

32. *Id.* § 203(a).

33. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *see also Rutherford Food Corp.*, 331 U.S. at 728.

34. *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991); *see also Nationwide Mut. Ins. Co.*, 503 U.S. at 325–26; *Rutherford Food Corp.*, 331 U.S. at 728; *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989).

35. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993).

36. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as 42 U.S.C.); *see also Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999); *Pfau v. Reed*, 125 F.3d 927, 936 (5th Cir. 1997) (holding that individual supervisors are not liable under Title VII).

37. *See* Pub. L. No. 90-102, 81 Stat. 602 (1967) (codified as 29 U.S.C. §§ 621–634); *see also E.E.O.C. v. Wessel*, 55 F.3d 1276, 1279 (7th Cir. 1995); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996) (noting that the ADEA does not establish individual supervisors as agents).

38. *See Reich*, 998 F.2d at 329; *see also Falbaum v. Pomerantz*, 891 F. Supp. 986, 990 (S.D.N.Y. 1995) (comparing individual liability under the FLSA and ADEA and

Similarly, the United States Supreme Court has noted the FLSA's definition of employment is broader than that of the Employee Retirement Income Security Act (ERISA).³⁹ This broad interpretation of the employer-employee relationship "is intended to identify responsible parties without obfuscation by legal fictions applicable in other contexts."⁴⁰ Not surprisingly, the Supreme Court has referred to the FLSA's definition of employer as "the broadest definition that has ever been included in any one act."⁴¹

C. *Effect of Contractual Relationships*

Just as courts are willing to disregard the "corporate identity" to place liability on an individual shareholder or manager (or, as discussed below, a joint employer), courts have shown a similar, if not greater, disregard for contractual arrangements between the alleged employer and employee.⁴² "Where the work done . . . follows the usual path of an employee," courts do not hesitate to set aside the "independent contractor" label.⁴³ This willingness to ignore the effect of contractual arrangements led one judge to comment that "[t]he FLSA is designed to defeat rather than implement contractual arrangements."⁴⁴

V. JOINT EMPLOYER DOCTRINE

A. *The Importance of the "Joint Employer" Doctrine*

noting that the FLSA definition includes individuals).

39. See Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1000 *et seq.* (2000)); see also *Nationwide Mut. Ins. Co.*, 503 U.S. at 326 (acknowledging that the FLSA "definition of 'employee' . . . on its face, goes beyond its ERISA counterpart").

40. *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991).

41. *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 CONG. REC. 7657).

42. It may be argued that this willingness to ignore the parties' contractual relations is of greater significance than the "disregard" shown to the corporate form. After all, unlike the "right" to conduct business in the corporate form, the right to contract is a constitutional one. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947); see also *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (stating that "in determining who are 'employees' under the Act, common law [employee] categories or employer-employee classifications under other statutes are not of controlling significance").

43. *Rutherford Food Corp.*, 331 U.S. 729 & n.8.

44. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7th Cir. 1987) (Easterbrook, J., concurring).

In July 1939, the Department of Labor issued Interpretive Bulletin Number 13.⁴⁵ Interpretive Bulletin Number 13 contained an interpretation of joint employer status with respect to the overtime compensation requirements of the FLSA.⁴⁶ The apparent purpose of the bulletin was to prevent would-be “wage chiselers” from avoiding the overtime provisions of the act by having employees work overtime hours for a nominally “separate” employer.⁴⁷ Thus, it appears that the overtime provisions of the FLSA first gave rise to the FLSA’s notion of “joint employment.”⁴⁸

The impact of a “joint employment” finding is significant. Where the parties are found to be “joint employers,” each entity will be held liable “individually and jointly, for compliance with all of the applicable provisions of the [FLSA] . . . with respect to the entire employment for the particular workweek.”⁴⁹ For example, if we assume that Company A and Company Z are joint

45. See *Walling v. Friend*, 156 F. 2d 429, 432 (8th Cir. 1946); Interpretative Bulletin No. 13 (1940).

46. See Interpretive Bulletin No. 13, ¶ 17 (1940).

47. See *id.* at ¶¶ 16–17.

48. Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLIN J. PUB. L. & POL’Y 321, 330 (1989).

49. 29 C.F.R. § 791.2(a) (2000). Section 791.2(a) states:

A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee’s work for all of the joint employers during the workweek is considered as one employment for purposes of the act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

Id.

employers, and an employee works twenty hours for Company A and forty hours for Company Z in the same workweek, the FLSA will require overtime wages be paid on the twenty hours worked in excess of forty hours.⁵⁰ Moreover, both Company A and Company Z each can be held individually responsible for the overtime compensation owed under the FLSA.⁵¹ By imposing full liability for unpaid or underpaid wages on all employers, the joint employer rule helps ensure that workers will be paid their lawful wages.

In addition, the joint employer liability protects legitimate businesses from unfair competition by businesses that use substandard labor obtained from fly-by-night contractors. A study by the House of Representatives' Subcommittee on Employment and Housing reported that "[a] company which reduces its labor cost through use of illegitimate contractors can readily underbid legitimate competitors."⁵² By ensuring that companies found to be joint employers are held responsible for the full measure of wages owed under the FLSA, the joint employer doctrine denies a competitive advantage to those who use substandard labor.⁵³

B. *The Economic Reality Test*

In determining whether a particular relationship should be deemed joint employment, courts generally agree that the "economic reality" test should be used.⁵⁴ The "well settled" goal of

50. *See id.*

51. *See id.*

52. H.R. REP. NO. 102-1053, at 8 (1992), available at 1992 WL 353996. Courts take a dim view of such arrangements. For example, the Fifth Circuit has commented that the presence of collusion between the admitted employer and the proposed joint employer, for the purposes of avoiding the requirements of the FLSA, would conclude in a finding of joint employment. *See Bowman v. Pace Co.*, 119 F.2d 858, 860 (5th Cir. 1941).

53. *See* 29 C.F.R. § 791.2(a). However, each joint employer may take credit for payments made to the employee by the other employer in determining the amount of overtime owed to the employee. In *Karr v. Strong Detective Agency*, a detective agency successfully argued the investigator was a joint employee of the detective agency and its client, a manufacturing company. *See Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1208 (7th Cir. 1986). The undercover agent had been placed inside the client manufacturing company's facility to covertly observe the manufacturer's other employees. *See id.* at 1205. The agent was treated as an employee of the manufacturer and was paid overtime pursuant to the FLSA. *See id.* By establishing "joint employer" status, the detective agency was able to take credit for the wages paid by the manufacturer such that no additional wages were owed. *See id.* at 1207-08.

54. *See Golberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see also* *Howard v. Malcolm*, 852 F.2d 101, 104 (4th Cir. 1988); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38

the economic reality test is “to determine whether the employees in question are economically dependent on the putative employer.”⁵⁵ Where the employee is, as a matter of economic reality, dependent upon an employer, an employer-employee relationship will be found.⁵⁶ However, under this test, no single factor is determinative.⁵⁷ Rather, “the court must evaluate the totality of the circumstances, focusing on the economic realities of the particular employment relationship.”⁵⁸

As with other aspects of the employment relationship, “joint employment” must be construed broadly “in order to effectuate the broad remedial purposes of the [FLSA].”⁵⁹ Accordingly, the labels and contractual terms used in a particular relationship are largely unimportant.⁶⁰ This is because the “FLSA is designed to defeat rather than implement contractual arrangements.”⁶¹

(5th Cir. 1973). As the cases have evolved, four factors have developed to assist the court in its analysis. These four factors are whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedule or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. *Bonnette*, 704 F.2d at 1470; *see also* Goldstein et al., *supra* note 1, at 1008 (noting that “[f]rom the mid-1940s, when the Supreme Court began interpreting the scope of coverage under the FLSA and other New Deal social-protective legislation, to the present, courts have used the economic reality test to determine whether a putative employer has employed a worker so as to be bound by the act’s provisions with regard to such worker”); *cf.* Goldstein et al., *supra* note 1, at 1161 (arguing that the economic reality test “improperly narrows the scope of the FLSA coverage because it uses many common-law factors at odds with the expansive ‘suffer or permit to work’ definition”).

55. *Lopez v. Silverman*, 14 F. Supp. 2d 405, 414 (S.D.N.Y. 1998); Goldstein et al., *supra* note 1, at 1008–09 (“Under [the economic reality] test, various factors, or areas of factual inquiry, are selected and then evaluated to determine whether the worker is economically dependent on the putative employer.”); *see also* Antenor v. D&S Farms, 88 F.3d 925, 932 (11th Cir. 1996) (“the weight of each factor depends on the light it sheds on the [worker’s] economic dependence . . .”); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987) (“Economic dependence is more than just another factor. It is instead the focus of all the other considerations.”); *Castillo v. Givens*, 704 F.2d 181, 190 (5th Cir. 1983) (noting that dependency is the “touchstone” of the economic reality test).

56. *See* Goldstein et al., *supra* note 1, at 1009 (“If the court concludes that the requisite dependency exists, an employment relationship is established.”).

57. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (holding that “the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity”); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 195 (5th Cir. 1983); *see also* 29 C.F.R. § 791.2(a) (2000) (“A determination of whether the employment by the employers is to be considered joint employment . . . depends on all the facts in the particular case.”).

58. *Reich v. Priba Corp.*, 890 F. Supp. 586, 590 (N.D. Tex. 1995).

59. *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *see also* *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997).

60. *See Real*, 603 F.2d at 755. For example, an employee’s job title has nothing to do with whether an employee will be considered exempt from the overtime provisions of the act. *See* 29 C.F.R. § 541.201(b)(1) (2000) (stating that job titles are “of little or no assistance in determining” whether an employee should be considered to have either

The application of the economic reality test in the “joint employer” context should not be used in an effort to determine which entity is more of an employer in relation to the proposed employee, “with the winner avoiding responsibility as an employer.”⁶² Indeed, the fact that the purported joint employees are admittedly employees of another employer does not preclude a finding that another employer is a joint employer.⁶³ Nor does a finding that the admitted employer is an independent contractor of the proposed joint employer necessarily alter this conclusion.⁶⁴

C. Factors Used to Determine Economic Reality

Although the economic reality test and its method of application are widely accepted, courts have struggled with formulating the proper factors to use in analyzing “economic reality” in the joint employer context.⁶⁵ For example, defendants, or those generally seeking to avoid joint employer status, usually suggest the use of the four factor test as articulated in *Bonnette v. California Health & Welfare Agency*.⁶⁶ Under *Bonnette*, courts are directed to examine the extent to which the proposed employer:

exempt or nonexempt status because such titles “can be had cheaply and are of no determinative value”).

61. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1544–45 (7th Cir. 1987).

62. *Antenor v. D&S Farms*, 88 F.3d 925, 932 (11th Cir. 1996); *see also Torres-Lopez*, 111 F.3d at 641.

63. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973).

64. *See Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973); *see also Charles v. Burton*, 169 F.3d 1322, 1328 (11th Cir. 1999). In *Hodgson*, the court stated that even if the plaintiffs admitted the employer was an independent contractor of the proposed joint employer, this did not “negate the possibility that Griffin and Brand may be a joint [e]mployer of the []workers.” *Hodgson*, 471 F.2d at 237. The court made clear that, in the appropriate circumstance, “[a]nother employer may be responsible for the contractor’s employees.” *Id.* (citing *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)). On the other hand, where the admitted employer is himself an employee of the proposed joint employer, the proposed joint employer has been found liable under the FLSA. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 192–93 (5th Cir. 1983); *see also Mednick v. Albert Enter., Inc.*, 508 F.2d 297, 302–03 (5th Cir. 1975).

65. *See generally Lopez v. Silverman*, 14 F. Supp. 2d 405, 413–14 (S.D.N.Y. 1998); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1467–68 (C.D. Cal. 1996) (explaining that the factors identified by the Ninth Circuit “provide a useful framework for analysis,’ but are neither exclusive nor conclusive,” and, furthermore, “[the factors] are not etched in stone and will not be blindly applied”); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (stating that “[n]either the presence nor the absence of any individual factor is determinative. Whether an employer-employee relationship exists depends ‘upon the circumstances of the whole activity.’”).

66. 704 F.2d 1465, 1470 (9th Cir. 1983); *see also Lopez*, 14 F. Supp. 2d at 414.

- (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.⁶⁷

The first two factors are designed to evaluate a proposed employer's control over the economic terms and working conditions of the employee at issue.⁶⁸ This test has been criticized as being "obviously skewed" against a finding of joint employment outside of certain limited situations.⁶⁹

In contrast, the more expansive test found in *Brock v. Superior Care, Inc.*,⁷⁰ is often used by parties seeking to establish joint employer status.⁷¹ Under *Superior Care*, courts examine:

- (1) the degree of control exercised by the employer over the workers,
- (2) the workers' opportunity for profit or loss and their investment in the business,
- (3) the degree of skill and independent initiative necessary to perform the work,
- (4) the duration of the of the working relationship, and
- (5) the extent to which the work is an integral part of the employer's business.⁷²

However, because these factors are traditionally applied to determine whether a particular worker is an employee or an independent contractor,⁷³ the usefulness of these factors has been questioned in the joint employer context.⁷⁴

67. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

68. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675-76 (1st Cir. 1998) (discussing the purpose of the various *Bonnette* factors).

69. *See Lopez*, 14 F. Supp. 2d at 415 (noting the situation where the court could hold against defendants that are "direct corporate subsidiaries or managing administrators").

70. 840 F.2d 1054 (2d Cir. 1988).

71. *See id.* at 1058-59.

72. *Id.*

73. *See id.*

74. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 n9 (1st Cir. 1998) (questioning the factors because the issue of employee versus independent contractor was no longer before the court).

Similarly, in the farm worker context, the Eleventh Circuit identified eight factors to use in determining whether a joint employment relationship exists.⁷⁵ However, the Fifth Circuit has proffered five “important factors” to be used in determining joint employer status.⁷⁶

Several appellate courts have suggested these factors should be used or discarded on an *ad hoc* basis.⁷⁷ For example, the Ninth Circuit indicated that under its version of the test, a court is to consider those factors that are “relevant to the particular situation” when evaluating a potential joint employer relationship.⁷⁸ Similarly, the Eleventh Circuit indicates that courts should “closely scrutinize” the various factors to determine which are relevant to a particular setting.⁷⁹ The view that a

75. See *Antenor v. D&S Farms*, 88 F.3d 925, 932–37 (11th Cir. 1996). The court indicated that the eight factors are:

- (1) the nature and degree of the grower’s control of the farmworkers; (2) the degree of the grower’s supervision, direct or indirect, of the farmworkers’ work; (3) the grower’s right, directly or indirectly, to hire, fire, or modify the farmworkers’ work; (4) the grower’s power to determine the workers’ pay rates or methods of payment; (5) the grower’s preparation of payroll and payment of the workers’ wages; (6) the grower’s ownership of the facilities where the work occurred; (7) the farmworkers’ performance of a line-job integral to the harvesting and production of salable vegetables; and (8) the grower’s and labor contractor’s relative investment in equipment and facilities.

Id.

76. See *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669–70 (5th Cir. 1968). In *Wirtz*, the court held that:

- [The five factors to consider] when determining whether a person or corporation is an ‘employer’ or ‘joint employer’ are: (1) whether or not employment takes place on the premises of the company; (2) how much control does the company exert over the employees; (3) does the company have the power to fire, hire, or modify the employment condition of the employees; (4) do the employees perform a ‘specialty job’ within the production line; and (5) may the employee refuse to work for the company or work for others.

Id. Interestingly, early Fifth Circuit cases suggest that the analysis for “joint employer” status is the same as that for “employer” status. See *id.* at 669 (noting that the factors apply when “considering whether a person or corporation is an ‘employer’ or ‘joint employer’”).

77. See *Ricketts v. Vann*, 32 F.3d 71, 76 (4th Cir. 1994) (acknowledging that the court’s “list of six factors was not exhaustive and its final determination depended on all of the relevant facts wholly considered”); see also *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (citing and quoting in part *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983): “[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”); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 444 (11th Cir. 1994) (cautioning that “[c]ourts must closely scrutinize [non-regulatory] factors to determine their relevancy to each particular situation”).

78. See *Torres-Lopez*, 111 F.3d at 639.

79. See *Aimable*, 20 F.3d at 444 (finding “four of [] six non-regulatory factors

court should tailor its test to the particular setting would appear to coincide with the Administrator's interpretive regulation requiring that joint employer relationships be determined based on the facts of each particular case.⁸⁰

Perhaps following this advice, the court in *Lopez v. Silverman*⁸¹ conducted a review of the various factors used by other courts in determining whether an employer-employee relationship existed.⁸² The *Lopez* case involved, in part, a claim for unpaid overtime compensation brought by sewing contractors against a garment manufacturer.⁸³ In creating its own "economic reality" test, the court evaluated the various factors used for determining "employee" status under the FLSA, focusing on those factors it considered relevant to a determination of "joint employer" status for the case at hand.⁸⁴ In the end, the court settled on a mixture of control and dependency factors.⁸⁵ Although not used by the court in *Lopez*, the interpretive guidelines of the FLSA may aid in determining which factors should be applied in a given circumstance by providing a conceptual framework for the joint employer analysis.⁸⁶

irrelevant" and stating "[a]lthough many factors may be useful . . . they are not necessarily useful in all such situations").

80. See 29 C.F.R. § 791.2(a) (2000) ("A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case.").

81. 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

82. See *id.* at 413–20.

83. See *id.* at 408–09.

84. See *id.* at 413–20 (considering factors from several cases including *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); *Torres-Lopez v. May*, 111 F.3d 633, 643–44 (9th Cir. 1997); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); and *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

85. See *id.* at 419–20. The court concluded that the following seven factors "are the ones most relevant to and indicative of a joint employer relationship":

- (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective;
- (2) whether the putative joint employer's premises and equipment were used for the work;
- (3) the extent of the putative employees' work for the putative joint employer;
- (4) the permanence or duration of the working relationship between the workers and the putative joint employer;
- (5) the degree of control exercised by the putative joint employer over the workers;
- (6) whether responsibility under the contract with the putative joint employer passed "without material changes" from one group of potential joint employees to another; and
- (7) whether the workers had a "business organization" that could or did shift as a unit from one putative joint employer to another.

Id.

86. See *id.* at 419–24.

D. *Using the Interpretative Guidelines to Help Determine the “Relevant Factors”*

The current version of the “joint employer” regulation gives examples of several situations where the joint employer relationship is generally considered to exist.⁸⁷ The first example considers the situation where “there is an arrangement between the employers to share the employee’s services”⁸⁸ In the second instance, joint employment will be found where “one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee.”⁸⁹ The final example listed in the regulations deal with situations “where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under the common control with the other employer.”⁹⁰

1. Agreement Between Employers to Share Employee Services

The first example, whether there is an agreement between employers to share an employee’s services, “does not involve the question whether [the alleged joint employers] jointly entered into a contract with [the putative employee] as a joint employee.”⁹¹ Rather, the central inquiry is whether, for the purposes of the Act, the employee may be deemed to be doing

87. See 29 C.F.R. § 791.2(b) (2000). Section 791.2(b) gives examples in which a joint employment relationship will exist because “the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek.” *Id.* These examples include the situations listed below:

- (1) where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees;
- (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Id.

88. *Id.* § 791.2(b)(1).

89. *Id.* § 791.2(b)(2).

90. *Id.* § 791.2(b)(3).

91. *Mitchell v. John R. Cowley & Bros., Inc.*, 292 F.2d 105, 112 (5th Cir. 1961).

work for both employers such that the hours worked for each should be combined for the purposes of determining when overtime compensation is due.⁹² Thus, “the significant element is the doing of work for both jointly, not the existence of a joint contract or a legal status of a joint employee.”⁹³

In such a situation, it is clear that factors such as the presence of a mutual purpose, similarity of work for each employer, and whether the work benefited both proposed employers are particularly important. These factors focus on the “mutuality” of the employment by determining for whom the work was performed. Joint employment under these circumstances is proper because each proposed employer is jointly enjoying the fruits of the worker’s labor.⁹⁴

2. Employers Acting Directly or Indirectly in the Interest of Another Employer

Joint employment may also be found where one employer acts “directly or indirectly in the interest of the other employer in relation to” an employee.⁹⁵ Cases interpreting this situation have considered whether the proposed joint employer: 1) “hired the employees;” 2) paid the employees’ wages; and 3) “directed and supervised the employees in the performance of their duties.”⁹⁶

92. *See id.*

93. *Id.*

94. *See id.* In *Mitchell*, the court stated:

This inquiry does not involve the question whether [the employers] jointly entered into a contract with Allen as joint employee. It, as the case of employment status, is a question whether for the purposes of the Act he may be deemed to be doing work for both so that the hours worked are aggregated to determine compliance with the requirements concerning hours of work and rates of pay. The significant element is the doing of work for both jointly, not the existence of a joint contract or a legal status of a joint employee. In view of this the actual circumstances of employment again become relevant. Identical contracts, executed initially and terminated finally on the same days, indicate a mutual purpose. And the work to be performed was identical. But of even more significance, the presence of Allen on the premises of either [employer] was beneficial to both.

* * * *

The result is that during all of this time Allen was literally performing for each. Performing for each simultaneously he was, for the purposes of the Act, performing for them jointly.

Id.

95. 29 C.F.R. § 791.2(b)(2) (2000).

96. *Greenberg v. Arsenal Bldg. Corp.*, 144 F. 2d 292, 294 (2d Cir. 1944), *aff’d*, *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945).

Under this scenario, the focus appears to be on whether the proposed employer has acted as a surrogate employer by acting, directly or indirectly, in the interest of an employer in relation to an employee.⁹⁷ Where the joint employer has assumed the “normal” responsibilities of an employer, it must also bear responsibility for compliance with the FLSA.

3. Employers who are not “Completely Disassociated” Sharing Direct or Indirect Control of Employee

Related entities may be held to be joint employers where the employers share direct or indirect control over the employee because “one employer controls, is controlled by, or is under common control with the other employer.”⁹⁸ Joint employment has been found where the companies were contractually related, contained overlapping board members, and set salaries for the employees at issue.⁹⁹ Courts have also considered whether the entities shared the same location.¹⁰⁰ Under this example, it is relevant to examine both the putative employer’s relationships with the employee and with the other employer.¹⁰¹

VI. SUMMARY

Implemented at a time when America was still in the clutches of the Great Depression, Congress intended for the FLSA to have broad application so that it would provide a true remedy for the deplorable working conditions then in existence. In the absence of broad application, unscrupulous employers would likely benefit through the competitive advantage of being able to offer unfair discounts to the detriment of employers complying with the FLSA and to the harm of the employees of compliant employers. The broad scope of the FLSA protects workers by extending liability for non-compliance with its terms beyond the bounds of ordinary employment. Included in the scope of the FLSA is the notion of joint employment.

Where parties are found to be joint employers, the status of which is determined through use of the multi-factor economic

97. See *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (holding that a real estate management company was the joint employer of maintenance workers due to its “substantial control [over] the terms and conditions” of the maintenance workers’ work).

98. 29 C.F.R. § 791.2(b)(3) (2000).

99. See *Dolan v. Day & Zimmerman, Inc.*, 65 F. Supp. 923, 929, 938 (D. Mass. 1946).

100. See *McComb v. Midwest Rust Proof Co.*, 8 WH Cases 460, 463 (E.D. Mo. 1948).

101. See *id.*; see also 29 C.F.R. § 791.2(b)(3).

reality test, each entity is held liable individually and jointly for compliance with the FLSA for the employment during the particular workweek. Joint employer liability ensures that workers will be paid their lawful wages and protects legitimate businesses from unfair competition by unscrupulous employers. As with other aspects of the employment relationship, joint employment is construed broadly to accomplish the goals of the FLSA.