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Jeffrey M. Hirsch
University of North Carolina School of Law, jmhirsch@email.unc.edu

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Jeffrey M. Hirsch*

Abstract

The joint-employer doctrine in the United States is as fissured as the economy itself. As this paper's brief survey of the different joint-employer standards used in the U.S. shows, the diverse set of work laws and governing authorities involved in workplace disputes have led to an unpredictable and confusing set of joint-employer standards. Although most of these standards share similarities, there are numerous differences based on the statute involved, whether the dispute is brought under federal or state law, which federal court is hearing the case, and which political party controls a relevant agency. Moreover, thanks in large part to a labor law action against McDonald's, the joint-employer doctrine has become a politically charged issue, leading several federal agencies recently to change their approach to the question. As a result, businesses and workers cannot be certain that the relevant joint employer standard that exists today will be the same one that applies later. In short, joint employment in the U.S. consists of a complex set of standards that lack clarity and predictability, imposing costs on businesses and workers alike.

Keyword: Joint employer; Labor law; Employment law; Employment discrimination; Statutory interpretation.

1. Introduction.

The classic employment relationship is a relatively simple one to identify and define, with a single employer that employs a clearly defined group of employees. Yet, that simple relationship has never been the only model and as a result, for long as there have been laws regulating the workplace, there have been disputes regarding which parties are part of a

* Geneva Yeargan Rand Distinguished Professor of Law, University of North Carolina School of Law. This Article benefitted from the extraordinary research assistance of Dakota Lipscombe. This article has been submitted to a double-blind peer review process.

formal employment relationship[1]. These questions are important because workers only have statutory rights if they are considered formal employees and a hiring business can only face liability if they are classified as a statutory employer.

Although these classification issues are not new, they have captured the public's attention in recent years, as the gig economy has highlighted and exacerbated this long-standing issue. Much of the attention has been on whether to classify gig workers as employees or independent contractors. But there is a related question that is no less important, despite garnering less attention: identifying who is an employer.

As the economy has become increasingly "fissured"[2] through the use of arrangements such as subcontracts and franchise agreements, questions about which businesses should be considered statutory employers have also increased. Although fissured workplaces are not new, they have become more prevalent and prominent as technology has permitted businesses to influence the work of employees who are officially employed by other firms[3]. One recent estimate states that 13.8 United States employees arguably provide work for the benefit of multiple employers, which is approximately 11.9% of the entire civilian workforce[4].

Although there are many types of fissured business relationships, franchises provide an apt illustration of this issue, as they are both a significant portion of the U.S. economy and their business model is ripe for employer classification questions. As of 2018, the franchise industry employed almost 9 million individuals, or 5.7% of all private civilian jobs in the U.S.[5] In most franchise relationships, a franchisor retains some level of control over the franchisee's operations for quality control and other reasons. As technology has advanced, the level of control that franchisors are able to exert has increased substantially. Yet that very control puts franchisors at a higher risk of being classified as an employer of the franchise employees and liable for violations of work laws.

Much like its impact in muddying the classification of an "employee"[6], technology is increasingly influencing the classification of employers as well. For instance, monitoring technology has been rapidly advancing in recent years,[7] which enhances a franchisor's ability

[1] *See*, e.g., *American Bemberg Corp.*, in *National Labor Relations Board*, 1940, 23, 623 - 628 (NLRB relying on joint employment concept to decide unit determination case); *Bell Oil & Gas Co.*, in *National Labor Relations Board*, 1936, 1, 562 - 588 (NLRB decision referring to joint employment).

[2] *See*, Weil D., *The Fissured Workplace: Why Work Became Bad for So Many and What Can Be Done to Improve It,* Harvard University Press, Harvard, 2014, 3-4, 94-95 (describing "fissured" workplaces in workers perform services for businesses that do not directly employ them, including subcontracting and franchising).

[3] *See infra (*n.) 13-23.

[4] McNicholas C., Shierzholz H., *Comments Regarding the Department of Labor's Proposed Joint Employer Standard,* in *Economic Policy Institute*, 2019, June 25, (noting that estimate—which attempts to count workers at temp agencies (2.94 million), contract firms (2.02 million), and franchises (8.85 million) is larger than what they argue is Department of Labor's artificially low estimate of contingent workers, but smaller than other estimates), https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/. The percentage was based on the estimated 2018 U.S. civilian labor force of 155.76 million workers. See, U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, https://www.bls.gov/cps/cpsaat01.htm.

[5] *See* McNicholas C., Shierzholz H., n. (4).

[6] *See* Hirsch J. M., *Future Work*, in *University Illinois Law Review*, 2020, 264, 889- 925 (citing Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (noting that trying to apply employee classification law to gig workers is like being "handed a square peg and asked to choose between two round holes")); Hirsch J. M., Seiner J. A., *A Modern Union for the Modern Economy*, in *Fordham Law Review*, 86, 2018, 4, 1727, 1739-1745 (describing challenges faced by gig and other contingent workers, particularly Uber drivers).

[7] Ajunwa I., Crawford K., Schultz J., *Limitless Worker Surveillance*, in *California Law Review*, 2017, 105, 735 (describing workplace monitoring).

to observe the smallest details of a franchisee's operations and require or incentivize the franchisee to implement certain workplace practices. The most prominent example of this trend is McDonald's, perhaps the most well-known franchise in history[8].

In 2014, the General Counsel of the National Labor Relations Board (NLRB) issued a complaint against the McDonald's corporation for violations of the National Labor Relations Act (NLRA).[9] The complaint—which may be the largest claim ever litigated at the NLRB—arose out of "Fight for $15" protests, in which workers and their advocates pushed for a $15 per hour minimum wage for fast-food workers.[10] In reaction to these protests, numerous employees were fired.[11] The General Counsel alleged that the terminations violated the NLRA and sought to hold not only the franchisees—the official employers of the fired employees—but also corporate McDonald's accountable[12]. According to the General Counsel, McDonald's should have been considered a "joint employer" along with the franchisees, and liable for violations of the NLRA, because of the control that it exerts over franchise's working conditions. Among the types of McDonald's alleged control was its use of technology to set franchisees' labor needs based on monitoring of their sales, inventory, labor costs, and employee work performance[13]. Using this information, as well as software and consultants, McDonald's set the number of employees working on a given shift and employees' work schedules; required some duties to performed in specific ways or during specific times; monitored wage reviews; screened applicants; and, on occasion, prevented franchisees from hiring certain applicants.[14] McDonald's challenged some of these allegations, but admitted to others as part of its quality control measures[15]. And McDonald's even seemed to admit that it worked with franchisees in responding to the Fight for $15 protests—actions that led to the General Counsel's unfair labor practice charges[16]. Ultimately, however, following a high-profile political battle and political changes in the NLRB's leadership, a new General Counsel reached a controversial settlement with McDonald's that did not recognize the franchisor as a joint employer; an administrative law judge initially rejected the settlement, but a newly constituted NLRB later reversed that ruling and approved the settlement[17].

[8] Moreover, in 2016, the fast-food industry made up over 45% of U.S. franchises and is the largest contributor to the U.S. Gross Domestic Product. *See* International Franchising Association Education and Research Foundation (IFA), *The Economic Impact of Franchised Business: Volume IV,* 2016, I-8, I-12, https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf.

[9] NLBR *Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and Their Franchisor McDonald's, USA, LLC as Joint Employers*, in *National Labor Relations Board*, 2014, 19, https://www.nlrb.gov/news-outreach/news-story/nlrb-office-of-the-general-counsel-issues-. (consolidated-complaints-against (describing 13 complaints, involving 78 unfair labor practice charges, filed against McDonald's and some of its franchises as a joint employers).

[10] *See* Kanu H. A., *McDonald's Gets a Win in Labor Case Backed by Fight for $15*, in *Bloomberg Law*, 2019, December 12.

[11] *See NLRB General Counsel Issues Consolidated Complaints*, *supra* 9.

[12] *Id.*

[13] *Id.*

[14] Elejalde-Ruiz A., *Why Should McDonald's be a Joint Employer? NLRB Starts to Provide Answers*, in *Chicago Tribune*, 2016, March 10 (noting requirements about staffing levels, when to clean bathrooms, and where to place completed orders).

[15] *Ibid.*

[16] *Ibid.*

[17] *See* Kanu H. A., n. (10).

McDonald's has faced other joint-employer claims alleging the existence of similar types of technology aided control. For instance, in one lawsuit employees claimed that McDonald's labor software system failed to properly credit overtime pay and hindered employees' ability to take state-mandated breaks[18]. To support their claim that McDonald's was a joint employer, the employees cited some of the same evidence used by the NLRB's General Counsel, as well as allegations that its labor system improperly classified work hours and controlled working conditions such as where employees should be positioned during their shifts.[19] The federal Ninth Circuit refused to find that the software was enough to classify McDonald's as an employer, in part out of a fear that such a ruling would expand liability too broadly.[20] Similar claims based on the use of software to control working conditions have failed against major franchise companies, like Domino's Pizza[21]. On the other hand, other technology-based allegations have seen more success, such as a claim that DIRECTV was a joint employer, along with one of its contractors, of a group of technicians[22]. In that case, the employees were allowed to go to trial with their argument that DIRECTV should be considered a statutory employer in part because of the level of control it exerted via its centralized work-assignment system[23]. Although these sorts of employment questions will continue to be fact driven and face hurdles in court[24], the degree to which technology allows a company like McDonald's to control the work of employees will only increase in the future, producing more and stronger claims that such businesses are statutory employers.

As technology has advanced and the economy has become increasingly fissured, the problems with identifying employers has gained added prominence—and controversy. The NLRB General Counsel's case against McDonald's was the focal point and catalyst of many of the debates regarding this topic in recent years. As the General Counsel pursued his claim against McDonald's, he was simultaneously advocating for a broader "joint employment" standard under the NLRA, which the Obama NLRB ultimately adopted. However, after the 2016 election and the resulting changes to the Board's membership, it has reverted back to its earlier, more restrictive standard[25].

The flip-flopping at the NLRB is extreme, but highlights the degree to which joint employment is viewed as an important issue in the American economy and government. Yet it also illustrates the doctrine's lack of coherence and stability. Joint employment standards in the U.S. are complex and lack predictability, which is emblematic of the country's work law more generally. In other words, joint employment is a doctrine that is as fissured as the American economy itself.

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[18] *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019).
[19] *Ibid.* at 1028.
[20] *Ibid.* at 1032 (expressing concern that "the IT specialist, the accountant, and the lawyer would become joint employers").
[21] *In re Domino's Pizza Inc.*, 2018 WL 4757944, at *4 (S.D.N.Y. Sept. 30, 2018) (challenging wage software program, called "PULSE" that led to franchisees paying $1.5 million in settlement). However, the New York State Attorney General's suit against Domino's for violations of state law as a joint employer just survived a summary judgment motion and is currently scheduled for trial. People v. Domino's Pizza, Inc., 2020 WL 2747803 (N.Y. Sup. Ct. May 27, 2020); *see* also Von Wilpert M., *States with Joint Employer Shield Laws are Protecting Wealthy Corporate Franchisers at the Expense of Franchisees and their Workers*, in *Economic Policy Institute, 2018,* 2 (describing New York suit against Domino's), https://files.epi.org/pdf/142015.pdf.
[22] *Hall v. Directv, LLC*, 846 F.3d 757 (4th Cir. 2017).
[23] *Ibid.* at 773 (reversing district court's dismissal of joint-employer claim).
[24] *See infra* (n.) 32.
[25] *See infra* (n.) 68-71.

2. Fissured Work, Fissured Doctrine

A central feature of U.S. labor and employment law is its decentralized nature. Rather than using a unitary labor statute or agency, the American workplace is governed by numerous federal, state, and local laws which, at times, can apply simultaneously to the same dispute[26]. This plays out in the joint-employment context in various ways. Typically, the contours of the employment relationship fall under state common law, usually pursuant to agency law concepts[27]. But because of the diverse set of regulatory bodies, there is less continuity than one might expect. As a result, the joint-employment standard can, and often does, differ depending on the legal claim, type of employment, and possibly geography[28]. Moreover, as McDonald's dispute with the NLRB highlights, even under a single statute and agency, the standard can change over time.

a. The Fragmented System of American Work Laws.

The complex web of joint-employment standards is largely the product of two different aspects of American labor market regulation. The first is the federalist structure of the U.S.—one in which individual states retain a great deal of authority to legislate, including in the workplace. The other is that the U.S., unlike many other countries, does not have a unified workplace regulatory body, either at the federal or state level. Thus, rather than a single labor authority, there is an alphabet soup of agencies that govern various labor and employment laws[29]. As a result, it can be quite difficult to keep track of the various rules and means of enforcement.

Despite the number of laws and enforcing agencies, most major statutes regulating the workplace have ways to hold multiple businesses liable in a given dispute. There are variations in the doctrines or terms used[30], but the most common - and the one that generates the most questions and controversy - is the joint-employment doctrine. This doctrine allows a court or agency to find a joint employer liable for remedying either its own actions or being

[26] *See* Hirsch J. M., *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, in *Alabama Law Review*, 2010, 61, 1025, 1038-49 (describing and criticizing fragmented system of workplace regulation in the U.S.).
[27] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518, 524, 1992 (holding that courts should use common-law employment classification when statute does not specifically define "employee").
[28] *See* Rubinstein M. H., *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, in *University of Pennsylvania Journal of Business Law*, 2012, 14, 605, 647-649 (noting different joint-employment standards under the Family and Medical Leave Act, Rehabilitation Act, and Title VII of the Civil Rights Act).
[29] Some major federal agencies that have the power (although not always exclusive power) to enforce private-sector labor and employment statutes include the Department of Labor, which enforces the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), and several other statutes; Occupational Safety and Health Administration, which enforces the Occupational Safety and Health Act (OSHA); National Labor Relations Board, which enforces the National Labor Relations Act (NLRA); and Equal Employment Opportunity Commission, which enforces Title VII of the Civil Rights Act, Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Equal Pay Act (EPA).
[30] *Lihli Fashions Corp. v. NLRB,* 80 F.3d 743, 748 (2d Cir.1996) (discussing difference between alter ego and single employer doctrines under the NLRA); *Ferrara v. Oakfield Leasing Inc.*, 904 F. Supp. 2d 249, 260-61 (E.D.N.Y. 2012) (discussing single employer doctrine under ERISA as distinct from joint employer doctrine).

jointly and severally liable for its actions and those of the other joint employer[31]. But there is no single standard for finding joint employment. Moreover, there has been much criticism that many of the various joint-employment standards used by courts fail to adequately apportion liability to companies that are involved in work law violations[32].

Because of the multiple work law statutes and governing bodies, joint employment is often measured differently, depending on the claims made in a given case. Moreover, even under a specific statute, the doctrine is not stable. Joint employment, like other employment classification issues, has always been a topic that changes at times based on the political party in charge. But this has been especially true over the past decade as the joint-employer standard became a politically charged and relatively high-profile topic.[33] Adding to these legal problems is the increased adoption of emerging technologies, which has made the joint-employment question ever more relevant[34]. As technology allows businesses, like franchisors, to exert more control over work, defining who the employer is becomes more difficult[35]. At the same time, technology makes the answer to this question increasingly important, as workers' rights become jeopardized by the fissured labor market.

b. The Common-Law Approach to Joint Employment.

There are too many different joint-employer standards in the U.S. to fully examine in this article, but an exploration of some of the primary ones is illustrative. Although there is significant variety among these standards, the starting point for most is the common-law conception of the employment relationship. Because most workplace statutes define the employment relationship in a uniquely unhelpful and circular manner, courts have been left to their own devices to determine when employment exists[36]. Following Supreme Court precedent, which is derived from agency law, courts have long relied upon assorted multi-factor tests to determine whether a business' influence over a worker is sufficient to declare an employment relationship[37]. Yet this common theme glosses over a great deal of ambiguity

[31] Compare *Torres-Negron v. Merck & Co.*, Inc., 488 F.3d 34, 41 No.6 (1st Cir. 2007) (holding, in discrimination case, that "a finding that two companies are an employee's 'joint employers' only affects each employer's liability to the employee for their *own* actions, not for each other's actions"), *with* Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1362–63 (11th Cir. 1994) (finding, in discrimination case, joint employer to be jointly and severally liable based on state agency law).

[32] *See,* e.g., Glynn T. P., *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation,* in *Employee Rights and Employment Policy Journal*, 2011, 5, 1, 201, 212-26 (critiquing various current and proposed standards).

[33] In recent years, business groups have been especially focused on advocating narrow joint-employment standards. *See, e.g.*, U.S. Chamber of Commerce, *Opportunity at Risk: A New Joint-Employment Standard and the Threat to Small Business* (2015), https://www.uschamber.com/sites/default/files/documents/files/joint_employer_standard_final_0.pdf.

[34] *See supra* (n.) 18-23.

[35] In addition, the lack of a single geographic location and enhanced flexibility with gig work and other technology influenced industries makes defining the employment relationship more difficult. *See* Hirsch J. M., Seiner J. A., *A Modern Union for the Modern Economy*, in *Fordham Law Review*, 2018, 86, 4, 1727, 1744.

[36] *See*, e.g., *infra* (n.) 38.

[37] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518, 323, 1992 (establishing common-law "right-to-control" test used for the "circular" definition of the employment relationship in ERISA and most other workplace laws); *see* also *Clackamas Gastroenterology Associates*, *P.C. v. Wells*, 538 U.S. 440, 447, 2003 (holding that Congress' failure to define terms, such as the employment relationship, "often reflects an expectation that courts will look

and churn that occurs when different adjudicators during different time periods try to determine joint employment under different statutory schemes.

When relying up common law, most courts apply a set of factors similar to the ones expressed by the federal Ninth Circuit in *EEOC v. Global Horizons, Inc*, an employment discrimination case under Title VII of the Civil Right Act[38]. These factors - which center on a purported joint employer's "extent of control over the details of the work" of employees - include:

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[39].

Like most courts examining joint employment under Title VII and other statutes, the court in *Global Horizons* refused to apply the broader "economic realities" test that had typically been used for cases under the Fair Labor Standards Act (FLSA)[40]. Yet, there is still a fair amount of variation even under Title VII, as different federal circuits have used a variety of joint-employment standards for the same statute[41]. Moreover, the agency responsible for enforcing Title VII and other federal employment discrimination statutes—the Equal Employment Opportunity Commission (EEOC) - has suggested that it will promulgate a new joint-employer rule that moves away from its current approach which emulates Obama-era standards under the FLSA and NLRA; however, it is unclear what the new standard will look like.[42]

c. State Court Joint-Employer Standards.

Surveying all fifty states is well beyond the scope of this article, but a few examples will help illustrate the variance among states' application of the joint-employer doctrine to their

to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law").

[38] 915 F.3d 631 (9th Cir. 2019) (finding that fruit growers and labor contractor were joint employers of immigrant orchard workers). Title VII shares the same circular definition as most other work law statutes, although it also provides explicit coverage for employment agencies. *See* 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."); *ibid.* § 2000e(c) ("The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.").

[39] *Ibid.* at 638 (quoting *Clackamas*, 538 U.S. at 448, and *Darden*, 503 U.S. at 523-24).

[40] 915 F.3d at 638-39; *see infra* Section II.B.

[41] Some circuits use a similar test as the Ninth Circuit. *See*, e.g., *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214 (3rd Cir. 2015). Other circuits have used a "hybrid" test that merges elements of the common-law test control test and the economic realities test. *See*, e.g., *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 408 No.3 (4th Cir. 2015). At least one circuit uses a version of the economic realities test. *See Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 929 (7th Cir. 2017).

[42] *See* Opfer C., *Employer Group Wants Harmony Among "Joint Employer" Rules*, in *Bloomberg Law*, Nov. 27, 2019.

own work laws. As is the case within the federal system, states use a variety of standards that, while related, can differ in meaningful ways.

California has a well-earned reputation as a state with worker-friendly laws, and its approach to joint employment is no exception. Thus, when enforcing its independent, state work laws, California does not rely on federal standards to find joint employment. For instance, California's wage and hour law, similar to the federal FLSA, defines an employer as one "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person"[43]. Befitting its pro-worker reputation, California will consider a business a joint employer under three different scenarios: under the state labor code, to "employ" means "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law relationship"[44]. The "exercise control" and "common law" options are quite similar, in that they both focus on a business' ability to control how various aspects of how work is performed[45]. In addition, "to suffer or permit" is akin to the broader, FLSA definition and will find joint employment based on a business' "knowledge of and failure to prevent the work from occurring"[46]. Allowing for any of these three standards to establish joint employment sets California apart from virtually all other states, which generally only has a single option.

Other states, like New York, adopt joint-employer standards that largely follow similar federal standards. In other words, a New York state wage and hour claim has traditionally been analyzed under the same framework as a federal wage and hour claim under the FLSA[47]. However, recent federal changes to the FLSA joint-employer standard[48] leaves open the question whether states like New York will follow suit. Indeed, New York has recently sued the federal Department of Labor over its new joint-employer rule and, as part of that suit, successfully argued that it had standing in part because it would have to spend more resources to review the new rule and create either revised or new enforcement guidance[49].

Another set of states take a more restrictive view of joint employment, even carving out explicit exceptions for franchisors. Take, for example, North Carolina. In order to find joint employment, the state typically requires: 1) an "employment contract[] . . . express or implied" that is "between the [employee] and the [purported joint-employer]"; (2) the purported joint-employer "control[ed] the details of the [employee's] work"; and (3) "the work the employee does at the relevant time is essentially the same for both employers"[50]. In

[43] *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1029 (9th Cir. 2019) (quoting California Wage Order No. 5-2001, § 2(H)).
[44] *Ibid.* at 1029-30 (holding McDonald's control was related to quality control).
[45] The main difference appears to be that one definition focuses on control over compensation and working conditions while the other more on how the work is performed. *See ibid.* at 1029-30, 1032. Moreover, "control over wage, hours, and working conditions" refers to day-to-day control over working conditions, as opposed to measures that impact work in order to maintain quality control. *See Martinez v. Combs*, 231 P.3d 259, 277-79 (Cal. 2010).
[46] *Curry v. Equilon Enterprises*, LLC, 233 Cal. Rptr. 3d 295, 311 (Cal. App. 2018).
[47] *See*, e.g., *In re Domino's Pizza Inc.*, 2018 WL 4757944, at *4 (S.D.N.Y. Sept. 30, 2018) (applying federal Second Circuit's FLSA standard to New York Labor Law claim; *People v. Domino's Pizza*, Inc., 2020 WL 2747803, at *11 (N.Y. Sup. Ct. May 27, 2020) (same).
[48] *See infra* Section II.B.
[49] *New York v. Scalia*, -- F. Supp.3d --, 2020 WL 2857207, at *11 (S.D.N.Y. June 1, 2020).
[50] *See McGuine v. Nat'l Copier Logistics, LLC*, 841 S.E.2d 333, 339-40 (N.C. Ct. App. 2020) (discussing workers' compensation claim).

other words, "[j]oint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers," and the employee's service for each employer is the same as, or is closely related to, the employee's service for the other[51]. These requirements, especially the demand for simultaneous and closely related service for both employers, is quite narrow in comparison to states like California and New York. In addition, a North Carolina statute enacted in 2017 provides that franchisors cannot be considered the employer of a franchisee's employees "for any purposes"[52]—a remarkably broad exception that gives franchisors carte blanche to control franchisee employees' working conditions without any liability under state law.

This brief survey shows a fairly diverse, albeit related set of federal and state joint-employer standards. This diversity is somewhat surprising given that the anchor for most workplace laws is supposed to be the common-law employment relationship. But the American federalist system, combined with its lack of centralized workplace regulations, have led to this fragmented set of standards. A set of standards that makes it difficult for workers and employers, especially those who cross state lines, to understand the exact contours of their working relationships and the legal consequences that flow from them. Further complicating matters is the fact that joint employment has become more of a political issue in recent years. The result is further instability, even under a given law governed by a single agency.

3. Politics and Changing Joint-Employment Standards.

The joint-employer doctrine has been quite controversial over the last several years, garnering more political attention then it perhaps ever has. Much of that controversy was spurred by the NLRB General Counsel's attempt to hold McDonald's liable for retaliation against franchisee employees for their participation in Fight for $15 protests[53]. What followed included political arguments, ethics complaints, and attempts by politicians and agency officials to protect (depending on their political affiliation) either workers or businesses, especially franchisors. By way of example, as of 2018, eighteen states had enacted statutes that expressly prevented employees of franchisees from being considered employees of a franchisor—many of which were enacted recently[54].

The result of this turmoil is a flip-flopping of legal standards that has produced a lack of clarity for employers and employees alike. As described in the previous section, the varying joint-employer standards are already bewildering; the addition of politically motivated changes creates even more confusion, as no one can be sure what rules will apply in the future. This level of uncertainty is always problematic[55], but it is particularly troubling at a

[51] *Ibidd.* at 338 (N.C. Ct. App. 2020) (quoting *Whicker v. Compass Grp. USA, Inc.*, 784 S.E.2d 564, 569 (N.C. Ct. App. 2016)).
[52] N.C. Gen. Stat. § 95-25.24A ("Neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purposes ...").
[53] *See supra* (n.) 9, 17.
[54] *See* Von Wilpert, n. (21), at 3; 52.
[55] *See* Hirsch J. M., (n.) 26.

time when technology is making it easier for multiple businesses to influence the work of a given group of employees. To illustrate this dynamic, the following sections provide a brief description of the political back-and-forth that in recent years has changed the joint-employer standard under two key American work laws-the NLRA and FLSA.

a. Changing Joint Employment Standards Under Federal Labor Law.

Like most U.S. labor and employment laws, the statutory definition of "employer" under the NLRA is completely circular and utterly unhelpful to anyone trying to classify a business[56]. Thus, the NLRA is one of the laws that have traditionally used common-law agency principles to classify employers[57]. These principles are typically analyzed through a multi-factored "right-to-control" test[58].

For decades, the NLRB's common-law approach to joint employment was stable, at least on paper[59]. Eventually, however, complaints arose that the NLRB, while not officially changing its approach, had gradually adopted a standard that improperly moved away from the common law by requiring a joint employer to exert active, direct control over employees' work rather than a mere right to control[60]. This led the Obama-era NLRB, pushed by the General Counsel pursuing charges against McDonald's, to adopt a new standard that allow for indirect and more sporadic control[61]. Because this change was lumped together with the backlash against the McDonald's case—largely by those seeking to protect franchisors—joint employment under the NLRA became a highly political issue, with many arguing that the new standard jeopardized the entire franchise business model[62].

Much of the disagreement surrounding the NLRA's joint-employment standard revolves around the degree to which a joint employer's influence over working conditions is direct and active, as opposed to being more indirect or sporadic. The Obama Board's justification for its new joint employment standard in the 2015 case *Browning-Ferris Industries of California, Inc.* was rooted in its belief that prior Boards had improperly required joint employers to retain active and direct control over workers[63]. Instead, the Board concluded that joint employment would be found pursuant to the common-law test's focus on the *right* to control

[56] 29 U.S.C. § 152(2) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly ...").
[57] *See supra* Section I.B.
[58] *See supra* (n.) 37.
[59] *See*, e.g., *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324 (1984); *TLI, Inc.*, 271 N.L.R.B. 798, 1984.
[60] Compare *Browning-Ferris, Indus. of California, Inc.,* 362, in *National labor relation board* 1599, 1606-08, 2015 (arguing that new rule returned joint employment to original standard), with *Hy-Brand Industrial Contractors, Ltd.*, 365, N.L.R.B., 156, slip op. at 5-8, 2017 (arguing that *Browning-Ferris* was a new, improper standard), *vacated* 366, N.L.R.B., No. 26, 2018.
[61] *Browning-Ferris*, 362 N.L.R.B. at 1613; NLRB *General Counsel Issues Consolidated Complaints*, *supra* note 9.
[62] *See*, e.g., *Save Local Business Act*, *H.R.* 3441, 115th Cong. § 1, 2017 (would reverse *Browning-Ferris*); Carvell S. A., Sherwyn D., *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, in American University Business Law Review, 5, 2015, 29 (predicting that expansion of joint employment under *Browning-Ferris* would lead franchisors to either abandon franchises or enter into franchise agreements only with larger franchisees); Gibson K., *Should McDonald's be Responsible for How its Franchises Treat Workers?*, in *Moneywatch*, Mar. 11, 2016 (noting argument that broad joint-employment standard could "undermine the entire franchise concept").
[63] 362 N.L.R.B., at 1608-09.

working conditions[64]. Under *Browning-Ferris*, therefore, joint employment would exist if two entities "share or codetermine those matters governing the essential terms and conditions of employment"[65]. A joint employer needed only to "possess the authority to control employees' terms and conditions of employment"—it did not, as was previously the case, need to actually "exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner"[66]. Thus, a business could be a joint employer if it possessed either a "direct or indirect" right to control work[67].

After the Trump Board was installed, the joint-employment standard was one of its early targets. But its attempts to change the standard did not go smoothly. In 2017, the NLRB attempted to reverse the *Browning-Ferris* standard in *Hy-Brand Industrial Contractors, Ltd.*[68] That case was later vacated because of a conflict of interest with one of the Board members[69], leading the Board to pursue the same aim via formal rulemaking instead[70]. The new standard, promulgated in 2020, formalized the pre-*Browning-Ferris* analysis by requiring a joint employer to possess actual control over working conditions. In particular, a joint employer must wield actual control that has a "direct and immediate" impact on employees' terms and conditions of employment, as opposed to control that is only "limited and routine"[71]. This rule is too recent to gauge how it will be applied in practice—and we may not get the chance if there is a change in the occupant of the White House after the 2020 election, for it is a safe bet that a new NLRB would change the rule yet again to something similar to the *Browning-Ferris* standard.

The NLRA's recent experience with joint employment shows a significant amount of change in a short period of time, with a possibility of still more change in the near future. The Obama Board's move to allowing for indirect and sporadic control in *Browning-Ferris* promised to classify many more businesses as joint employers. The backlash from those businesses and their supporters resulted in a reversal under the Trump Board, narrowing the joint employment standard by requiring actual, direct, and regular control. No matter what one thinks the standard should be, this brief history exhibits a significant amount of instability—especially for workers and businesses that operate in the gray areas of this doctrine—that makes an already confusing legal law doctrine even more so.

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[64] *Ibid.* at 1614.
[65] *Ibid.* at 1613-14.
[66] *Ibid.*
[67] *Ibid.* at 1613 (stating that control over "terms and conditions of employment" include things such as "hiring, firing, discipline, supervision, and direction," as well as "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance").
[68] 365 N.L.R.B., No. 156, 2017.
[69] *See Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B., 26, 2018 (vacating decision because one of the participating Board Members had been a partner in a law firm that presented parties in the *Browning-Ferris* case that *Hy-Brand* was reversing, while *Browning-Ferris* was still pending on appeal); Dubé L. E., Opfer C., *Labor Board Wants to Send Joint Employer Case Back to D.C. Cir.*, in *BNA Daily Lab. Rep.*, Mar. 2, 2018.
[70] On February 26, 2020 the N.L.R.B. finalized its rule which, effective April 27, 2020, incorporated the *Hy-Brand* standard for joint employment under the NLRA. 29 C.F.R. § 103.40.
[71] *Hy-Brand*, slip op. at 34. For a more detailed discussion of these changes and the joint-employer standard under the NLRA, *see Twenty-First Century Employers*, in *The Cambridge Handbook of U.S. Labor Law: Reviving American Labor for a 21st Century Economy*, 2019.

b. Changing Joint Employment Standards Under Federal Wage and Hour Law.

The FLSA is one of the most basic workplace laws in the U.S., mandating a minimum wage and overtime premiums, while also banning child labor. Its approach to joint employment has seen recent changes similar to the NLRA. Or at least attempted changes. Because enforcement of the FLSA is not as agency driven as the NLRA, courts have a more central role in setting joint employment standards. Thus, it is unclear where the law now stands.

Like in other contexts, there are a variety of scenarios under which two or more entities might be considered joint employers under the FLSA. One situation occurs when an employee engages in separate hours and work for two or more employers[72]. If the employers are independent and the work for each is "disassociated" from the other, they will not be joint employers[73]. However, if the employers' and employees' work are "sufficiently associated," based on a set of factors, then they employees will be considered joint employers[74].

The other main situation—one that has produced the most litigation and confusion—occurs when one entity is a formal or clear employer, but another entity simultaneously benefits from the employees' work[75]. An example of this situation is when employees work directly for a subcontractor by doing work that also benefits a general contractor. How to determine whether the other entity (like the hypothetical general contractor) should be considered a joint employer has undergone significant changes recently.

Traditionally under the FLSA, determining joint employment in a situation where an employee provides work that benefits two or more entities centers on a multi-factored test. This test—a variant of the "economic realities" test for FLSA employee classifications—is similar to the common-law right-to-control test, but casts a wider net. This difference is the result of statutory language in the FLSA that, because of the statute's remedial purposes, intends to cover a broader range of work relationships[76]. Courts have adopted different sets of factors in FLSA litigation, but one of the leading cases is instructive, as its incorporates most of the salient factors that may be helpful in determining whether a business that benefits from an employee's work is a joint employer. This test looks to whether the putative joint employer:

(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;
(4) maintained employment records;

72 29 C.F.R. § 791.2(e)(1) (2020)
73 *Ibid.* § 791.2(e)(2).
74 *Ibid.* (describing factors pointing to "sufficiently associated" joint employers if: "(i) There is an arrangement between them to share the employee's services; (ii) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (iii) They 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.").
75 29 C.F.R. §791.2(a)(1) (2020).
76 *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67 (2d Cir. 2003). The FLSA defines an employer as one who "suffer[s] or permit[s]" an individual to work. 29 U.S.C § 203(g); *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992) (noting that the FLSA's definition of the employment relationship is broader in scope that traditional agency law); *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 733 (1947).

(5) whether the premises and equipment of the putative joint employer were used for the employee's work;

(6) whether the primary (or official) employer had a business that could or did shift as a unit from one putative joint employer to another;

(7) the extent to which employees performed a discrete line-job that was integral to the putative joint employer's process of production;

(8) whether responsibility under the contracts between the primary employer and putative joint employer could pass from one subcontractor to another without material changes;

(9) the degree to which the putative joint employer or its agents supervised employees' work; and

(10) whether employees' worked exclusively or predominantly for the putative joint employer[77].

Most other federal courts use some of these factors, including the first four so-called *Bonnette* factors, although other courts employ an entirely different set of factors to find joint employment under the FLSA[78].

Adding to the confusion is the role of the federal Department of Labor, which has authority to enact rules enforcing the FLSA. Courts often defer to these rules, but need not - and, at times, do not - rubber stamp them. In 2020, the Department of Labor enacted a new rule that would supplant its preceding joint employment factors[79]. The rule requires an employee to work "directly or indirectly in the interest of" the joint employer[80]. To determine whether this interest exists, the new rule supplants the factors noted above with the more limited *Bonnette* factors, asking whether the putative joint employer:

(1) hires or fires the employee;

(2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

(3) determines the employee's rate and method of payment; and

(4) maintains the employee's employment records[81].

According to the new rule, a joint employer must actually engage in such actions, either directly or indirectly—the mere ability to undertake an action will not be sufficient[82].

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[77] *Zheng*, 355 F.3d at 72.

[78] *See*, e.g., *Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125, 141-42 (4th Cir. 2017) (criticizing standards based on common-law and putative joint employer's relationship with employees and using instead six-factor test focused on relationship between putative joint employers); *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983) (using a four-factor, common-law based test adopted in new Department of Labor rule and used as part of *Zheng* test).

[79] An additional confusion is that the new rule did not change the joint employer test under the Family and Medical Leave Act (FMLA), which uses the same remedial provisions as the FLSA and has traditionally used the same definitional standards, such as joint employer. *See, U.S. Dep't of Labor, Joint Employer Status under the Fair Labor Standards Act*, 85 Fed. Reg. 2820, 2828, No. 55, Jan. 16, 2020; see, e.g., *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.,* 536 F.3d 640, 644 (7th Cir. 2008).

[80] 29 C.F.R. § 791.2(a)(1) (2020) (citing 29 U.S.C. § 203(d)).

[81] *Ibid.* The Department of Labor also states that "Additional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." *Ibid.* § 791.2(b).

[82] *Ibid.* § 791(a)(3)(1).

Although some courts have used these factors or some variation of them previously[83], limiting joint employment to these four factors has been criticized for being improperly narrow. Of particular concern is the sole focuses on a business' formal right to control employees' work, rather than the economic realities of a work relationship that typifies FLSA coverage[84]. But that facet of the new rule standard seems to have been the point, as the Department of Labor's action intentionally narrowed the scope of joint employment, including an express prohibition against considering employees' economic dependency on a putative joint employer, which is a key factor in the traditional economic realities test[85]. But it is unclear to what the extent courts will adopt this new rule, as some may find it inconsistent with the FLSA's definition of employer[86] or Supreme Court precedent[87]. Indeed, several states have sued to block the rule, arguing that it conflicts with the FLSA's broad statutory scope of employment[88].

4. Conclusion.

Identifying an employer in the U.S. is often no easy task. It requires navigating the fragmented and shifting system of joint-employer standards that may apply in a given case, then applying the appropriate standard to an increasingly fissured workplace. This trend is exacerbated by emerging technology, which makes it easier for businesses to exert control over the work of individuals who are officially employed by others.

Barring any move to centralize work laws and their enforcement in the U.S.,[89] many employers and workers will continue to grapple with uncertainty whether they are in an employment relationship and, thus, whether various work laws apply. Moreover, if joint employment continues to be a politically charged issue, this lack of clarity will only get worse. The result is that employers will need to be careful about exerting too much control over workers with whom it does not want an employment relationship, but even such care may not guarantee a certain outcome. For workers, the situation is more dire. Most have no control over their work conditions and little, if any, knowledge of the joint-employment doctrine. Thus, their ability to exercise statutory workplace rights will typically be at the mercy of employers, agencies, and courts that are themselves navigating murky waters.

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[83] *See Zheng*, 355 F.3d at 66-68 (discussing factors as one of the two tests the Second Circuit had used in FLSA joint-employment cases)

[84] *Ibid.* at 69-70; *see also* Edmonds v. Amazon.com, Inc., 2020 WL 1875533, at *4 (W.D. Wash. Apr. 15, 2020) (noting that the Ninth Circuit uses this four-factor test as a baseline, but also uses additional, economic realities, factors under other circumstances, such as when one company contracts with another for work).

[85] 29 C.F.R. § 791.2(c) (2020).

[86] *See*, e.g., *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (adopting employee-friendly joint-employment standard); Penn B., *New Joint Employment Rule Hinges on Reception in Court*, in *Bloomberg Law*, Jan. 13, 2020.

[87] *See*, *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947) (considering factors such as whether the employees did specialty work, whether responsibility for the contracts passed from one employee to another, the premises and equipment used for the work, and whether there was a business organization that could shift the work from one putative joint employment to another).

[88] *New York v. Scalia*, S.D.N.Y., No. 20-01689 (2020).

[89] *See,* Hirsch J. M., (n.) 26 (advocating nationalizing labor and employment law in the U.S.).

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