



NORTHEASTERN UNIVERSITY  
**LAW JOURNAL**

**Employed or Just Working?:  
Rethinking Employment Relationships in the  
Global Economy**

VOLUME 6, NO. 2    SUMMER 2014

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Northeastern University School of Law  
400 Huntington Avenue  
Boston, Massachusetts 02115

Cite as 6 NE. U. L.J. \_\_\_\_ (2014).

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## Editors' Introduction

It is with a genuine sense of pride and accomplishment that the Northeastern University Law Journal celebrates its sixth year of publication with this, our eighth issue, entitled *Employed or Just Working?: Rethinking Employment Relationships in the Global Economy*. When the Journal was originally founded in 2007, it was the result of the remarkable vision and herculean efforts of a small group of inspired students who recognized the need for Northeastern's hallmark social justice and active-lawyering perspective in legal academia. Since that time, the Journal has evolved into a vibrant and active group within the Northeastern University School of Law community. We have expanded our staff size, increased the number of annual publications, and cultivated a tradition of partnering with members of Northeastern's exceptional faculty and on-campus organizations to co-host symposia and events, in addition to sponsoring an annual symposium of our own. In the summer of 2013, the Journal sprang into the digital age with the launch of *Extra Legal*, an online platform dedicated to publishing concise legal commentaries on a variety of emerging legal issues. We are presently publishing works by current and recently-graduated Northeastern University School of Law students, and are looking forward to opening up publication opportunities to faculty, staff, and the greater public in the near future.

Much has changed over the past several years, but what has remained constant is the Journal's unyielding dedication to exploring social justice topics by highlighting differing viewpoints of practitioners and academics within a wide range of fields. We take great pride in bringing together esteemed practitioners, academics, faculty, and our fellow law students to think critically about some of the most pressing legal issues of our day. Given the immense pressures to both find and maintain quality employment that is personally, professionally, and financially fulfilling in today's global economy, we believe that this issue is no exception. The articles contained herein represent a continuation of a dialogue that began during the symposium we hosted in March 2013. The discussions and conversations spawned by that event explored the limits of traditional employment relations and examined how state and federal law determines the legal status of workers and employees.

As you will see here, sometimes it really is all in the name; the legal classifications of “employee,” “intern,” and “independent contractor” confer varying degrees of legal benefits, and sadly, force many outside the protections of our legal system entirely.

As we come to the close of another academic year, the Editorial Board would like to take this opportunity to thank those within the Northeastern community who have supported, influenced, and contributed to the continued development of the Journal. First and foremost, we would like to extend our sincere thanks to both Kimberly Webster, who first advanced the idea of devoting this publication to the topic of employee misclassification and whose student note is featured in this issue, and to Professor Karl Klare, who played an instrumental role in making our March 2013 symposium the resounding success that it was. We are also endlessly appreciative of the dedication and hard work of our ever-growing staff. Journal Staffers and Senior Staffers have proven time and again that they can and will rise to the occasion. Similarly, we would be remiss if we did not acknowledge our wonderful Faculty Advisors, Professors Michael Meltsner and Martha Davis, whose assistance and guidance throughout this past year was immensely valuable. Lastly, we would like to thank Dean Jeremy Paul, Associate Dean Wendy Parmet, and the entire faculty and staff of Northeastern University School of Law for their steadfast support.

Although our tenure has come to an end, we have the utmost confidence in the vision, leadership, and dedication of our successors, and we look with eager anticipation to the Journal’s continued evolution in the years to come.

Editorial Board  
Northeastern University Law Journal  
Summer 2014



## Employment Law and the Evolving Organization of Work – A Commentary

Emily A. Spieler

A worker on the night shift in a fish processing plant in New Bedford, Massachusetts, is caught and killed in a shucking machine. He worked for a staffing agency that provided “manpower” to the plant. Who is responsible?<sup>1</sup> Was he trained, and if so, by whom? Should the staffing agency or the processing plant be providing his family the required workers’ compensation benefits?

People who sew garments do not receive minimum wage and overtime. They work for a contractor to the primary garment manufacturer; the manufacturer routinely outsources the work to their employer. When they bring a lawsuit for unpaid wages, they find that their “employer” has vanished, cannot be served, and in any event is without assets. Can they collect their wages from the primary garment manufacturer?<sup>2</sup>

An intern works for a film production company and is unpaid. After concluding that he was due wages under federal law, he wants to sue. The film production company has shut down, but the parent companies, all the way up to Fox Searchlight, are still in business. Should he have been receiving compensation for his work? If so, are the parent companies responsible for any wages due and owing?<sup>3</sup>

A volunteer for her local fire and rescue squad is sexually harassed by the dispatcher, an employee of the town. Does-

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1 Maria Sacchetti and Catalina Gaitan, *Man Dies in Shucking Machine Accident at New Bedford Seafood Plant*, BOSTON GLOBE, Jan. 17, 2014, <http://www.boston.com/news/local/massachusetts/2014/01/17/man-dies-shucking-machine-accident-new-bedford-seafood-plant/UTUjxcg2m1N6e2sIDD5UxL/story.html>.

2 See *Zheng v. Liberty Apparel Inc.*, 355 F.3d 61 (2d Cir. 2003) (remanding for jury trial, stating legal standard), 617 F.3d 182 (2d Cir. 2010) (affirming jury verdict for plaintiffs), *cert. denied*, 131 S.Ct. 2879 (2011). This case is the springboard for James Reif’s discussion of contracting-out and responsible employers under the Fair Labor Standards Act in this symposium. See James Reif, ‘To Suffer or Permit to Work’: Did Congress and State Legislatures Say What They Meant and Mean What They Said?, 6 NE. U. L.J. 347 (2014).

3 See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed* No. 13-4478-CV (2d Cir.) (refusing to grant summary judgment to the tiered but integrated employers). Glatt awaits further decision as this journal issue goes to print.

the town or the dispatcher have any liability for the serious harassment?<sup>4</sup>

A new college graduate can't find a job and signs up as a Turker for Amazon Mechanical Turk, earning \$0.05 per human intelligence task and, in total, close to \$10,000 per year.<sup>5</sup> Is this relationship entirely outside any employment regulations?

Four hundred foreign students who had paid substantial sums to participate in the J-1 visa program are assigned to work in the manufacture of Hershey's chocolate. They work long hours at heavy manual work. It turns out that they were hired by a staffing subcontractor to work for a contractor that had been hired by Hershey to produce the chocolate. Is Hershey responsible for their unpaid wages? And who is responsible when another temporary worker falls into the 120-degree vat of chocolate and is killed?<sup>6</sup>

Delivery truck drivers for FedEx are required to follow FedEx rules, wear FedEx logos, and follow FedEx routes, but must supply their own trucks and may use the trucks (if the FedEx logo is covered) for personal and other business. Are they misclassified as independent contractors by FedEx?<sup>7</sup>

\* \* \* \* \*

The authors in this issue of the Northeastern University Law Journal grapple with questions like these. In doing so, they expose

4 See *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill. Dec. 4, 2012), discussed in this symposium. See Lisa Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311 (2014) at n.171 and accompanying text. In *Volling*, the issue was whether members of a volunteer rescue squad could sue the relevant service organizations for sexual harassment, discrimination and retaliation.

5 See Bernt, *supra* note 4, for a discussion of Amazon Mechanical Turk (AMT) and Turkers.

6 DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT*, 113-117 (2014). See also Dave Jamieson, *Hershey Student Guest Workers Win \$200,000 In Back Pay After Claims Of Abusive Conditions*, HUFFINGTON POST, Nov. 14, 2012, [http://www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers\\_n\\_2131914.html](http://www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers_n_2131914.html) ("Foreign students who claimed they toiled under abusive conditions at a Pennsylvania plant handling Hershey candies last year have won over \$200,000 in back wages in a settlement struck with the U.S. Labor Department.").

7 See, e.g., *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1 (Cal. Ct. App. 2007); *Schwann v. FedEx Ground Package Sys., Inc.*, 2014 WL 496882 (D. Mass. Feb. 7, 2014); *Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006 (E.D. Mo. 2013).

the inadequacies of the current – and past – legal regime governing employment.

This discussion must be seen in historical context, looking back over the past 100 years. Continuous legal developments in work law in the 20th century chipped away at the 19th century presumption of the at-will doctrine. Workers' rights were defined and redefined as courts and legislatures responded to complex social, political and economic forces. This history is, of course, well known. It is also worth remembering, however, that the application of 20th century legal developments to the realities of the marginal or nonstandard workforce has always been problematic.

In the post-*Lochner* depression era, in the face of economic crisis, a shared political sense emerged: that the engine of the economy, and therefore the labor market, needed legal intervention. Powerful political and economic forces created a sufficient consensus to allow Congress to enact federal legislation providing new protections for workers. During this period, the National Labor Relations Act<sup>8</sup> (giving workers legal protection to engage in concerted activity and organize unions), the Fair Labor Standards Act<sup>9</sup> (setting minimum wage and overtime requirements), and the Social Security Act<sup>10</sup> (establishing old age pensions and unemployment insurance) were passed – and upheld.<sup>11</sup>

Later, the era of civil rights activism gave rise to developments in employment law that embraced basic notions of dignity, rejecting discrimination based on status, and resulting in the passage of the Civil Rights Act of 1964, including Title VII.<sup>12</sup> This era persisted, so that disability rights under the Americans with Disability Act<sup>13</sup> followed the 'civil rights model' of the earlier Title VII and Age Discrimination in Employment Act.<sup>14</sup> Later amendments of these acts – including the Pregnancy Discrimination Act

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8 29 U.S.C. §§ 151-169 (2012).

9 29 U.S.C. §§ 201-219 (2006).

10 42 U.S.C. §§ 402-403, 701-705 (2012).

11 *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the constitutionality of the Social Security Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

12 42 U.S.C. 2000e (2000).

13 42 U.S.C. §§ 12101-12213 (2000).

14 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).



of 1976,<sup>15</sup> the Civil Rights Act of 1991,<sup>16</sup> the Lilly Ledbetter Fair Pay Act of 2009,<sup>17</sup> and the American Disabilities Act Amendments of 2008<sup>18</sup> all were designed to correct excessively restrictive judicial interpretations of these statutes. Similar legislation was passed in most states, creating a web of protections against discriminatory treatment of workers.

At the turn of the 19th to 20th century, occupational health legislation was only upheld when groups viewed as particularly vulnerable were at risk.<sup>19</sup> In fact, until the late 1960s, safety was largely shelved as a legislative issue – addressed primarily through state-based legislation that created workers’ compensation programs. It was not until the Farmington mine disaster in 1968 – and the activism of the period – that the Coal Mine Health and Safety Act of 1969<sup>20</sup> and the Occupational Safety and Health Act of 1970<sup>21</sup> were passed.

Starting in the 1970s, there was an interesting emergence of concern regarding the status of at-will employees when their claims collided with matters of public concern – resulting in various anti-retaliation provisions both under the common law and under a myriad of whistleblower statutes.<sup>22</sup> This coincided with

15 42 U.S.C. § 2000e(k) (2000).

16 Pub. L. No. 102-166, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C.).

17 Pub. L. No. 111-2, 123 Stat. 5 (2009).

18 Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-13 (2009)).

19 *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon restriction on the number of hours per day a woman may work based on the state’s interest in protecting the health of women); *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a Utah restriction on the number of working hours per day for miners and smelters based on dangerous conditions of the professions). *Cf. Lochner v. New York*, 198 U.S. 45 (1905) (striking a New York law limiting the number of working hours for bakers and rejecting the argument that such a restriction was necessary to protect the health of bakers).

20 Coal Mine Health and Safety, Pub. L. No. 91-173, 83 Stat. 742 (1969), later amended as the Mine Safety and Health Act of 1977, Pub. L. No. 91-173, 83 Stat. 742 (codified as amended at 30 U.S.C. §§ 801-962 (1977)).

21 Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (2006)).

22 *See, e.g.*, U.S. Dep’t of Labor, Office of the Whistleblower Protection Program, WHISTLEBLOWERS.GOV, [http://www.whistleblowers.gov/statutes\\_page.html](http://www.whistleblowers.gov/statutes_page.html) (last visited July 29, 2014) (listing twenty-two federal whistleblower statutes); National Conference of State Legislatures, State Whistleblower laws, NCSL.ORG, <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (last modified Nov. 2010) (listing state whistleblower

the expanding scholarly literature attacking rigid adherence to the employment-at-will doctrine.<sup>23</sup> Although the California courts had carved out a common law public policy exception in 1959,<sup>24</sup> it was not until the 1970s that other courts showed a willingness to follow California's lead. In 1973, the Indiana Supreme Court held that it was a violation of public policy to discharge an employee for filing for workers' compensation benefits.<sup>25</sup> After this, these cases spread like wildfire – much as the adoption of the at-will doctrine had spread 100 years earlier – to state after state, resulting in near unanimity that there must be some exception to the unequivocal application of the at-will doctrine in these situations. During this same period, courts experimented with implied contract theories to expand protection of at-will employees who were deemed to legitimately count on promises made to them.<sup>26</sup>

Underlying all of these 20th century legal developments was an assumption that the employee-employer relationship was amenable to simple analysis and definition: each employee worked for an identifiable employer, with some sense that the relationship had sufficient permanence to be identified – and regulated. Reflecting this – and as noted by both James Reif and Lisa Bernt in their articles in this symposium – *none* of the federal statutes ever attempted to include even a reasonably useful definition of the key terms of

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- provisions); National Whistleblower's Center, WHISTLEBLOWERS.ORG, [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=33&Itemid=62](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=33&Itemid=62) (last visited July 29, 2014) (describing additional federal statutes); Government Accountability Project, WHISTLEBLOWERS.ORG, <http://www.whistleblower.org/> (last visited July 29, 2014) (describing additional federal statutes).
- 23 See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1421–27 (1967) (providing an early scholarly argument that the law of torts offers an appropriate judicial means of protecting employees from abusive termination); Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992); Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).
- 24 *Petermann v. Int'l Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959).
- 25 *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).
- 26 See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985) (implied contract based on unilaterally issued handbook); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981), *rev'd on other grounds*, 203 Cal. App. 3d 743 (Cal. Ct. App. 1988) (implied contract based on oral promises).

“employee” or “employer.”<sup>27</sup> In fact, the statutory definitions are tautological: employees are individuals employed by employers; employers are entities that employ employees.

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27 See, e.g., National Labor Relations Act, 29 U.S.C. 152(2)-(3) (2011) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly . . . . The term ‘employee’ shall include any employee . . . .”); Fair Labor Standards Act, 29 U.S.C. § 203(d)-(e) (2006) (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . [T]he term ‘employee’ means any individual employed by an employer . . . .”); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)-(f) (2010) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term ‘employee’ means an individual employed by an employer . . . .”); Age Discrimination in Employment Act, 29 U.S.C. § 630(b)-(f) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term ‘employee’ means an individual employed by any employer . . . .”); Occupational Safety and Health Act, 29 U.S.C. § 652(5)-(6) (2010) (“The term ‘employer’ means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State. . . . The term ‘employee’ means an employee of an employer who is employed in a business of his employer which affects commerce.”); Employee Retirement Income Security Act, 29 U.S.C. § 1002(5)-(6) (2011) (“The term ‘employer’ means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such a capacity. . . . The term ‘employee’ means any individual employed by an employer.”); Americans with Disabilities Act, 42 U.S.C. § 12111(4)-(5) (2012) (“The term ‘employee’ means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States. . . . The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . .). Even workers’ compensation statutes fail to provide clear definitions. In Massachusetts, an employer is defined as follows: “‘Employer’, an individual, partnership, association, corporation or other legal entity, or any two or more of the foregoing engaged in a joint enterprise . . . employing employees subject to this chapter.” MASS. GEN. LAWS ch. 152, § 1(5). An employee under this section is “every person in the service of another under any contract of hire, express or implied, oral or written . . . .” MASS. GEN. LAWS ch. 152 § 1(4). Only the Fair Labor Standards Act provides guidance regarding the targeted relationship, defining “employ” as “includes to suffer or permit to work.” 29 U.S.C. § 203(g).

These definitions suggest that Congress and others thought, “We’ll know one when we see one.”

Perhaps not surprisingly, this failure of definitional structure turned out to be problematic: even during the period when traditional employment relationships clearly dominated everyone’s thinking, alternative arrangements were common, and often – at least from the worker’s viewpoint – precarious.<sup>28</sup> This problem has therefore been lurking, continuously, beneath our assumptions that workers were in traditional work with permanent, full-time relationships with identifiable employers. It is, as Bernt points out, a regulatory black hole.<sup>29</sup>

This black hole in regulatory structures presents special challenges for the courts. Examples of definitional boundary-drawing dilemmas started to appear in cases and the legal literature soon after the first direct regulatory interventions in the employment relationship in the early 20th century – and have continued to this day. Before the sweeping federal legislative enactments, American Law Report annotations summarized case law that addressed questions regarding the proper scope of independent contractors and joint employer liability in the workers’ compensation systems – in part to determine the extent of the immunity from tort liability that was provided by these new laws.<sup>30</sup> After the constitutionality of the New Deal legislation was upheld, the U.S. Supreme Court had to confront the definitional problems inherent in the

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28 WEIL, *supra* note 6, at 99–101. This notion of “traditional” employment relationships, reiterated in casebooks now for the education of our next generation of law students, was always a misnomer. In fact, there was a relatively brief period in the 20th century when the majority of workers in the U.S. had the benefit of stable work relationships in unionized settings with guaranteed wages, benefits and job security. This “traditional” arrangement began in the late 1940s and persisted until the late 1970s or 1980s, when it began to erode – a mere 30 to 40 years. There were, also, always large numbers of workers who never benefited from these arrangements. *See id.* at 39–41.

29 Bernt, *supra* note 4, at 322, quoting Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 165 (2003).

30 *See* G.S.G., Annotation, *Workmen’s Compensation: One Employed Concurrently or Jointly by Several*, 30 A.L.R. 1000 (1924), updated by E.W.H., Annotation, *Workmen’s Compensation: One Employed Concurrently or Jointly by Several*, 58 A.L.R. 1395 (1929). *See also* E.G. Knight, Annotation, *Construction and Effect of Specific Provisions of Workmen’s Compensation Acts in Relation to Employees of Independent Contractors or Subcontractors*, 105 A.L.R. FED. 580 (1936).

new employment and labor laws: under the Wagner Act in 1944;<sup>31</sup> under the Social Security Act in 1948;<sup>32</sup> under FLSA many times, including in 1961;<sup>33</sup> under ERISA in 1992,<sup>34</sup> and, later, under the anti-discrimination statutes.<sup>35</sup> The court has itself noted the “problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance,”<sup>36</sup> and that the definitional structure offered by the statutes is “completely circular and explains nothing.”<sup>37</sup> Thus, the courts have been drawn to old common law rules, looking to pre-industrial master-servant relationships and the common law,<sup>38</sup> to “economic realities”<sup>39</sup> and issues of “control,”<sup>40</sup> and to

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31 NLRB v. Hearst Publ'ns. Inc., 322 U.S. 111 (1944) (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” *Id.* at 121).

32 United States v. Silk, 331 U.S. 704 (1947).

33 Goldberg v. Whitaker House Co-Op., Inc., 366 U.S. 28 (1961).

34 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) [hereinafter *Darden*].

35 See Clackamas Gastroenterology Assoc., P. C. v. Wells, 538 U.S. 440 (2003) (interpreting the Americans with Disabilities Act and citing the discussion in *Darden*, *supra*, with approval: “[O]ur cases construing similar language give us guidance on how best to fill the gap in the statutory text.” *Id.* at 444–45).

36 *Silk*, 331 U.S. at 713.

37 *Darden*, 503 U.S. at 323.

38 “When Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Id.* at 322–23.

39 This test is most often used to see whether an employment relationship exists under the Fair Labor Standards Act. See, e.g., Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985); *Goldberg*, 366 U.S. 28 (noting “if the ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment, these homeworkers are employees.” (citation omitted) *Id.* at 33). The economic realities test is also used to determine whether there is joint employer liability in a claim, where the conclusion “must be based on a consideration of the total employment situation and the economic realities of the work relationship.” *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 469 (3d Cir. 2012) (citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

40 Where there are two or more employers, joint liability may rest on whether both employers exert significant control over the same employees, looking at whether they share or co-determine matters governing terms and conditions of employment. See e.g., *Enterprise*, 683 F.3d at 470; *Bonnette*, 704 F.2d at 1470

developing multi-part tests in an attempt to try to draw bright lines through arguably ambiguous relationships.<sup>41</sup>

These definitional problems have never been solved, as the articles in this symposium illustrate clearly. Since the 1940s, workers have challenged their classification as non-employees under federal laws in many industries. Similarly, workers have sought responsible parties to pay wages or other benefits when their direct employer could not – or would not – live up to its obligation to pay compensation.<sup>42</sup> The problem of identifying the responsible employers even continues to be the subject of very recent litigation under state workers' compensation laws.<sup>43</sup>

The legal arguments in the cases today remain remarkably similar to the arguments raised throughout the 20th century.<sup>44</sup> But the underlying conditions may be undergoing a significant shift, suggesting that the issues have increasing salience for a growing segment of the workforce. Globalization, new technologies, union decline, changes in work organization and in financial institutions have fueled – or permitted – the expansion of alternative relationships. Franchising, independent contractor designations, subcontracting and staffing through employment

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(considering “whether the alleged 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, and (4) maintained employment records.” *Id.*).

41 These definitional issues are discussed at length in the articles in this symposium. See Bernt, *supra* note 4; Reif, *supra* note 2.

42 For example, in the 1970s, coal miners went looking for responsible parties when mines shut down with wages due and owing and the contractor for whom they worked was unable or unavailable to pay the wages. See WEIL, *supra* note 6, at 101–107. See also *Farley v. Zapata Coal Co.*, 281 S.E.2d 238 (W. Va. 1981); *Zheng*, 355 F.3d 61; *Glatt*, 293 F.R.D. 516.

43 See, e.g., *Campbell v. Flowers Bakery of Crossville*, No. 2:13-0101, 2014 WL 233815 (M.D. Tenn. Jan. 22, 2014) (granting summary judgment to defendant Flowers Bakery of Crossville, LLC, in a suit brought by an injured employee of a subcontractor that provided cleaning services, finding Flowers Bakery immune to suit as a “statutory employer” under the Tennessee Workers’ Compensation Act); *Fleming v. Shaheen Bros. Inc.*, 71 Mass. App. Ct. 223 (2008) (holding that a direct employment relationship existed between warehouse owner and operator, and thus warehouse owner’s tort liability for operator injuries was precluded by worker’s compensation statute).

44 The articles included in this symposium tell this story well. See Reif, *supra* note 2; Christina Harris Schwinn, *Half-Time or Time and One-Half? Recent Developments Deprive Employees of Their Rightful Overtime Compensation under the FLSA*, 6 NE. U. L. J. 409 (2014).



agencies have now expanded into sectors where they were previously uncommon.<sup>45</sup> New ways of obtaining help – which some might legitimately call work – from sources that include volunteers or crowd-sourcing<sup>46</sup> have opened up new questions about who deserves the protection of the 20th century labor and employment laws. Expanded use of staffing agencies creates additional barriers to collective action by workers.<sup>47</sup> Scholars call attention to these trends, exposing the “fissuring” of work relationships that increases the level of vulnerability of many workers.<sup>48</sup> Legislators are raising concerns about the impact of temporary work relationships on safety<sup>49</sup> and the challenges of temporary and on-call work for marginal workers.<sup>50</sup> Federal agencies are developing policies and regulations that address issues of staffing agencies and joint

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45 See WEIL, *supra* note 6 (also noting, “[t]he more the workplace has fissured, the more the subtleties raised by definitions of employment matter.” *Id.* at 185).

46 These arrangements are discussed by Lisa Bernt in her article in this symposium, *supra* note 4.

47 This issue is discussed in this symposium as well. See Kimberly Webster, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights?* 6 NE. U. L. J. 433 (2014). The staffing industry sometimes goes under the misnomer of temporary agencies, though the workers may work at the same site, and be paid by the same agency, for years.

48 See WEIL, *supra* note 6; RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W. Stone & Harry Arthurs, eds., 2013).

49 See, e.g., Letter from Senator Robert P. Casey, Jr., to Assistant Secretary of Labor David Michaels (July 10, 2014), available at <http://www.casey.senate.gov/newsroom/releases/casey-presses-osha-on-safety-protections-for-temp-workers> (discussing “possible regulatory or legislative impediments to OSHA’s ability to ensure safe and healthy workplaces for temporary workers.”).

50 See Stephen Greenhouse, *A Push to Give Steadier Shifts to Part-Timers*, N.Y. TIMES, July 15, 2014, <http://www.nytimes.com/2014/07/16/business/a-push-to-give-steadier-shifts-to-part-timers.html> (describing state and federal responses to the problem of just-in-time part-time work).

employer liability.<sup>51</sup> Reporters are pointing to the vulnerability of many of these workers.<sup>52</sup>

Is there in fact a crisis of a changing workforce today? It is difficult to measure the magnitude of the recent changes. Part of the problem is that the definitions of precarious or contingent employment vary. A 1999 U.S. Department of Labor report on flexible staffing arrangements gives a flavor for the definitional problem: these arrangements include agency temporaries, leased employees, contract company workers, independent contractors, direct-hire temporaries, and on-call workers.<sup>53</sup> The Government Account-

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- 51 See, e.g., Occ. Safety and Health Admin., Dep't of Labor, CPL 02-00-124, OSHA Instruction: Multiemployer Citation Policy (Dec. 10, 1999) (holding responsible the employers that create a hazard, the employers whose employees are exposed to the hazard, the employers who are responsible for correcting the hazard and any employer with general supervisory authority over the worksite); Lawrence E. Dubé, *Amicus Briefs Describe High-Stakes Debate As NLRB Revisits 'Joint Employer' Standards*, BNA Daily Labor Report, July 02, 2014 (describing frenzy of amicus brief filing before the deadline in Browning-Ferris Indus. of Cal., Inc., NLRB, No. 32-RC-109684); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #35: JOINT EMPLOYMENT AND INDEPENDENT CONTRACTORS UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (2008).
- 52 See, e.g., Greenhouse, *supra* note 50, and Stephen Greenhouse, *Part-Time Schedules, Full-Time Headaches*, N.Y. TIMES, July 18, 2014, [http://www.nytimes.com/2014/07/19/business/part-time-schedules-full-time-headaches.html?\\_r=0](http://www.nytimes.com/2014/07/19/business/part-time-schedules-full-time-headaches.html?_r=0) (describing the responses of readers to the prior article); Michael Grabell, *A Modern Day 'Harvest of Shame'*, PROPUBLICA, March 10, 2014, <http://www.propublica.org/article/a-modern-day-harvest-of-shame> (describing part-time work in giant warehouses; the temporary industry "now employs 2.8 million workers – the highest number and highest proportion of the American workforce in history"; also noting that these temp workers may work for years at the same site).
- 53 SUSAN N. HOUSEMAN, FLEXIBLE STAFFING ARRANGEMENTS: A REPORT ON TEMPORARY HELP, ON-CALL, DIRECT-HIRE TEMPORARY, LEASED, CONTRACT COMPANY, AND INDEPENDENT CONTRACTOR EMPLOYMENT IN THE UNITED STATES (Aug. 1999), available at [http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/exec\\_s.htm](http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/exec_s.htm) (stating as follows: "Agency temporaries, leased employees, contract company workers, and independent contractors usually are not regarded as employees of the organization for whom they are performing work. For the first three categories, there are no official definitions and the distinction between them is sometimes blurred. However, it is commonly understood that agency temporaries are the employees of a staffing company which places them, usually on a short-term basis, with a client firm, which usually directs their work. Leased employees are similar to agency temporaries, except that they are typically assigned to the client on a long-term basis. Contract com-



ability Office considers all of these jobs, as well as day laborers, self-employed workers and “standard part-time workers” to be among the contingent workforce.<sup>54</sup> Thus, the jobs labeled by some as “contingent” or “precarious” can be permanent or temporary, full-time or part-time, direct hires or indirect employment through agencies – but they may nevertheless be precarious from the vantage point of the workers. There are other new categories that may be confusing to anyone receiving a paycheck: Professional Employer Organizations (PEO) in which the workers are hired but then co-employed by the PEO, which assumes responsibility for human resources-related obligations; Human Resources Outsourcing, where the HR functions are contracted out, but the contractor does not assume the role of employer;<sup>55</sup> crowd sourced piece workers, where the individuals may have little connection to the entity paying for their services.<sup>56</sup> And this does not include people who have always been outside the boundaries of many legal protections, including domestic and agricultural workers. Nor does it include workers who are employed directly for employers who cannot be counted on to pay their wages; this may be due to the marginality of the firm, but it may also be due to contracting arrangements that themselves are problematic.<sup>57</sup>

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pany workers are employed by a company that contracts out their services to a client, but the contract company directs their work. Legally, independent contractors are self-employed and must direct their own work. Direct-hire temporaries and on-call workers are employees of the organization for whom they are performing work. Direct-hire temporaries are hired on a short-term basis often to do seasonal work or to work on a specific project. On-call workers are hired only on an as needed basis. Thus, while their job may not be temporary, their hours of work typically vary.” *Id.*).

54 U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 6 (2006), available at <http://www.gao.gov/new.items/d06656.pdf>.

55 Christiane Soto, *Rise of the Contingent Workforce*, Snelling Staffing Services (2012), <http://www.snelling.com/WorkArea/DownloadAsset.aspx?id=20147> (also asserting that more than 25% of the private sector jobs added in 2010 were temp jobs, and that in 2012 contract employment grew by 24.2%).

56 See Bernt, *supra* note 4.

57 This is, in part, the problem explored by Reif in his article for this symposium, *supra* note 2. The immigrant workers who were the plaintiffs in *Zheng*, 355 F.3d 61, could not serve or collect wages from their direct employer, which was employing the workers to perform piece work for garment manufacturers which contracted with the direct employer for the goods that were produced.

Evidence is strong: we have plenty to worry about if we care about the ability of the modern workplace to provide safe, stable and secure employment.<sup>58</sup> If not a majority, certainly large numbers of American workers are facing conditions that underscore legitimate concerns about precarious work and deep inequalities in our society, put to shame any commitment to “work-life” balance, and demonstrate the inadequacy of the current legal and regulatory structure to remedy problems.

But there is certainly no question that there is bubbling enthusiasm among firms and vendors about the possibilities for decreased costs combined with increased efficiencies and flexibility to be derived from these relationships. “Utilize the contingent workforce!” exhorts CBI Group, which characterizes itself as an “Outside-In recruitment solutions company.”<sup>59</sup> CBI Group’s white paper on the subject continues:

Outside-In is a mindset and operating philosophy that drives us to be customer-centric in everything we do. Serving customers nationwide, we build recruitment, staffing and outplacement solutions across a variety of industries including Financial Services, Manufacturing, Healthcare, Pharma, Not-for-Profit and Hospitality... You may be thinking to yourself, how does this apply to my business? As employers, it’s time to start thinking differently. Take a fresh look at this workforce, and consider the possibility of employing contingent workers in the future (if you aren’t already!)... The structure of “work” is now increasingly being viewed as a project-based model where employers rely on highly technical skill sets and increased worker flexibility. This is far different from the days where workers would “punch the clock” and spend eight hours a day in a permanent position with a strict schedule. (In those days, lunch breaks measured down to the minute, and five o’clock-on-the-dot meant freedom!) These recent workforce realities developed this new structure and influenced how businesses operate, and how workers work!...Employing contingent workers not only alleviates the workload for

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58 For an overview of the concerns, see WEIL, *supra* note 6; Stone & Arthur, *supra* note 48, at 366–404 (providing a terrific summary of the available data).

59 Chris Burkhard, *Trends of the Contingent Workforce: A 21st Century Reality*, CBI GROUP (2012), <http://www.thebiggroup.com/files/2013/04/CBIGroup-ContingentWorkforce-WhitePaper.pdf>.

permanent jobholders, but it can also serve as a cost saver for you as an employer. Contingent workers, who work for contracted lengths of time, are less expensive to employ than permanent workers. Benefits costs, 401K plans, and employment taxes are eliminated. Moreover, when a contingent worker is employed through a staffing or recruiting firm, the third party provider assumes the costs.<sup>60</sup>

Needless to say, CBI's vision for the future of work collides with the interests of most workers. There is no question that fissured work organizations create greater pressure on those at the bottom. Anticipated payroll, tax and benefit savings through contracting results in downward pressure on wages and benefits. Business models may increase both efficiencies and consumer satisfaction, as parcels arrive promptly at doors and workers go unpaid if they are not needed that day<sup>61</sup> – but the stability of work days and pay decline dramatically as these practices spread. Meanwhile, workers attempt to fight back through 20th century laws, using old tests that are a poor fit for these realities.

As Bernt and Reif both point out, early Supreme Court cases interpreting statutes designed to protect working people repeatedly suggested that the statutes “must be read in the light of the mischief to be corrected and the end to be attained.”<sup>62</sup> What is the precise “mischief” to be corrected today? How should the courts – and others – approach these persistent definitional problems in the current environment, assuming that it is true that increasing numbers of workers find themselves outside the existing regulatory boundary lines? The articles in this symposium address these

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60 *Id.*

61 Greenhouse, *supra* note 50.

62 *NLRB v. Hearst Publ'ns. Inc.*, 322 U.S. 111 (1944) (citing *S. Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)); *cf.* *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940). This language first appeared in the case of the master of a tugboat who “met his death on the waters of the Ohio river through the negligence of a pilot employed to navigate the tug.” *Warner v. Goltra*, 293 U.S. 155, 156 (1934). In a suit against the owner to recover damages, the court was called upon to interpret the meaning of the term “seaman” within the meaning of the Merchant Marine Act of 1920, §33 (41 Stat. 1007, 46 U.S.C. § 688 (46 U.S.C.A. § 688)). This decision by Justice Cardozo presaged the later cases under the New Deal legislation.

questions in the context of the laws governing compensation, dignity and collective voice.

Lisa Bernt investigates these broad issues in *Suppressing the Mischief: New Work, Old Problems*<sup>63</sup> and suggests that we go back to first principles. What is the purpose of these laws? she inquires, as she explores the current scholarly literature that elucidates the challenges posed by both the current law and modern work arrangements. She advocates for a “bounded purposive” approach, “one that sensibly focuses on regulatory purpose and the broader values that have been the foundation for the existing laws all along.”<sup>64</sup> Reaching back to 1944, she echoes the Supreme Court in *NLRB v. Hearst Publications*: when conditions require protection, “protection ought to be given.”<sup>65</sup> Acknowledging the “legislative neglect” that resulted in the remarkable lack of definition of key terms like “employer” and “employee,” she describes the tests that have been used by the courts to determine employee status, but she notes that these are “an ill fit for the remedial goals of the respective statutes.”<sup>66</sup> These tests both fail to acknowledge the inequality of bargaining power between individual workers and their employers and fail to protect workers in evolving nonstandard employment.

Bernt builds her case using two modern examples: crowd workers who do piece work, often anonymously, through internet connections; and volunteers, who perform valuable work that is required in order to advance to jobs or into a profession. Building out from these illustrations, she posits that the employment relationship is “typically one between a bearer of power and one who is not a bearer of power, and labor law acts as a restraint on that power.”<sup>67</sup> That is, quoting Harry Arthur, “labor law ‘is designed to protect ‘workers,’”<sup>68</sup> and underlying labor law is a “protective reflex.” She concludes that current law leaves out work relationships that are exactly the kind of ‘mischief’ that “the law is meant to address,”<sup>69</sup> and moves on to propose a taxonomy of definitions

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63 Bernt, *supra* note 4.

64 *Id.* at 312.

65 *Id.* at 317.

66 *Id.* at 320.

67 *Id.* at 336.

68 *Id.* at n.143, citing Harry Arthurs, *Labour Law After Labour*, in *THE IDEA OF LABOUR LAW* 13, 18 (Guy Davidov & Brian Langille eds., 2011).

69 Bernt, *supra* note 4, at 337.

that would extend work law to encompass these nonstandard work relationships. She would limit this protection to those who exert effort for another for “compensation or reward,” focusing on “whether, in reality, the putative worker was in a position of dependency.”<sup>70</sup> Applying these definitions is nevertheless challenging. For example, she proposes that “traditional volunteers” should be outside the definition if their volunteer work “will not affect their job prospects or livelihoods in any meaningful way.”<sup>71</sup> Bernt would, however, move most interns in training programs presumptively (though not conclusively) under the umbrella of employment legislation, particularly noting interns’ need for protection against discrimination and harassment.

In contrast to Bernt’s 21st century examples of evolving work, the twenty-five immigrants employed in a factory at 103 Broadway in New York’s Chinatown faced challenges that are more reminiscent of the 19th century workplace - or, perhaps, the garment industry in Bangladesh today. Working in sweat shop conditions under contracting arrangements, the question was: who was going to make good on their unpaid wages? Their immediate employer ceased doing business, and they pursued their claims against the garment manufacturer that had contracted for their work.<sup>72</sup> The work that the plaintiffs performed was a critical component of the production of the garments and was done under precise requirements.<sup>73</sup> Nevertheless, in remanding the case for further

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70 *Id.* at 338.

71 *Id.* at 342.

72 *Zheng*, 355 F.3d 61. After remand, the workers prevailed at trial, and the jury verdict was upheld in a *per curiam* decision. See *Zheng v. Liberty Apparel Co. Inc.*, 617 F.3d 182 (2d Cir 2010) (affirming jury verdict for plaintiffs, including decision by the trial judge to allow the jury to determine whether Liberty was a joint employer for purposes of the wage claims, noting that this determination is a mixed question of law and fact).

73 *Zheng*, 355 F.3d at 64 (“Liberty, a ‘jobber’ in the parlance of the garment industry, is a manufacturing company that contracts out the last phase of its production process. That process, in broad terms, worked as follows: First, Liberty employees developed a pattern for a garment, cut a sample from the pattern, and sent the sample to a customer for approval. Once the customer approved the pattern, Liberty purchased the necessary fabric from a vendor, and the vendor delivered the fabric to Liberty’s warehouse. There, the fabric was graded and marked, spread out on tables, and, finally, cut by Liberty employees. After the fabric was cut, Liberty did not complete the production process on its own premises. Instead, Liberty delivered the cut fabric, along with other essential materials, to various contractors for assembly. The assem-

consideration by the District Court, the Court of Appeals suggested that joint liability might be inappropriate if the purpose of the contracting was *not* to avoid application of the wage and hour laws.<sup>74</sup>

With this case as his starting point,<sup>75</sup> James Reif provides a detailed and thoughtful exploration of the outsourcing of business and joint employer liability under the wage and hour laws in *'To Suffer or Permit to Work': Did Congress and State Legislatures Say What They Meant and Mean What They Said?*<sup>76</sup> Noting that companies often engage contractors to perform parts of their processes of production, Reif argues that these companies should have joint liability with the direct employer. He is also quite rightly concerned about the notion that “run-of-the-mill” outsourcing arrangements are viewed by the court as outside the reach of joint employer liability: this approach suggests that the more outsourcing becomes commonplace in an industry, the lower the likelihood that workers performing the out-sourced work will have a claim for wages against the primary company – irrespective of their ability to collect their wages from their direct employer.

The broad language of the Fair Labor Standards Act defines “employ” to include “to suffer or permit to work.”<sup>77</sup> Reif notes that this language is broader than the definition of employment under the common law, but that the courts have nevertheless applied analyses and factors that result in a narrower interpretation than

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blers, in turn, employed workers to stitch and finish the pieces, a process that included sewing the fabrics, buttons, and labels into the garments, cuffing and hemming the garments, and, finally, hanging the garments. The workers, including plaintiffs, were paid at a piece rate for their labor.”)

74 *Id.* at 73–75 (“Industry custom may be relevant because, insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws. At the same time, historical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws.... supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement.”).

75 Reif served as plaintiff’s counsel in *Zheng*, 355 F.3d 61.

76 Reif, *supra* note 2.

77 29 U.S.C. § 203(g) (2006).



the statutory language suggests. He makes a persuasive case that “courts proceed on the unarticulated presumption that Congress simply could not have meant what it said.”<sup>78</sup> In situations involving outsourcing, this “leaves businesses in the same industry that comply with fair labor standards at a competitive disadvantage and ...effectively deprives the workers who perform outsourced work of FLSA rights or remedies.”<sup>79</sup>

The solution, Reif suggests, is a return to the language of the statute itself, to the regulatory interpretations of the child labor laws, and to the earlier judicial interpretations that were not imbued with the “narrow, grudging manner”<sup>80</sup> of more recent cases. He proposes the following test for joint liability when outsourcing is involved:

- (i) the company outsourced to the contractor an integral part of its process of producing goods or providing services;
- (ii) the contractor employed the individuals in the performance of the outsourced work;
- (iii) the company knew or had reason to know that the individuals in question and/or other individuals similarly employed by the contractor were participating in the performance of its outsourced work, yet failed to prevent or hinder that work; and
- (iv) the outsourced work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company.<sup>81</sup>

Further, Reif points out that the court in *Zheng* concluded that the purpose of the economic reality test is to “expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the orbit of the FLSA.”<sup>82</sup> He rightly raises an alarm about this “solicitude” that the federal appellate court demonstrated in favor of economically-motivated outsourcing arrangements – solicitude that flies in the face of the overwhelm-

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78 Reif, *supra* note 2, at 359.

79 *Id.* at 401.

80 *Id.* at n.191, citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 153*, 321 U.S. 590, 597 (1944).

81 Reif, *supra* note 2, at 348.

82 *Id.*, at n.30, quoting *Zheng*, 355 F.3d at 76.

ing concern that has been expressed by scholars and activists regarding wage and hour abuses that are tolerated in “normal” contracting schemes. Thus, he persuasively argues, the court had it all wrong: run-of-the-mill contracting should not be shielded from liability. Instead, “a company should not be entitled to a safe haven from wage and hour claims ... if it engages in outsourcing primarily to reduce its labor costs.”<sup>83</sup> Of course, if one is to believe the CBI exhortations,<sup>84</sup> that is exactly what many companies are trying to do when they develop “flexible” work through contracting arrangements.

The issues of interpretation of the Fair Labor Standards Act – and concerns about recent interpretations in the federal judiciary – are also the focus of Christina Harris Schwinn’s article, *Half-Time or Time and One-Half? Recent Developments Deprive Employees of Their Rightful Overtime Compensation under the FLSA*.<sup>85</sup> Schwinn critiques the Seventh Circuit’s methodology for the retroactive calculation of overtime in *Urnikis-Negro v. American Family Property Services*,<sup>86</sup> a case in which the plaintiff had been misclassified as an administrative exempt employee, and therefore was not paid overtime when she worked more than 40 hours per week. The plaintiff had thought that she was hired to work a regular 40 hour week, but found that the bank intended her salary to compensate her for “whatever hours she happened to work.”<sup>87</sup> Noting that the right to overtime under the Fair Labor Standards Act cannot be waived, Schwinn describes in detail the possible methodologies for calculation of overtime pay in these cases and argues that the court in *Urnikis-Negro* misinterpreted prior decisional law by applying the fluctuating-work-week (FWW) calculation. According to Schwinn, when FWW is applied retroactively, “the purposes of the FLSA are nullified because it abridges an employee’s right to time and one-half wages for overtime hours.”<sup>88</sup> The essential problem is that the retroactive application of FWW in cases of misclassified exempt employees significantly cuts the overtime pay to an employee, reducing it to below the level that overtime would have

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83 Reif, *supra* note 2, at 407.

84 See *supra*, notes 59–60 and accompanying text.

85 Schwinn, *supra* note 44.

86 *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010).

87 Schwinn, *supra* note 44, at n.51, quoting *Urnikis-Negro*, 616 F.3d at 674.

88 Schwinn, *supra* note 44, at 431.



been paid absent the misclassification. It thus serves “to reward – and potentially encourage – an employer to misclassify a non-exempt employee as exempt at the inception of the employment relationship...”<sup>89</sup> Notably, as Schwinn observes, the circuit courts are divided on this issue, and cases in other circuits have not followed the *Urnikis-Negro* reasoning. It is time, she suggests, that the Supreme Court or Congress rectify the ambiguity resulting from the split opinions of the circuits, and clarify that the FWW should not be applied to these situations.

Kimberly Webster turns our attention away from the minimum standards of compensation and the need for protection against discrimination and harassment, and toward the foundational issues of worker collective action. In her note, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights?*,<sup>90</sup> she explores the fundamental importance of the right of workers to act together to advance their collective well-being. The first step, Webster argues, is that workers need to know their rights. First, she advocates for a “direct-to-worker” model of communication: “[R]egulations designed to inform workers of their rights should take a cue from different frameworks of legal rights disclosures that are better equipped for the present day,” and “an alternative framework for informing workers of their rights ...encompassing electronic and/or active methods of disclosure – is a better fit for the current landscape of employment relationships...”<sup>91</sup> This need might be met, for example, through electronic distribution of notices or through affirmative legal requirements for specific individual disclosures, as has been developed in new state legislation in Massachusetts and Illinois (targeting day and temporary laborers) and in New York (requiring disclosure of job information to all private sector employees). Second, Webster provides us with a deeply critical analysis of recent decisions that struck down an NLRB-promulgated regulation that would have required employers to post notices regarding workers’ rights under the NLRA. Without this regulation, workers receive no notice about these rights – in contrast to the statutorily mandated postings under other statutes.<sup>92</sup>

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89 *Id.*

90 Webster, *supra* note 47.

91 *Id.* at 435-36.

92 *Id.* at 441-51.

Third, she suggests that workers' access to each other is critical to the exercise of rights under the NLRA, and that this access is eroding due to the complex contracting and fissuring of the workforce.<sup>93</sup> Given this, she advocates for an expanded interpretation of Section 7<sup>94</sup> that would give non-union workers access to co-workers' contact information.

### Conclusion

These four articles draw a troubling picture, reminding us that there are inadequate legal protections for misclassified workers and workers in nonstandard work arrangements. Authors in this symposium urge the courts to read the law expansively, rather than narrowly. "Suffer or permit to work" surely encompasses the business relationships that underlie the problem in *Zheng v. Liberty Apparel*, as Reif suggests. Workers who have been misclassified should be receiving a full retrospective accounting for overtime hours, as Schwinn recommends. The powers of the NLRB could have been read to include a requirement that workers be notified of their rights to engage in collective action, as Webster argues. If the courts were to read the statutes "purposively," the 20th century laws discussed in these articles might protect many of those in murky or precarious legal situations, as Bernt proposes. Some of these authors argue, as well, for legislative solutions. All of these arguments have merit, though the extent to which they will be sufficiently powerful to persuade the courts – or the legislatures – remains to be seen.

There is, however, some movement that suggests change is possible, as these authors note. State legislatures are extending legal protections to domestic workers who have been historically excluded from all employment laws,<sup>95</sup> creating "right to know"

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93 *Id.* at 452-55.

94 29 U.S.C. § 157 (2012).

95 Massachusetts, New York, California and Hawaii have all enacted laws providing protection for domestic workers. The Massachusetts law, "An Act Establishing a Domestic Worker's Bill of Rights," was signed by Governor Patrick on June 26, 2014, and extends the strongest protections; it goes into effect in 2015. According to the National Domestic Workers' Alliance, the Massachusetts legislation amends "state labor law to guarantee basic work standards and protections: 24 hours off per 7-day calendar week; meal and rest breaks; limited vacation and sick days; parental leave; protection from discrimination,

laws to guarantee that temporary workers will receive basic protection and information about their work,<sup>96</sup> and extending anti-discrimination protection to unpaid interns.<sup>97</sup> Even Congress has recognized the problem of the exclusion of independent contractors from whistleblower statutes, and expanded at least one statute to protect long distance truckers from retaliation.<sup>98</sup> State courts have acted to expand protection against discrimination and harassment to people not within state anti-discrimination statute definitions: sexual harassment and discrimination claims against small employers outside the specific statutory size requirements have been allowed under both the common law<sup>99</sup> and under alternative statutory arguments;<sup>100</sup> sexual harassment against unpaid

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sexual harassment, illegal charges for food and lodging, and eviction without notice; notice of termination; and a means of enforcing these standards. Domestic employers under the bill do not include state regulated staffing agencies or the employers of those who work as casual babysitters.” Massachusetts Domestic Workers Alliance, Massachusetts Bill of Rights, (2014), available at <http://www.domesticworkers.org/mass-bill-of-rights>. See An Act Establishing the Domestic Workers Bill of Rights, Bill S.882, 188th Gen. Ct. (Mass. 2014), amending MASS. GEN. LAWS ch. 149.

96 See Webster, *supra* note 47, at n.34, citing 820 ILL. COMP. STAT. 175/2 (2014); *Id.* at n.39, citing MASS. GEN. LAWS ch. 149 § 159C.

97 See, e.g., 2013 Or. Laws 379, 2013 (HB 2669).

98 See Surface Transportation Assistance Act, 49 U.S.C. § 31105(j) (defining “employee” as follows: “In this section, ‘employee’ means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who - (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.”).

99 See, e.g., *Williamson v. Greene*, 490 S.E.2d 23 (W. Va. 1997) (holding that “even though a discharged at-will employee has no statutory claim for retaliatory discharge under . . . the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed . . . the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State.” *Id.* at 23.).

100 See, e.g., *Thurdin v. SEI Boston, LLC*, 895 N.E.2d 446 (Mass. 2008) (holding that, when an employer lacks the required six employees for coverage under MASS. GEN. LAWS ch. 151B, sex discrimination is nevertheless actionable under the Massachusetts Equal Rights Act, MASS. GEN. LAWS ch. 93 § 102).

interns – by definition “non-employees” – has been held actionable as well.<sup>101</sup> Enforcement agencies have developed highly strategic approaches to setting priorities and are seeking to make the old laws applicable to changing workplaces.<sup>102</sup> These developments may not represent the majority rule – but they do demonstrate that courts, legislatures and administrative agencies are capable of responding to concerns regarding holes in the regulatory structure.

Not all change is initially rooted in the law. People are also developing new organizing strategies through workers’ centers and new networks that are enabled by social media. New ways of electronic communication provide just-in-time information to domestic workers.<sup>103</sup> Thus, new technologies may help to overcome some of the isolation caused by nonstandard work arrangements. And, as always, legal change is integrally related to social and political movements.

These developments suggest that change is possible, though perhaps it is – at least as yet – too halting to meet the needs of many workers caught in unforgiving marginalized and nonstandard work. As the articles here suggest, there is much work left to be done.

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101 See, e.g., Volling, 2012 U.S. Dist. LEXIS 171623, *supra* note 4.

102 See DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 1–4 (2010), <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>. It is of some significance that Weil, the principal investigator on this report and the author of *THE FISSURED WORKPLACE* *supra* note 6, was confirmed by the Senate to lead the Wage and Hour Division of the U.S. Department of Labor on April 29, 2014. See Katie Johnston, *BU Professor Takes on Task of Enforcing US Wage Laws*, BOSTON GLOBE, June 8, 2014, <http://www.bostonglobe.com/business/2014/06/07/professor-david-weil-brings-controversial-workplace-views-labor-department/N2k3YBB2S2pm2qLShA0PSP/story.html>.

103 See, e.g., NANNYVAN <http://www.nannyvan.org/> (last visited July 28, 2014). NannyVan is part of an outreach program that provides domestic workers information about their rights and launched a text-based app for mobile devices in April 2014. (“The Domestic Worker App is a public art and know-your-rights app accessible by any kind of phone — even the most basic kinds. Call (347) 967-5500 at any hour to hear humorous episodes about topics such as overtime wage, paying your taxes, health and safety essentials, and the growing movement for domestic worker justice! AND, text the number to sign up to receive weekly text messages — type any key in the subject of the text message.” *Id.*)



## Suppressing the Mischief: New Work, Old Problems

*Lisa J. Bernt*

### Introduction

The task of differentiating an employee from an independent contractor has been the cause of some angst for generations. Such a distinction has been an important threshold question for determining coverage under labor and employment laws, in that employees are generally covered by such laws, while independent contractors are not.

Legislative definitions tend to be unhelpful, so courts have utilized various tests to decide who is an employee. The most commonly used tests are derived from common law agency principles, developed long before the advent of contemporary labor law, that determined whether a master was liable to injured third parties for the negligence of a servant. These tests have been roundly criticized as ill-fitting the purposes of labor law.

As new forms of work arrangements have proliferated in recent years, this poor fit is even more pronounced. Some types of contemporary work were unimaginable at the time our original definitions were developed. Crowd work, an online form of cognitive piecework, is one example.

We are also seeing new variations on older arrangements, such as occupationally required volunteering. Volunteers include not only the folks making cookies for the PTA bake sale. Today, they also include those required to volunteer in some fashion to enter or remain in an occupation.

Before we go too far into the job of defining and sorting new work into our existing regulatory labyrinth, let us step back and consider the underlying values of labor law, as well as the purposes of specific regulations. Such values and purposes need to inform any such taxonomical projects.

Noting the challenges presented by the shifting “tectonic plates of the world of productive relations,”<sup>1</sup> Brian Langille and Guy Davidov aptly frame the problem: “Revolutionary developments in

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1 Brian A. Langille & Guy Davidov, *Beyond Employee and Independent Contractors: A View From Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 8 (1999).

information technologies, new methods of organizing productive activity and competitive pressures of globalization . . . have conspired to create new modes of laboring” that shake our traditional understanding of labor law.<sup>2</sup> Answers to questions of employment status and labor law coverage now “depend upon an earlier starting point than we traditionally utilize when engaging the employee/independent contractor distinction.”<sup>3</sup> That earlier starting point is an examination of “why we have labor law - that is, what it is for in the first place.”<sup>4</sup>

Noah Zatz asks: “In a world of shifting organizational forms and imperfect enforcement . . . [w]hich workers receive the benefit or protection, and how are they identified?”<sup>5</sup> To these questions, I add my own: Who is a worker? What kind of work raises the concerns that labor law is meant to address? How do we address these issues in a way that speaks to the myriad of new ways of laboring, for today and whatever may be around the corner?

Some commentators and courts have taken a “purposive” approach to determining coverage of labor laws, one that sensibly focuses on regulatory purpose—the “mischief to be corrected and the end to be attained”<sup>6</sup>—and would develop definitions in that context. A purposive orientation can help answer the questions posed above. But before we examine the purpose of a particular statute, let us remember the values of labor law more generally. I suggest that we first look at those broader values to decide whether a worker belongs in the protective realm of labor law—and then move to examine the specific regulatory purpose at issue. This method widens potential application of some workplace laws, yet still limits those admitted into the labor law domain to those in economically dependent relationships that give rise to the mischief at which workplace regulation is aimed. My aim here is not to define and classify for regulatory purposes all emergent forms of work. Rather, I propose some definitions and some taxonomical guideposts to inform the

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2 *Id.*

3 *Id.* at 9.

4 *Id.*

5 Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 31, 56 (Annette Bernhardt et al. eds., 2008).

6 *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 124 (1944).



process. I look at crowd work and volunteerism merely to illustrate this discussion, which concerns labor law more generally.

Part I reviews the most commonly used methods of distinguishing an employee from an independent contractor. Part II discusses crowd work and some recent developments in volunteerism, both of which raise new questions and bring urgency to some older ones. Part III lays out some examples of, and concerns regarding, a purposive approach to labor law coverage. Part IV proposes a bounded purposive approach to guide the discussion of labor law coverage, one that first looks at broader purposes of labor law to decide whether a worker belongs in the protective realm of labor law, and then moves to examine the specific regulatory purpose at issue.

My focus is on U.S. labor law. At the same time, there is much to learn from scholarship outside our borders, and indeed I borrow from many such commentators. (For simplicity, I refer to labor and employment law collectively as “labor law.”<sup>7</sup>)

## I. Employee or Independent Contractor? Traditional Binary Approach

Employment status is a threshold question in labor law, as most workplace regulations cover employees, but not independent contractors.<sup>8</sup> Yet, U.S. statutes typically lack a definition of “employee,” or include one that is of little use. The National Labor Relations Act (NLRA), for example, says that “the term ‘employee’ shall include any employee ....”<sup>9</sup> The Fair Labor Standards Act (FLSA) defines “employee” as “any individual employed by an employer;” an “employer” is any person “acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>10</sup>

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7 “Labor law” in the United States usually refers to that which governs the relationship between employers and collective bargaining units. “Employment law” typically refers to the statutory and common law that governs the relationship between an employer and its individual employees.

8 There are exceptions: 42 U.S.C. § 1981, which prohibits race discrimination in the making of contracts, is not limited to employment. *See, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009) (holding that an independent contractor may bring a claim under 42 U.S.C. § 1981). On the other hand, even some employees do not enjoy protection of all labor laws. *See, e.g.*, 29 U.S.C. § 152(3) (2006) (expressly excluding supervisors from the NLRA).

9 29 U.S.C. § 152(3) (2006).

10 29 U.S.C. § 203 (2006).



Such legislative neglect has left the job of defining statutory coverage largely in the courts, which have used a variety of inelegant methods to define “employee” in different contexts. And as contemporary working arrangements become increasingly more varied, classifying them has become even more difficult. Because of the different methods, it is possible for a worker to be classified as an employee for one purpose, and an independent contractor for another.<sup>11</sup>

The dominant test has been the common law “control” test, followed by the economic realities test, trailed by a variety of lesser-used tests.<sup>12</sup> The tests typically consist of multiple factors, with no single factor being decisive.

The common law “control” test looks at the degree of control the hiring party exercises over a worker; the more indicia of control, the more likely the worker will be defined as an employee.<sup>13</sup> The test was developed under agency law to determine whether a master was liable for the actions of his servant, the master ordinarily being responsible for the actions of a servant but not those of an independent contractor. The test was essentially designed to address the issue of a master’s liability to an injured third party.<sup>14</sup> As such, the master’s direct physical control over the servant’s work became the focus of the inquiry.<sup>15</sup>

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11 See, e.g., *Seattle Opera v. NLRB*, 292 F.3d 757 (D.C. Cir. 2002) (finding performers and stage personnel were employees, in spite of tax treatment as independent contractors); *Volling v. Antioch Rescue Squad*, No. 11C04920, 2013 U.S. Dist. LEXIS 170064, at \*19 (N.D. Ill. Dec. 2, 2013) (“Title VII and the [Illinois Human Rights Act] are distinct statutes that serve different purposes and define the relationship between employees and employers differently.”).

12 See, e.g., Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 675 (2013) (“The ‘control’ test is the dominant standard for employment, both nationally and internationally.”).

13 See Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 673-74 (1996) (discussing indicia of control).

14 Richard R. Carlson, *Why the Law Still Can’t Tell An Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 305 (2001) (“Originally the ‘control test’ primarily served one purpose: to explain one person’s liability for another’s negligence.”). For discussion of pre-industrial origins of worker classification and master-servant relationships, see *id.*; see also Lisa J. Bernt, *Tailoring a Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31, 41 (2012).

15 RESTATEMENT (SECOND) AGENCY § 220 (1958).

The control test has been articulated in various ways, but the list of factors in the Restatement Second of Agency, sec. 220, has provided a template: “A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”<sup>16</sup> The Restatement provides a ten-factor test to determine whether the potential employer exercises sufficient control:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.<sup>17</sup>

Some variant of the common law control test has been used in cases brought under Title VII of the Civil Rights Act of 1964 (Title VII), Americans with Disabilities Act, Uniformed Services Employment and Reemployment Rights Act, Employee Retirement Income Security Act, the NLRA, and others, including many state employment laws.<sup>18</sup> The Supreme Court has made the common

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16 *Id.* § 220(1).

17 *Id.* The Restatement (Third) of Agency changes “servant” to “employee,” but the doctrines remain relatively the same. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (“[A]n *employee* is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.”) (emphasis added); see also Bodie, *supra* note 12, at 677 n.81.

18 Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 619 (2012).

law test the default test for federal statutes that do not provide an alternative definition or further explanation.<sup>19</sup>

The primary alternative to the control test has been the “economic realities” test, a more inclusive test that looks not only at the extent to which the hiring party controls the worker, but also at how dependent the worker is on the hiring party.<sup>20</sup> There have been various iterations of the economic realities test. One version is the list of factors that the Department of Labor considers when determining employment status under the FLSA:

- (1) the extent to which the services rendered are an integral part of the principal’s business; (2) the permanence of the relationship; (3) the amount of the alleged contractor’s investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor’s opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation.<sup>21</sup>

The history of the economic realities test is worth a closer look here, as the case law that gave rise to this test illustrates a purposive approach to determining coverage under some labor legislation.

The Supreme Court laid the groundwork for the economic realities test in the 1944 case of *NLRB v. Hearst Publications, Inc.*<sup>22</sup> The NLRA, a New Deal statute enacted in 1935 to protect the rights

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19 Bodie, *supra* note 12, at 677.

20 *Id.* at 684 (stating that the economic realities test is the “primary alternative to the control test”).

21 *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs13.htm> (last visited May 4, 2014).

22 *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 124 (1944); Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 163 (2006) (“[T]he Court [in *Hearst*] recognized early in its labor law jurisprudence that economic relationships were important to determining whether or not someone was an employee, laying the ground work for what later became the ‘economic realities’ test.”). The test used in *Hearst* has also been referred to as the “primary purpose” test. See Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 163 (2006).

of employees to engage in collective bargaining and other forms of concerted action, by its terms covers only employees.<sup>23</sup> The issue in *Hearst* was whether the workers who sold newspapers on the streets were employees or independent contractors of the newspaper publisher.<sup>24</sup> The Court decided that, while the traditional common law control test was suitable for common law tort actions, it was inappropriate for the purpose of the NLRA, which was enacted to address the problem of unequal bargaining power.<sup>25</sup> The Court said that the word “employee” derives meaning from the context of the statute, which “must be read in the light of the mischief to be corrected and the end to be attained.”<sup>26</sup> Further, the Court stated:

[I]t cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation . . . [When] the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.<sup>27</sup>

The *Hearst* court looked at the “special purpose at hand” and concluded that the term “employee” under the NLRA “must be understood with reference to the purpose of the Act and the facts involved in the economic relationship[;] ‘Where all the conditions of the relation require protection, protection ought to be given.’”<sup>28</sup>

Three years after *Hearst* was decided, the Court in *United States v. Silk*, a case decided under the Social Security Act, used what would become known as the multi-factor economic realities test.<sup>29</sup> The factors considered in *Silk* included not only the employer’s control over the worker, but the worker’s opportunities for profit or

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23 29 U.S.C. §§ 151-169 (2006).

24 *Hearst*, 322 U.S. at 113.

25 *Id.* at 124-29.

26 *Id.* at 124 (citations omitted).

27 *Id.* at 127-28 (citations omitted).

28 *Id.* at 126-27, 129 (citations omitted).

29 331 U.S. 704 (1947).

loss, investment in the facilities, permanence of relation, and skill required for the job.<sup>30</sup> On the same day the Court decided *Silk*, the Court decided *Rutherford Food Corp. v. McComb*,<sup>31</sup> using an expansive definition of “employee” under the FLSA, a 1938 statute that set minimum wage and overtime requirements for covered employees.<sup>32</sup> Later, in *Bartels v. Birmingham*,<sup>33</sup> another case under the Social Security Act, the Court used the multi-factor analysis used in *Silk*, emphasizing the economic reality of a worker’s dependence and the purpose of the Social Security Act.<sup>34</sup>

Soon thereafter, Congress amended the NLRA to explicitly exclude independent contractors and to state that “employee” shall have its “ordinary meaning,” which generally has been interpreted to require some variant of the common law control test.<sup>35</sup> Congress also amended the Social Security Act to provide that the term employee would not include “any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor . . . .”<sup>36</sup> But Congress did not amend the FLSA to overrule the Court’s expansive definition of “employee” used in *Rutherford Food*, and the economic realities test remains in use to determine employment status under the FLSA.<sup>37</sup>

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30 *Id.* at 716.

31 331 U.S. 722 (1947).

32 29 U.S.C. §§ 201-219 (2006); *see also* Carlson, *supra* note 13, at 668-69 (“[The Court’s ruling in *Rutherford Food*] depended primarily on the FLSA’s unique definition of ‘employ’ and was not expressly based on an economic realities approach. Nevertheless, many lower courts subsequently made the economic realities test part of their analysis of the employee/independent contractor problem under the FLSA.”).

33 332 U.S. 126 (1947).

34 *Id.* at 130 (“Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”).

35 29 U.S.C. § 152(3) (2006); *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971) (discussing statutory amendment and Congressional intent); *see also* Rubinstein, *supra* note 18, at 619 (noting current use of control test used in the NLRA). But also note the recent use of “entrepreneurial opportunities” test under the NLRA. Rubinstein, *supra* note 18, at 619-22.

36 Social Security Act of 1948, ch. 468, § 2(a), 62 Stat. 438 (1948).

37 *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT’ OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs13.htm> (last visited May 4, 2014); Bodie, *supra* note 12, at 685.

Courts also use the economic realities test in cases brought under other statutes, such as the Family and Medical Leave Act.<sup>38</sup>

There have been some lesser-used alternatives to these two tests. Some courts have used a hybrid of the common law control test and the economic realities test in cases brought under federal discrimination laws.<sup>39</sup> There has also been case law under the NLRA using what has been dubbed the “entrepreneurial opportunities” test, which looks to whether the worker has an opportunity to operate an independent business.<sup>40</sup> Additionally, state courts may use still other tests in determining employment status under state laws.<sup>41</sup>

Many commentators have noted that the various tests are not all that different.<sup>42</sup> A principal factor in these tests is often still control over the details of the work, what Marc Linder refers to as “traditional looking-over-the-shoulder physical control.”<sup>43</sup> And while other factors, such as those reflecting the scope of the hiring and the economic dependence, might be considered in some tests, the hiring party’s control over the manner of work is still typically a significant, perhaps the most important, factor.<sup>44</sup>

Critics have faulted the various tests as anachronistic, unpredictable, and easily manipulated, creating incentives to *de*

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38 Bodie, *supra* note 12, at 685.

39 Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 167 (2003).

40 See Bodie, *supra* note 12, at 688-89.

41 See, e.g., Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187, 217 n.144 (1999) (noting, e.g., use of “ABC test” for unemployment benefits cases).

42 See Rubinstein, *supra* note 22, at 169 n.114 (“[S]everal academic commentators have argued that there is little difference between the various employment status tests.”).

43 Marc Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555, 601 (1989).

44 Befort, *supra* note 39, at 172-73 (“The economic realities test, like the common law standard, consists of a multi-factor formula in which the right to control the manner of work is a significant factor.”); Carlson, *supra* note 14, at 344 (“[C]ourts have frequently looked to other factors beyond control to expand their search for evidence of employee status. Unfortunately, any of the additional factors courts have listed as evidence of employee status are, in reality, additional aspects of control, or they present the same problems as the control factor.”).



*facto* deregulate by avoiding coverage.<sup>45</sup> The tests have also been criticized for being an ill fit for the remedial goals of the respective statutes; i.e., they do not address the mischief that labor laws are intended to correct.<sup>46</sup> Traditional notions of measuring “control,” especially, have been the target of such criticism.<sup>47</sup> Stephen Befort, for example, describes the common law control test and its variants as being “inconsistent with the fundamental objectives of modern labor and employment legislation,” which is rooted in the premise that “individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment.”<sup>48</sup> The common law control test, “fashioned in the nineteenth century for the purpose of determining the reach of respondeat superior tort liability, is blind to this goal. By focusing solely on the right to control, the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances.”<sup>49</sup> Nancy Dowd has argued that the policies underlying discrimination laws, in particular, are fundamentally different from those underlying the common law test and that the right to control the physical conduct of employees is irrelevant to the concerns that gave rise to discrimination laws.<sup>50</sup> Using the common law control test for Title VII is thus “simply inappropriate. At its worst, the practice erects yet another barrier

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45 See, e.g., Carlson, *supra* note 14, at 340 (“[T]he degree and nature of employer control is hopelessly elusive.”); Bodie, *supra* note 12, at 682-83, (noting that “[c]ourts and commentators continue to bemoan [the control test’s] inability to deliver clear answers”); Linder, *supra* note 41, at 188 (describing the common law test as an “eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners’ drivers on third parties”); Befort, *supra* note 39, at 167-69 (characterizing the common law control test as unpredictable, subject to manipulation, and blind to purposes of modern labor and employment legislation).

46 See, e.g., Linder, *supra* note 41, at 227.

47 See, e.g., *id.* at 227 (“Simulated statutory purposelessness enables employers and judges to manipulate the appearances of control, to deprive run-of-the-mill unskilled workers [of protection.]”); Bodie, *supra* note 12, at 683-84 (discussing concerns that idea of control is not proper proxy for concept of employment, either because it is too expansive or anachronistic).

48 Befort, *supra* note 39, at 168 (quoting Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7 (1988)).

49 *Id.*

50 Nancy E. Dowd, *The Test of Employee Status: Economic Relations and Title VII*, 26 WM. & MARY L. REV. 75, 101 (1984).

to equal employment opportunity.”<sup>51</sup> The rigid use of the common law control test, Dowd writes, “unduly denies the protection of Title VII to workers who are dependent on employers by virtue of the employer’s control of the employment marketplace or of the terms and conditions of employment.”<sup>52</sup>

## II. New Ways of Working: Misfits for Traditional Notions of Employment

Existing tests utilized to define employment have often proved a poor fit for purposes of labor law. The increase in newer forms of work makes that incompatibility even more pronounced.

In recent decades, increasing numbers of individuals are working in what have been described as nonstandard, contingent, or precarious relationships, often in ways unimaginable when definitions and regulatory schemes were written.<sup>53</sup> The trend seems to be moving, Richard Carlson notes, “toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships. Our employment statutes, however, rarely accept the challenge posed by this problem.”<sup>54</sup>

Linder describes how manipulating the labels results in loss of protection for vulnerable workers: “[E]mployers are relentlessly labeling ‘independent contractors’ workers as humble as those who clear stables of manure. Pseudo-purposeless approaches facilitate and are, in turn, reinforced by the accelerating trend toward pseudo-

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51 *Id.* at 102.

52 *Id.*

53 See Befort, *supra* note 39, at 158 (“The ‘contingent workforce’ is a catch-phrase that encompasses a diverse group of non-core workers who provide work other than on a long-term, full-time basis. While no universally-accepted definition of contingent work exists, it is clear that this amorphous group is steadily increasing in size.”); Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 1, 1 (Katherine V.W. Stone & Harry Arthurs eds., 2013) (“Around the world, workers are embattled, labor markets are in disarray, and labor laws are in flux . . . [Work] relationships have become increasingly unstable in most industrialized countries and this instability is undermining the regulatory regimes that organized and governed labor markets and employment relationships for much of the twentieth century.”).

54 Carlson, *supra* note 14, at 298.



self-employment. The result is massive deregulation of the labor market.”<sup>55</sup> These practices “then set off a race to the bottom of their industry as competitors are forced to follow suit lest their profits are unduly diminished by their abiding by the law.”<sup>56</sup> Befort calls the result a “regulatory ‘black hole.’”<sup>57</sup>

Some forms of “virtual” or online work, such as crowd work, are testing the limits of our current definitions. At the same time, there seems to be an increase in volunteer work that is required to enter, or remain, in an occupation, such that these volunteers resemble employees in some respects. Crowd work and volunteerism might seem dissimilar, but they both force us to reconsider the way we identify which workers receive the benefit of labor law protection.

### A. Crowd Work<sup>58</sup>

Crowd work has been defined as “the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large, group of people in the form of an open call.”<sup>59</sup> Alek Felstiner describes these new platforms for online work that “allow firms to connect with enormous numbers of prospective laborers and to distribute tasks to an

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55 Linder, *supra* note 41, at 188.

56 *Id.*

57 Befort, *supra* note 39, at 165.

58 The following brief descriptions of crowd work (also known as crowdsourcing) are presented here not as any definitive report on the subject, but merely to illustrate some features that present new challenges to how we regulate work.

59 Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143, 145 (2011) (internal quotation marks omitted); see also Aniket Kittur et al., *The Future of Crowd Work*, in PROCEEDINGS OF THE 2013 CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK 1301, 1303 (Ass’n for Computing Mach. ed., 2013), available at <http://hci.stanford.edu/publications/2013/CrowdWork/futureofcrowdwork-cscw2013.pdf> (“Current crowd work typically consists of small, independent, and homogenous tasks . . . Workers are paired with an instance of each task to produce an output. Such simple, small-scale work has engendered low-pay, piece rate reward structures, in part due to the perception that workers are homogenous and unskilled.”). Some of the more popular crowd work platforms include “general-purpose marketplaces . . . as well as markets for specific expertise . . . While these platforms are intended for legitimate tasks, these and other platforms are sometimes appropriated for illegal or nefarious purposes . . .” Kittur, *supra*, at 1302.

amorphous collection of individuals, all sitting in front of computer screens.”<sup>60</sup> Online labor markets allow workers from around the world to sell their labor to a global pool of buyers. The creators of these markets act as labor market intermediaries in what has become something of a global virtual hiring hall for piecework. Crowd work is still so new that its definitions, contours, theoretical models, economic theory and design are still evolving.<sup>61</sup> Felstiner writes that “[t]he structure of these contracts, and the obligations they entail, remain quite murky.”<sup>62</sup>

Firms using crowd workers enjoy the advantages of scalability and on-demand labor at a relatively low cost.<sup>63</sup> Such firms “do not need to provide facilities and support for a workforce, nor do they need to pay overhead fees to an outside contractor.”<sup>64</sup> Because the relationship “tends to be fleeting and largely anonymous,” crowd work typically requires little or no need to hire supervisors or personnel managers.<sup>65</sup>

Crowd workers have been described as “a diverse and multifaceted population with a range of motives and experiences.”<sup>66</sup> Crowd workers choose when and where to work, how long to spend, and what work to perform. Indeed, “[a]ll you need to get started is a computer and a reasonably fast internet connection.”<sup>67</sup> But that flexibility comes at a cost: “Crowd workers tend to receive extremely low pay for their cognitive piecework, on the order of pennies per task. They usually earn no benefits and enjoy no job security, and in fact the vendors may seek to prevent them from doing so.”<sup>68</sup>

Amazon Mechanical Turk (AMT) is one example of crowd work, and is probably the largest crowd work platform on the web.<sup>69</sup>

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60 Felstiner, *supra* note 59, at 145.

61 See John J. Horton & Lydia B. Chilton, *Labor Economics of Paid Crowdsourcing*, in PROCEEDINGS OF THE 11TH ACM CONFERENCE ON ELECTRONIC COMMERCE 209, 216 (Ass’n for Computing Mach. ed., 2010), available at <http://dl.acm.org/citation.cfm?id=1807376> (“Crowdsourcing is still a new development, and many open questions remain.”).

62 Felstiner, *supra* note 59, at 171.

63 *Id.* at 151-52.

64 *Id.* at 152.

65 *Id.* at 151-53.

66 Kittur, *supra* note 59, at 1310.

67 Felstiner, *supra* note 59, at 154.

68 *Id.* at 155-56.

69 *Id.* at 161. Amazon Mechanical Turk is named after an eighteenth-century mechanical device that appeared to beat humans at the game of chess (a

“Individuals or companies formulate and post tasks for the vast crowd of Turkers/Workers on the Mechanical Turk website.”<sup>70</sup> These micro-tasks are typically simple and repetitive, and “may include tagging photos, comparing two products, or determining if a website is suitable for a general audience. The Turkers are able to browse among the listed tasks and complete them, then receive payment in the form of credits from Amazon.com.”<sup>71</sup> Miriam Cherry describes the asymmetrical nature of this arrangement: “Requesters have many rights on the Mechanical Turk website; Turkers, on the other hand, have far fewer. Requesters may set hiring criteria and they may accept or reject the work product, which has an effect on a Turkers’s online reputation and ability to compete for work in the future.”<sup>72</sup> According to recent studies, many Turkers report that they relied on the money they make from AMT work to survive, but as Felstiner notes “the low rate of pay makes closing income gaps with AMT an uphill battle. The average [T]urker spends eight hours per week doing HITs, earning \$1.25 per hour . . . .”<sup>73</sup>

Online activity often blurs the line between work and leisure. Cherry describes some of this activity as “playbor,” a gray area, occupying the space between work and play:<sup>74</sup> “[O]ne of the more challenging questions is how to classify many of the activities that occur in virtual worlds—are these activities work or leisure?”<sup>75</sup>

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chessmaster was hidden inside). Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 967 (2011).

70 Cherry, *supra* note 69, at 967.

71 *Id.*

72 *Id.* at 968.

73 Felstiner, *supra* note 59, at 167 (HITs standing for “Human Intelligence Tasks”); see also M. Six Silberman et al., *Ethics and Tactics of Professional Crowdsourcing*, XRDS, Winter 2010, at 40, available at <http://xrds.acm.org/article.cfm?aid=1869100> (“The Mechanical Turk labor pool hosts a growing international population earning less than \$10,000 per year, some of whom rely on Turking income to make basic ends meet.”).

74 Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1096 (2009) [hereinafter Cherry, *Working for (Virtually) Minimum Wage*]; Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 407 (2013) [hereinafter Cherry, *Cyber Commodification*].

75 Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 74, at 1098. Cherry describes some activity as “gamification,” the introduction of elements of fun or game-playing into everyday tasks or through simulations. Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851, 852 (2012) (“[T]he idea that people could be working while they play a video game—in some

Some virtual workers are paid to “harvest virtual treasures” for more affluent online gamers who “want to advance quickly within the game and, tired of the repetitive tasks necessary to build a high-level character, would prefer to pay others to do the work.”<sup>76</sup> Markets have developed around such activity, as “virtual worlds have real-money-convertible economies that include as their basis a value on time that people spend in the world.”<sup>77</sup> Some playborers “may be users who are performing this work for fun or out of altruistic motivations, and have no expectation of payment. Others are attempting to eke out a living through this type of work.”<sup>78</sup>

Felstiner describes in-game work as having many forms: “Some of the work performed inside gaming environments resembles bartering. For example, one gamer might agree to perform some task on another’s behalf, in exchange for access to some virtual asset or benefit.”<sup>79</sup> But sometimes, these arrangements become more formal and begin to look like a contract for services. Such arrangements might develop further, into a longer-term relationship that has at least some hallmarks of traditional employment.<sup>80</sup>

Cherry identifies some of the challenges that virtual work poses for the law:

It is often difficult to analyze change when it is unfolding and one is living through it. Much of our current body of contract law doctrine traces its origins to the rise of mass production and expansion of factory labor 300 years ago. The changes in information technology and commerce that are now taking place are equally as complex and dramatic as the innovations during the original Industrial Revolution. Accompanying advances in communication and information technology is a dramatic expansion of online trade and commerce.<sup>81</sup>

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instances without even knowing that they are working—is becoming part of our reality.”).

76 Cherry, *Cyber Commodification*, *supra* note 74, at 412-13.

77 Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 74, at 1096-97.

78 *Id.* at 1096.

79 Alek Felstiner, *Sweatshop or Paper Route?: Child Labor Laws and In-Game Work*, in PROCEEDINGS OF CROWDCONF \*1, \*1 (2010), available at <http://www.crowdconf2010.com/images/finalpapers/felstiner.pdf>.

80 *Id.*

81 Cherry, *Cyber Commodification*, *supra* note 74, at 387-88.

Cherry submits that while such virtual work might be new, it “presents many of the same enduring problems that workers’ rights advocates have struggled with over the years.”<sup>82</sup> Crowd workers, for example, might risk nonpayment for their work; they often bear the cost of errors made by requesters; and they must be vigilant to stay safe and protect their privacy, as some requests are scams.<sup>83</sup> Given the lack of a shared physical workspace, one might think that unlawful discrimination would not be an issue for online work. Some commentators suggest, however, that online workplaces might be more prone to discrimination and bullying because of costumes, cloaking, anonymity, escapism, and lower boundaries.<sup>84</sup> Natasha Martin, for example, posits that the “mechanics of online identity and the social and behavioral dynamics of virtual engagement produce a new locus for bias to flourish.”<sup>85</sup> Cherry writes that “the potential for sexual harassment, as well as other types of harassment, abound in virtual work. Part of this may be due to the anonymous nature of cyberspace, the fact that some worlds are loosely monitored, if at all, and the idea that the Internet is a relaxed area where the formal rules of social interaction do not typically apply.”<sup>86</sup>

Cherry notes that some types of virtual work have been called “virtual sweatshops.”<sup>87</sup> She has written on why virtual workers might need protection of labor laws, such as discrimination, workers’ compensation, whistleblowing, unionizing, privacy at work, and wage and hour laws.<sup>88</sup>

Felstiner writes that workplace law is “currently unequipped to decide rights and obligations in many online work scenarios.”<sup>89</sup>

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82 *Id.* at 410.

83 *See generally* Silberman, *supra* note 73 (describing potential hazards for AMT workers); *see also* Kittur, *supra* note 59, at 1304 (“The worker’s power is . . . limited: requesters do not make a long-term commitment to the worker, and endure few penalties if they renege on their agreement to pay for quality work.”).

84 *See, e.g.*, Natasha T. Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 LEWIS & CLARK L. REV. 605, 630 (2012); Cherry, *Cyber Commodification*, *supra* note 74, at 398-402.

85 Martin, *supra* note 84, at 605.

86 Cherry, *supra* note 69, at 979.

87 Cherry, *Cyber Commodification*, *supra* note 74, at 410.

88 *See generally* Cherry, *supra* note 69; *see also* Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 74.

89 Alek Felstiner, *Grappling with Online Work*, 56 ST. LOUIS U. L.J. 209, 209 (2011) [hereinafter Felstiner, *Grappling with Online Work*]; *see also* Felstiner, *supra* note

Crowd workers “do not enjoy true legal protection on the job, and the cyberspace in which they work remains essentially unregulated for employment and labor law purposes.”<sup>90</sup> Felstiner observes:

Though crowdsourcing has been called “the biggest paradigm shift in innovation since the Industrial Revolution,” the already-maturing market for crowd labor remains almost entirely unregulated. Or, to be more accurate, judicial authorities have yet to apply existing employment and labor laws, and regulatory authorities have taken no action to adapt those laws to crowd labor. Such delay should not surprise us, given the law’s generally slow reaction time and the likelihood that regulators have a limited awareness of the crowdsourcing industry.<sup>91</sup>

If and how crowd work might be subject to labor laws remains to be seen.

## B. Volunteers

At the same time we are grappling with these new forms of work, more attention is rightly being paid to some existing arrangements that have evolved in ways that should concern labor law.<sup>92</sup> Mitchell Rubinstein has written, for example, on the potential for abuse and exploitation of volunteers. Such scrutiny is especially timely now that volunteering has often become a gateway to paid work.<sup>93</sup> Volunteers include not only the folks making cookies for the

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59, at 197 (“If [crowd workers] fail to fit the legal definition of ‘statutory employee,’ it is not because they fall squarely into some other bracket. Our gap-ridden and outdated legal regime simply does not accommodate new labor models very well.”).

90 Felstiner, *supra* note 59, at 156 (“[C]rowd workers also encounter problems with information asymmetry, deception, and privacy.”); Kittur, *supra* note 59, at 1302 (“We may see echoes of past labor abuses in globally distributed crowd work: extremely low pay for labor, with marketplaces such as Amazon’s Mechanical Turk reported to effectively pay an average of \$2/hour with no benefits or worker protections.”).

91 Felstiner, *supra* note 59, at 145 (noting lack of case law on topic).

92 See, e.g., Rubinstein, *supra* note 22, at 163 (discussing the potential of abuse of volunteers).

93 See *id.* at 149 (“In some industries, an internship has become a ‘virtual requirement in the scramble to get a foot in the door.’”).



PTA bake sale or helping at the local blood drive. Today, they also include those required to “volunteer” in some fashion to enter or remain in an occupation.

Many states, for example, have for some time required pro bono work to maintain a law license.<sup>94</sup> New York now requires an applicant for that state’s bar to have performed 50 hours of qualifying pro bono service before applying for admission to practice.<sup>95</sup> Such pro bono work does not necessarily require working for free, as some paying positions may meet the requirement (for example, where such work is funded by a grant).<sup>96</sup> Many aspiring attorneys, however, will presumably take unpaid jobs to meet their pro bono requirements, especially in a tight job market of scarce paying jobs that qualify.

Such pro bono volunteer work would be considered “employment” by the National Conference of Bar Examiners (NCBE).<sup>97</sup> The NCBE Request for Preparation of a Character Report requires applicants to list their law-related employment, which includes volunteer work and internships, whether paid or unpaid.<sup>98</sup> The applicant must further disclose whether he has ever been terminated from such “employment,” and explain the circumstances of that termination.<sup>99</sup>

For New York bar applicants, a pro bono worker will need the “hiring” organization to certify the hours worked as part of the admission application process,<sup>100</sup> and might also depend on the organization to provide a job reference to secure paid employment.

This type of dependence puts significant power in the hands of such organizations—power that might exceed that of many

94 See *State-by-State Pro Bono Service Rules*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html) (last updated Jan. 30, 2012).

95 NY COMP. CODES R. & REGS. tit. 22, § 520.16 (2014); see also *New York State Bar Admission: Pro Bono Requirement FAQs*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf> (last updated Feb. 10, 2014) [hereinafter *NY Pro Bono Requirement FAQs*].

96 See *NY Pro Bono Requirement FAQs*, *supra* note 95 (answers to questions 16, 25-26: receipt of grant, stipend, or salary will not disqualify otherwise eligible pro bono service).

97 See *Request for Preparation of a Character Report*, NATIONAL CONFERENCE OF BAR EXAMINERS 1, [http://www.ncbex.org/assets/media\\_files/CandF/StandardNCBE.pdf](http://www.ncbex.org/assets/media_files/CandF/StandardNCBE.pdf) (last updated March 20, 2014) (sample application).

98 *Id.* at 6.

99 *Id.* at 8.

100 Tit. 22, § 520.16(f).

traditional employers—making such livelihood-dependent volunteers particularly vulnerable to at least some kinds of abuses, such as discrimination or sexual harassment. Yet, these unpaid volunteers are left largely unprotected by labor laws.

Rubinstein describes the current status of volunteers under labor law. He classifies volunteers into two categories:

The ordinary or *pure volunteer* is someone who receives nothing in return from the organization he or she is serving. The other type of volunteer is what I will term a '*volunteer plus*.' A volunteer plus may have his or her expenses reimbursed and may receive some types of minor benefits such as death or disability insurance or even a small stipend. The legal status of the volunteer very much depends upon the category into which the volunteer falls.<sup>101</sup>

"Pure" volunteers typically have not been protected by labor laws. Rubinstein notes the Supreme Court "has recognized that ordinary or pure volunteers are not subject to the FLSA and presumably our nation's other labor and employment laws."<sup>102</sup> (Discussed below is a recent counter-example—a federal district court case deciding that unpaid volunteers might indeed be "employees" under Title VII and Illinois state law.<sup>103</sup>) Rubinstein writes of the conflicting opinions issued with respect to the "volunteer plus:" "Usually, when volunteers receive something extra, such as a stipend or benefits, they are more likely to be found to be employees—but this is not always the case. Their employment status depends upon the type of benefits they receive and which type of test the court will utilize to determine employee status."<sup>104</sup>

The distinction that is currently drawn between the pure volunteer and the volunteer plus does not address the possible exploitation of those volunteers who are working for no monetary compensation but who depend on those jobs to enter, or remain in, their occupations.

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101 Rubinstein, *supra* note 22, at 153 (emphasis added).

102 *Id.* at 154.

103 See discussion *infra* Part IV.C.2.

104 Rubinstein, *supra* note 22, at 182.



### III. Some Purposive Approaches to Labor Law Protections

Some commentators and courts have taken a purposive approach to determining coverage of labor laws, by looking to regulatory purpose to develop definitions under the particular law.

Langille and Davidov recount the “basic rule in statutory interpretation . . . that the meaning of words be determined with regard to the context and purpose in which and for which they are used.”<sup>105</sup> “Classically put, the distinction between employees and independent contractors ultimately rests in the context of each specific legislation on the ‘mischief’ at which the legislation is aimed.”<sup>106</sup>

Henry Perritt submits that “[w]hether it would be a good idea to treat certain independent contractors as employees depends upon the purpose for which they would be treated as employees.”<sup>107</sup> The result might be different under different laws; it might make sense to treat independent contractors as employees under the NLRA for purposes of organization and representation for collective bargaining, or under discrimination laws, but not for purposes of minimum wage and maximum hour standards or for occupational safety and health standards.<sup>108</sup>

Linder reminds us that these “mischief-purpose principle[s]”<sup>109</sup> are hardly novel, as judges have been using them as canons of

105 Langille & Davidov, *supra* note 1, at 17-18 (authors describe Canadian experience).

106 *Id.* at 18. Davidov suggests that we “look more directly at the factual situation (specific vulnerabilities) that labour laws are designed to address. Then we can try to ensure that our labour laws are indeed covering the workers within this factual situation.” Guy Davidov, *Re-Matching Labour Laws with Their Purpose*, in *THE IDEA OF LABOUR LAW* 179, 181 (Guy Davidov & Brian Langille eds., 2011). Bruno Caruso describes a strategy that he says is “favored by the majority of academics,” which “proceeds on the assumption that all contracts in which a person is in some sense employed require protection adequate to the circumstances of the situation.” Bruno Caruso, “*The Employment Contract is Dead! Hurrah for the Work Contract!*” *A European Perspective*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 95, 105 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

107 Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as “Employees” Under Labor Law?*, 33 *VILL. L. REV.* 989, 1020 (1988).

108 *Id.*

109 Linder, *supra* note 41, at 193. Linder sees “the root problem with U.S. labor law defining covered employees [as] the purposed denial of socioeconomic purpose.” *Id.* at 187.

statutory construction for centuries.<sup>110</sup> He quotes the 400-year-old, but still relevant, *Heydon's Case*: "The office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . according to the true intent of the maker of the Act, pro bono publico."<sup>111</sup>

Some contemporary courts have taken a purposive direction in defining coverage under labor laws. In *Robinson v. Shell Oil Co.*, the Supreme Court looked at the primary purpose of Title VII in deciding that the statute's anti-retaliation provision applied to former employees who were given a negative post-employment reference.<sup>112</sup> The Court agreed with the Equal Employment Opportunity Commission (EEOC) that excluding former employees from the anti-retaliation provisions in Title VII "would undermine the effectiveness of Title VII by allowing the threat of post[-]employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."<sup>113</sup> The EEOC's position was consistent with a "primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms . . . [I]t would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII – for example, complaints regarding discriminatory termination."<sup>114</sup>

Discussing the statutory definition of employee under the FLSA, Judge Easterbrook, in *Secretary of Labor v. Lauritzen*, detailed the problems of applying to migrant farmers the factors that comprise common law and economic realities tests.<sup>115</sup> In his concurrence, he calls for an abandonment of "these unfocused 'factors,'" in favor of an inquiry into the purposes and functions of the statute.<sup>116</sup>

The D.C. Circuit Court of Appeals in *Sibley Memorial Hospital v. Wilson* looked at the statutory purpose of Title VII to decide that a plaintiff who was not a direct employee of the defendant was still

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110 *Id.* at 193.

111 *Heydon's Case*, (1584) 76 Eng. Rep. 637 (K.B.) 638; *see also* Linder, *supra* note 41, at 193.

112 519 U.S. 337, 346 (1997).

113 *Id.*

114 *Id.*

115 835 F.2d 1529, 1539-45 (7th Cir. 1987) (Easterbrook, J., concurring).

116 *Id.* at 1543.

covered under that statute.<sup>117</sup> Verne Wilson, a male nurse, had been referred to care for a female patient in the defendant hospital.<sup>118</sup> He alleged that the hospital refused to allow him into its facility to care for her, and he sued the hospital alleging sex discrimination.<sup>119</sup> The hospital argued that, since no direct employment relationship between itself and Wilson was ever contemplated by either of them, it was not an employer under Title VII with respect to Wilson.<sup>120</sup> The court rejected the hospital's argument, emphasizing the purpose of Title VII to achieve equality of employment opportunities:

To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.<sup>121</sup>

The court in *Sibley* looked past the absence of a direct employment relationship and concluded that the purpose of the statute would be undermined if the hospital were permitted to discriminatorily erect barriers to Wilson's job opportunities.

As discussed below, there is also recent case law that uses a purposive approach to find that some volunteers might be covered as employees under discrimination laws.<sup>122</sup> And though Congress rejected the Supreme Court's definitions of employment in *Hearst* and *Silk*, discussed above, the language in those cases illustrates a purposive approach; i.e., the definition of employee should be read "in light of the mischief to be corrected and the end to be attained."<sup>123</sup>

A purposive approach tends to shift the emphasis away from what Linder calls "traditional looking-over-the-shoulder physical control"<sup>124</sup> toward indicia of economic dependence. "The point is not

117 488 F.2d 1338 (D.C. Cir. 1973).

118 *Id.* at 1339.

119 *Id.* at 1339-40.

120 *Id.* at 1340-41 (noting that hospital was a "covered employer" under Title VII, but not the plaintiff's direct employer).

121 *Id.* at 1341.

122 See discussion *infra* Part IV.C.2.

123 *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 124 (1944).

124 Linder, *supra* note 43, at 601.

that control is entirely irrelevant, but that as an exclusive coverage criterion it prevents millions of workers from negotiating with employers who do not look over their shoulders issuing commands, yet nevertheless determine their working conditions.”<sup>125</sup>

Such a purposive orientation might lead in some scenarios to disregarding employment status altogether. Since “independent contractors frequently resemble employees in ways that make them equally in need of protection,”<sup>126</sup> Carlson asks why employment status matters at all.<sup>127</sup> He would focus on the purpose of a law and intended effect, and “provide for its application irrespective of traditional distinctions of status, and without the need for identifying a particular employment relationship.”<sup>128</sup>

Indeed, there are precedents for some protection for workers who are not employees. For example, 42 U.S.C. § 1981 prohibits race discrimination in the making of contracts, and is not limited to employment.<sup>129</sup>

I have also called for disregarding employment status in some cases brought under the common law tort of wrongful discharge in violation of public policy.<sup>130</sup> Courts recognizing such a claim tend to do so when an employer discharges an employee in retaliation for refusing to violate the law, reporting unlawful conduct, or performing some civic duty.<sup>131</sup> That cause of action traditionally has been limited to employees, even when the public policy at issue suggests wider coverage.

Suppose, for example, that an employee, Jane the Accountant, is fired for refusing to commit perjury in a fraud prosecution against her employer. Most courts would allow Jane to bring a common law claim of wrongful termination in violation of public policy—the policy found in the law against perjury. But what if Jane the Accountant is

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125 Linder, *supra* note 41, at 198. Linder refers to “the economic reality of dependence.” *Id.* at 201.

126 Carlson, *supra* note 14, at 300.

127 *Id.* at 299.

128 *Id.* at 300.

129 42 U.S.C. § 1981 (2006); *see* Carlson, *supra* note 13, at 683 (noting that “other statutes appear to extend protection to ‘workers’ or other broad classes of persons without regard to the employee or independent contractor distinction”).

130 Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL’Y REV. 39, 46 (2000).

131 *Id.* at 50.

an independent contractor and the company threatens to terminate its relationship with her if she testifies truthfully? Traditionally, Jane, because she is not an employee, would not be allowed to bring such a claim. Such a distinction here makes little sense, and thwarts the purpose of the underlying policy of preventing perjury.

To decide wrongful discharge cases for violation of public policy based only on employment status is to lose sight of the purpose of allowing such a claim—protecting the public’s interests. The better way is to look at the source of the public policy in a particular case to determine whether its purpose is to protect employees, as such, or whether its purpose is one that transcends the employment relationship.

Some have expressed apprehension about such purposive approaches. Perritt is concerned that it might be too inclusive: “An extremely simple way to broaden the scope of labor and employment law is to define ‘employee’ to include anyone who performs services for another. No one would be excluded because he is an ‘independent contractor.’”<sup>132</sup> But Perritt wonders whether labor law can protect independent contractors “without sweeping up a variety of purely commercial relations.”<sup>133</sup> Matthew Bodie sees this as an “abandonment of any common notion of employment. If certain regimes are based on the notion of ‘employee’ to determine the extent of coverage, then arguably the concept of employment is part of the overall system of regulation. The purpose-oriented approach seeks to deny, to a greater or lesser extent, the theoretical basis for this commonality.”<sup>134</sup>

Manfred Weiss is concerned that “[e]xtending the scope of the full amount of labour law application on economically dependent self-employed might lead to de-legitimacy of labour law.”<sup>135</sup> Weiss writes:

The changes of the employment reality . . . force labour law to be adapted to the new employment reality. But labour law is not to be misunderstood as a tool to compensate the position of the weaker party everywhere. There are different subsystems in society for which legal progress has devel-

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132 Perritt, *supra* note 107, at 1023.

133 *Id.* at 1020.

134 Bodie, *supra* note 12, at 691.

135 Manfred Weiss, *Re-Inventing Labour Law?*, in *THE IDEA OF LABOUR LAW* 43, 48 (Guy Davidov & Brian Langille eds., 2011).

oped specific instruments which are shaped according to the needs within the respective subsystem, be it family law, consumer protection law or whatever. This progress is not to be reversed but has to be adapted to changes of reality. For labour law this means that it has to respond to the new realities in the area of employment in its broadest sense but not to expand in overarching categories for all the miseries of the world. Then it would lose its function.<sup>136</sup>

Rather, it might be preferable initially to “establish basic principles which govern such economically dependent self-employed as well as employees. This then would allow the elaboration of tailor-made protective schemes, taking full account of the specific situation of this group.”<sup>137</sup>

Davidov suggests that we first examine the broader ideas of labor law and then attend to “concrete results that society finds unacceptable.”<sup>138</sup> That is, start from the “grand project” and then shift to specific pieces of legislation.<sup>139</sup>

Heeding such cautions, I suggest a purposive approach that first looks at broader purposes of labor law to decide whether a worker belongs in the protective realm (or subsystem, to use Weiss’s term) of labor law—and then move to examine the specific regulatory purpose at issue. To the extent that factors might be useful, then the articulation and relative weight of each factor need to address the mischief at hand. They also need to reflect an understanding of the work relationships under review.

#### IV. A Boundaried Purposive Approach

##### A. Labor Law’s Values

Let us return to the question: why do we have labor law? I am not sure we can all agree that labor law has a single “normative

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136 *Id.* at 49.

137 *Id.* at 48.

138 Davidov, *supra* note 106, at 180.

139 *Id.* at 180-81 (“[E]ach piece of legislation has its own purposes, which correspond with the general values that labour laws are aimed to protect and promote, or with the vulnerabilities that characterize employment relations in general.”).

fixed star.”<sup>140</sup> (If there is such a star, there seems to be no consensus on what or where it is.) And I recognize that there is an ongoing discussion and debate about the contours and theories of the field.<sup>141</sup> But there is a constellation of commonly articulated themes and principles of modern labor law. I will work within this constellation.

The employment relationship is typically one between a bearer of power and one who is not a bearer of power, and labor law acts as a restraint on that power.<sup>142</sup> Harry Arthurs writes that whatever its substantive content, labor law “is designed to protect ‘workers.’”<sup>143</sup> Langille and Davidov elaborate on this “common idea” of labor law:

[A]s far as most labor and employment law regulations are concerned, there seems to be one common idea that sheds light on them all—the protection of workers . . . There are, of course, specific goals to specific regulations and these should also be taken into account. But the basic purpose of protecting workers that are in need of and are entitled to certain forms of protection vis-a-vis their employers unites them all.<sup>144</sup>

Underlying labor law is a protective reflex. Langille writes:

When human bodies encounter the wheels of commerce some precautions are in order . . . Our ideas of exploitation, subordination, dependence, and so on are fundamental

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140 Langille & Davidov, *supra* note 1, at 43.

141 See, e.g., *THE IDEA OF LABOUR LAW passim* (Guy Davidov & Brian Langille eds., 2011).

142 Brian A. Langille, *Labour Law’s Theory of Justice*, in *THE IDEA OF LABOUR LAW* 101, 119 (Guy Davidov & Brian Langille eds., 2011) (“[L]abour lawyers know in their hearts that the whole point of labour law is to rid us of, or at least constrain to some degree, the world of ‘the free market’ in labour.”). For discussion of unequal bargaining power in the workplace, and criticism of such notion, see Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 *STAN. L. REV.* 351 (2011); see also Marion Crain, *Arm’s-Length Intimacy: Employment as Relationship*, 35 *WASH. U. J.L. & POL’Y* 163, 166 n.12 (2011) (responding to challenges to her assumption that most individual workers lack bargaining power).

143 Harry Arthurs, *Labour Law After Labour*, in *THE IDEA OF LABOUR LAW* 13, 18 (Guy Davidov & Brian Langille eds., 2011).

144 Langille & Davidov, *supra* note 1, at 18-19.



to our understandings here. The normative engine of our rallying cry is fuelled by the reality of the labour market position of most workers. And the logic of labour law so fuelled is, again, the idea of a set of constraints on otherwise available market power.<sup>145</sup>

## B. Identifying Workers Who Receive Benefits of Labor Law Protection

Mindful of these values, let us return to Zatz's questions: "Which workers receive the benefit or protection of labor law, and how are they identified?"<sup>146</sup> "It is not enough to say that all workers deserve certain protections or to focus only on what those protections should be. We need to understand exactly what makes someone a 'worker' and why that matters, exactly how and by whom that protection should be provided . . ." <sup>147</sup>

Labor law currently leaves out some work relationships that present the kind of mischief the law is meant to address. For example, the livelihood-dependent volunteers discussed above will typically be left out of labor law's protection if they do not receive some kind of pecuniary benefit from the "hiring" organization. And the crowd worker that does not measure up under our existing tests will also fall through the regulatory cracks. Still, there are legitimate concerns about defining "worker" too broadly here, so as to make the definition useless.

I propose the following definitions to address these gaps, without sweeping up all manner of commercial transactions. A "worker" is a person who exerts effort for (an)other person(s) for compensation or reward.<sup>148</sup> "Compensation or reward" includes earnings, wages, job opportunities, and occupational access. Such a broad definition of "compensation or reward" is consistent with concerns expressed by courts and legislatures in various contexts regarding a worker's dependence on a firm for occupational access

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145 Langille, *supra* note 142, at 106.

146 Zatz, *supra* note 5, at 56.

147 *Id.* at 58.

148 I have borrowed and modified some of this terminology language from foreign definitions of a "dependent contractor." See discussion *supra* notes 135-36.



(discussed more fully below). A “labor user” or “firm” is the person or entity for whom the worker exerts such effort.

The next question is: does this work(er) belong in the protective realm of labor law? Otherwise put, does this arrangement have the potential for the mischief that labor law is meant to address? Is this the kind of dependent relationship that starts that “normative engine” to which Langille refers? Does it hit that protective nerve? If the answer is yes, we next consider the purpose of a particular regulation to determine coverage under the same.

I am not suggesting that all for whom the answer is yes should be covered by all labor laws. Rather, this is an interim step toward a more focused purposive analysis for a given regulation. This initial inquiry regarding labor law’s broader purposes is meant to set some boundaries, albeit wide ones, around a purposive approach. (If the answer is no, then such activity might still be regulated outside labor law. For example, “traditional” volunteers of the bake-sale variety might still be covered by laws prohibiting discrimination in public accommodations.<sup>149</sup>)

Finding the right tools to determine when such dependency exists is challenging,<sup>150</sup> and the result might not be any more elegant than our current methods. But let us at least move the discussion in a direction that is more consistent with the goals and values of labor law. To the extent we consider notions of control at this stage, the emphasis should be less on physical control of the work and workplace and more on power and control over the terms and conditions of the relationship and the worker’s livelihood. Or as Davidov puts it, “[O]ne should look beyond the terms of the contract and focus on whether, in reality, the putative worker was in a position of dependency on

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149 Rubinstein, *supra* note 22, at 183.

150 See Guy Davidov, *Who is a Worker?*, 34 *INDUS. L.J.* 57, 67 (2005) (discussing the challenge of finding the right “tools for the task of determining when such dependency exists,” in context of labor law in United Kingdom). Outside the United States, measures of economic dependence have taken a more prominent role in determining who enjoys coverage of at least some labor protections. Some countries (e.g., Germany and most Canadian provinces) now include some intermediate categories of workers that are covered for at least some laws, e.g., recognizing “a third category of workers that falls in between employees and independent contractors. These ‘dependent contractors’ technically are not employees under the traditional legal tests, but nonetheless are recognized as deserving of some employee-like legal protections by virtue of working in positions of economic dependence.” Befort, *supra* note 39, at 173.

the relationship with the specific employer, thus being in need of protection.”<sup>151</sup>

Workers depend on firms for more than just wages. We also need to look at the firm’s power to control the worker’s livelihood, job opportunities, and occupational access. Legislatures and courts have recognized the need for this type of dependency inquiry, even outside a direct employment relationship. Legislation protecting apprenticeships, for example, is aimed at promoting job opportunities, recognizing the importance of apprenticeship work as a gateway to an occupation. Apprenticeships are regulated under federal labor law at least in part to “safeguard the welfare of apprentices” and “promote apprenticeship opportunity.”<sup>152</sup> And federal statutes prevent discrimination in apprenticeship programs.<sup>153</sup>

Similar concern for mischief-making in occupational access has also been evident in case law such as *Sibley*. Recall that in *Sibley*, the court decided that Mr. Wilson was entitled to Title VII protection even though the defendant was not his direct employer because the defendant controlled his access to job opportunities; i.e., the defendant-hospital was not paying him, but it had the power to inhibit his ability to earn his living by shutting off his opportunity to work for others.<sup>154</sup> Mr. Wilson was thus dependent on the hospital, in that the hospital had the power to control his ability to engage in his occupation. Other cases have similarly interpreted discrimination law in work scenarios outside a direct employment relationship where third parties, such as licensing bodies and professional associations, control access to employment opportunities or entry into a profession.<sup>155</sup>

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151 Davidov, *supra* note 150, at 70. Davidov argues that “dependency, in itself, should be used to identify ‘workers’ and trigger the application of (at least some) protective labour laws.” *Id.* at 71.

152 29 C.F.R. § 29.1(b) (2014).

153 See *EEOC Compliance Manual*, EEOC, <http://www.eeoc.gov/policy/docs/threshold.html> (last updated Aug. 6, 2009).

154 *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

155 See Dowd, *supra* note 50, at 104-05; see also Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 383, 398 (2013) (discussing workforce mobility as a source of power: “Mobility—the practical ability to exit, and therefore the credible threat of exit, from one geographic setting in favor of another with more lucrative opportunities—is a source of power.”). Some, but not all, courts have followed *Sibley*. Rubinstein, *supra* note 18, at 643-44.

### C. A Purposive Analysis for Particular Regulations

Once we have decided that a worker belongs in the labor law sphere, we can look at the purpose of a particular regulation to determine coverage. This next step requires a more thorough review of a particular regulation's purpose and the work relationship at issue. I am not going to review all regulations and make recommendations as to which types of work might fit where in the labor law tapestry. Such particularized analyses are beyond the scope of this Article, or probably any one paper. But I do offer the following taxonomical notes and guideposts with regard to crowd work and volunteers.

#### 1. *Crowd Work*

The descriptions above suggest that at least some forms of crowd work give rise to the kind of dependency and power dynamics that labor law is meant to address.<sup>156</sup>

A separate inquiry is whether a particular variant of crowd work might be covered by a specific regulation (or perhaps whether it warrants new or amended regulation). Such work must be viewed in light of the purposes of the specific statutes. For example, consider a worker completing micro-tasks from her home. Coverage analysis might differ under discrimination laws as opposed to health and safety laws. The potential for discrimination, as discussed above, might still be real in this scenario. Whether workplace safety laws were meant to reach into a micro-worker's own home is another question, and requires a different inquiry.

Some forms of virtual activity, such as "playbor," raise the additional question of whether an activity is really work, versus leisure. Yet, one's enjoyment of an activity cannot be determinative. As Alain Supiot puts it: "The distinction between work and activity should not be made by the nature of the action accomplished (the same mountain walk is a leisure activity for the tourist but work for the guide accompanying him)."<sup>157</sup> We certainly do not have exceptions to labor laws for those who take jobs for reasons other than money. One who wins the lottery but still reports to work does not suddenly become exempt from labor law protections. The better

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156 See discussion *supra* Part II.A.

157 ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 54 (2001).

inquiry is whether there is a dependent relationship here that might warrant labor law scrutiny. In that many are trying to make a living out of such activity, it appears that many of these arrangements do.<sup>158</sup>

The novelty and variations of virtual work presents additional complexities. Whether, and how, the various forms of virtual work might be covered under workplace regulation is best determined not only by purposive principles, but also with an understanding of the context of this type of work. As discussed above, our traditional tests for defining employment have too often proved to be ill-suited for labor law. Linder has remarked that using the common law control test, an “eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners’ drivers on third parties” is “a hell of a way to run a twenty-first century railroad.”<sup>159</sup> The advent of virtual work makes the misfit of the horse-and-buggy doctrine even more glaring.

While I cannot offer a grand new taxonomy of virtual work, others have begun that project and offer useful commentary.<sup>160</sup> Felstiner, for example, describes the unsuitability of traditional “control” factors to crowd work: “[C]ontrol’ in the context of a virtual work environment may mean something very different from control in a physical worksite.”<sup>161</sup> There is no physical supervision, no over-the-shoulder control here, but there is substantial control over the relationship and the terms and conditions of work.<sup>162</sup> He looks at the complication in applying the NLRA to crowd work; the case law interpreting the NLRA “relies on the existence of a physical workplace, a bounded geographic area, or some other form of centralization that allows for the selection of an appropriate bargaining unit. But online workplaces will not fit easily into the existing mold, making the NLRA even less relevant to the growing class of workers who perform their labor in cyberspace.”<sup>163</sup> Felstiner also examines crowd work in the context of FLSA coverage for crowd work, specifically AMT, using existing economic realities factors, and the problems of applying those factors. He concludes that “the employment status of [p]roviders for

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158 See Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 74, at 1096; see also discussion *supra* Part II.A and note 73.

159 Linder, *supra* note 41, at 188.

160 See generally Cherry, *supra* note 69; see also Felstiner, *Grappling with Online Work*, *supra* note 89; Felstiner, *supra* note 59.

161 Felstiner, *supra* note 59, at 191.

162 *Id.* at 191-94.

163 *Id.* at 182-83.

FLSA purposes remains unresolved, partly because some of the factors seem inapposite.”<sup>164</sup>

Felstiner offers a “context-driven readjustment of the tests” used to decide questions of regulatory coverage.<sup>165</sup> Such an analysis would look less at physical space, control over details, and duration of the relationship; instead, the emphasis should be on the terms of the relationship.<sup>166</sup> Control means something different in this context: “Examining the context could lead courts to acknowledge that in online work, the right to control employees themselves (many of whom will be anonymous and fleeting) is less important than the right to control the online environment in which the work is performed.”<sup>167</sup>

## 2. *Volunteers*

As discussed above, labor law has generally left unprotected “pure” volunteers—those who receive no payment, stipend, or benefits—even if such volunteers are performing such work as a means to enter or remain in an occupation.<sup>168</sup>

Instead, I propose that we distinguish volunteers this way: Traditional volunteers are those whose volunteer work will not affect their job prospects or livelihoods in any meaningful way. Livelihood-dependent volunteers, even if they receive no monetary compensation, are those whose job opportunities or occupational access depend on such volunteer work (e.g., pro bono volunteers, described above). This distinction better recognizes the power dynamics of these respective situations in a way that is consistent with the purposes of labor law.

Consider two volunteers: Tom volunteers for the Sunny Valley Garden Society. He earns no wages, but does receive a small stipend to cover his expenses. His volunteer work is unrelated to his occupation. Larry, a new law school graduate, volunteers for the Gotham Legal Aid Clinic, a non-profit organization. He receives no

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164 *Id.* at 178-79; see also Felstiner, *Grappling with Online Work*, *supra* note 89, at 210-11; Felstiner, *supra* note 59, at 179 (discussing the complications in applying the FLSA, i.e., how to determine and calculate minimum wage and overtime pay for crowd workers who might work for multiple employers).

165 Felstiner, *Grappling with Online Work*, *supra* note 89, at 228.

166 *Id.* at 228-29.

167 *Id.* at 228.

168 Rubinstein, *supra* note 22, at 181-82.

financial compensation, benefit, or stipend of any kind for such work. He needs Gotham to certify his hours on his bar application. He also needs a reference from his supervisor for his search for paid employment. I suggest that Larry's situation is a better illustration of the kind of relationship that labor law is meant to address, yet Tom is more likely to be covered by labor legislation using the current approach that distinguishes "pure" volunteers from "volunteers-plus."

Does this mean that livelihood-dependent volunteers should be covered by all labor laws? Not necessarily. We still need to look at the specific purpose of individual statutes. There might be valid policy reasons (e.g., to encourage charitable work and other socially valuable services) to exclude volunteers from minimum wage laws, for example. On the other hand, excluding livelihood-dependent volunteers (paid or not) from protection from discrimination is far less defensible.

Ideally, legislatures would step up and address some of the coverage gaps discussed here. Linder is correct that the administration and enforcement of labor laws "would be significantly enhanced if legislatures and courts coordinated both purpose and definition. If legislatures want to constrict rather than expand coverage, they should be forced to face public scrutiny of such a choice instead of being permitted to hide their agenda behind judicial semantics."<sup>169</sup> In 2013, for example, Oregon enacted a law explicitly prohibiting discrimination against unpaid interns.<sup>170</sup> Statutory provisions might similarly be amended to add volunteers to covered persons.

Short of a legislative fix, however, implementing this approach might be done judicially in some cases. There is room to purposively interpret coverage of discrimination laws, for example, to include unpaid volunteers in some scenarios.

The Northern District of Illinois has recently interpreted Title VII and the Illinois Human Rights Act to protect the unpaid volunteers in that case. The issue in *Volling v. Antioch Rescue Squad* was whether members of a volunteer rescue squad could sue the relevant service organizations for sexual harassment, discrimination and retaliation.<sup>171</sup> The plaintiffs received training and uniforms, but no other remuneration.<sup>172</sup> While the court in *Volling* did not sort

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169 Linder, *supra* note 41, at 222.

170 2013 Or. Laws ch. 379.

171 No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill. Dec. 4, 2012).

172 *Id.* at \*28-29.



volunteers in the categories that I have, it nevertheless found that the volunteers were “employees” for purposes of the discrimination laws.<sup>173</sup>

The court in *Volling* reached that conclusion while applying the multi-factor control test, but did so in a purposive manner. The court stated that remuneration is *but one factor* in the totality of the circumstances, and said that it would “not draw any bright line requiring an ‘employee’ to be salaried or that she receive substantial pecuniary remuneration.”<sup>174</sup> The court noted that the Seventh Circuit had “squarely rejected the ‘tyranny of labels’ advocated by the defendants in brandishing the term ‘volunteer’ as a shield to ward off liability under Title VII.”<sup>175</sup> Instead, the court in *Volling* looked at the remedial purposes of the discrimination statutes: “District courts are required to construe Title VII broadly to prevent and remediate discrimination in the workplace. The Seventh Circuit has been explicit both that the definition of ‘employee’ in Title VII be construed consistent with the statute’s purpose, and that ‘employee’ should be given a ‘generous construction.’”<sup>176</sup> The court then cited *American Tobacco Company v. Patterson*, in which the Supreme Court stated that “[t]hrough Title VII Congress sought in the broadest terms to prohibit and remedy discrimination.”<sup>177</sup> The court in *Volling* concluded that “[a] workplace is not necessarily any different for a non-compensated volunteer than it is for a compensated ‘employee,’ and while both are generally free to quit if they don’t like the conditions (at-will employment being the norm), neither should have to quit to avoid sexual, racial, or other unlawful discrimination and harassment.”<sup>178</sup>

The EEOC, which enforces various federal discrimination laws, takes the position that even uncompensated volunteers may be covered by those statutes “if the volunteer work is required for regular employment or regularly leads to regular employment *with the same entity*. In such situations, discrimination by the respondent operates to deny the charging party an employment opportunity.”<sup>179</sup> The EEOC Guidance does not appear to address the situation of

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173 *Id.* at \*32-34.

174 *Id.* at \*33.

175 *Id.* at \*23.

176 *Id.* at \*32 (citations omitted).

177 456 U.S. 63, 80 (1982).

178 *Volling*, 2012 U.S. Dist. 171623, at \*32-33.

179 See *EEOC Compliance Manual*, EEOC, <http://www.eeoc.gov/policy/docs/threshold.html> (last updated Aug. 6, 2009) (emphasis added).

Larry, who volunteers at Gotham Legal Aid not necessarily aspiring to regular employment *with Gotham*, but because he needs the work to get his law license or to obtain employment elsewhere.

Others have written in depth on the subject of internships;<sup>180</sup> I add only this brief note on the subject. Internships are training positions,<sup>181</sup> and can be an important gateway to paid (or better paid) employment. As such, I would include all internships in the protective realm of labor law as an initial matter. Coverage under a particular statute is a separate inquiry. There might be policy reasons to exclude some interns from minimum wage laws for example, if they meet certain criteria, such as those at charitable institutions.<sup>182</sup> But even interns who might be deemed exempt from wage laws are still in need of some labor law protection. The dependent nature of internships—paid or not—makes interns vulnerable to many types of exploitation to which employees are subject, and might be similarly situated to the livelihood-dependent volunteers described herein. And, as noted above, there has been some recent movement to provide at least job protections, such as discrimination laws, to interns.

### Conclusion

We have been grappling for generations with how to define “employee.” Our existing tests have never been a good fit for the goals

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180 See, e.g., David Yamada, *The Employment Rights of Student Interns*, 35 CONN. L. REV. 215 (2002); Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2640 (1998).

181 See *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, U.S. DEPT OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last visited May 4, 2014) (guidance for definition of internships under the FLSA).

182 See *id.* (“The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. [The DOL’s Wage and Hour Division] also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. [The DOL’s Wage and Hour Division] is reviewing the need for additional guidance on internships in the public and non-profit sectors.”).



of labor law; they are even more ill-fitting for the rapidly changing contemporary workforce. Crowd work and some types of volunteerism are just two examples of emergent forms of labor that force us to reconsider the way we identify which workers receive the benefit of labor law protection.

As we try to define these arrangements and fit them into our current regulatory schemes, we need to be mindful of the values of labor law, the purposes of specific regulation, and the context of the work at issue. Otherwise, it becomes easy to get bogged down with inapposite factors and tests, resulting in a purposeless exercise, or as Langille and Davidov put it, “simply another demonstration of the truth in Nietzsche’s reported admonition that ‘the most common form of stupidity is forgetting what it is you are trying to do.’”<sup>183</sup>

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183 Langille & Davidov, *supra* note 1, at 9.

**'To Suffer or Permit to Work':  
Did Congress and State Legislatures  
Say What They Meant and Mean What They Said?**

*James Reif*

**Introduction**

Businesses are relying more and more on what is euphemistically termed an “alternative workforce,” consisting of individuals who work directly or indirectly for a company but who are not treated as that company’s full-time employees. The “alternative workforce” includes, for example, so-called independent contractors, employees of contractors, interns and persons whose services are obtained through temporary staffing agencies. Reliance on such alternative workers is prompted in substantial part by anticipated payroll, tax and benefit savings. This Article focuses on businesses’ use of individuals, hired by contractors engaged by the businesses, to perform work outsourced by the businesses and the courts’ treatment of claims that such businesses are jointly liable for violations of those individuals’ federal and/or state rights to minimum wages and/or overtime compensation. Particular attention is given to analysis of the argument that businesses which engage in “run-of-the-mill” outsourcing should be deemed beyond the reach of such claims of joint liability.

Companies often engage contractors to perform parts of their processes of production. For example, garment manufacturers regularly engage sweatshop operators to accomplish the sewing and assembly phases of garment production. National or international fast food empires induce the creation of small local companies, through the device of franchising, to accomplish preparation and sale of their fast food. A sweatshop operator or a fast food franchisee in turn employs individuals to perform the outsourced work. Such individuals who are victimized by violations of a minimum wage or overtime compensation law may seek redress through litigation. If they fear they will be unable to serve process on the contractor that directly employed them or that they will not be able to enforce a judgment against the contractor, the victims may seek redress from the company which outsourced the work they performed. As plaintiffs, they contend that, notwithstanding their direct employment by the contractor, the outsourcing company is jointly liable for the wage

and/or hour violations. Plaintiffs argue that this follows from Sec. 3(g) of the Fair Labor Standards Act of 1938, as amended (“FLSA”), 52 Stat. 1060, 29 U.S.C. § 203(g), which provides that the term “employ” as used in the FLSA “includes to suffer or permit to work” and/or from an applicable state wage and hour law containing comparable terminology.

The thesis of this Article is three-fold. First, the courts should formulate a rule of decision for determining claims against outsourcing companies of joint liability under the FLSA or similar wage and hour laws, because no such rule exists under current case law. Second, where a wage and hour law such as the FLSA uses suffer-or-permit-to-work terminology in describing which companies are liable for violations thereof, a company should be deemed jointly liable to individuals employed by a contractor to perform work where: (i) the company outsourced to the contractor an integral part of its process of producing goods or providing services; (ii) the contractor employed the individuals in the performance of the outsourced work; (iii) the company knew or had reason to know that the individuals in question and/or other individuals similarly employed by the contractor were participating in the performance of its outsourced work, yet failed to prevent or hinder that work; and (iv) the outsourced work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company. Third, under these criteria, an outsourcing arrangement should not ordinarily render an outsourcing company beyond the reach of a joint liability claim by an individual engaged by a contractor to perform the outsourced work simply because it might be termed a “run-of-the-mill” outsourcing arrangement.

Part I describes the basic approach of appellate courts to interpreting the FLSA’s “suffer-or-permit-to-work” definition of “employ” in the context of claims of joint employment. Remarkably, when faced with such claims those courts have essentially ignored the actual language of § 203(g). They have also ignored the numerous state court opinions interpreting and applying state child labor laws which use “suffer-or-permit-to-work” or similar terminology and from which § 203(g) was derived. Instead the courts have sought to replace § 203(g)’s operative language with “economic reality,” “dependence” and/or “functional control,” concepts which do not appear in the FLSA and which are not valid substitutes for the operative terms of § 203(g). Lower courts have been instructed to balance non-exhaustive sets of factors identified by the appellate courts as pertaining to

one or more of the aforesaid concepts. They are also authorized to add to the balancing inquiry such other factors as they deem appropriate. Part I also discusses the solicitude for outsourcing which appears to underlay the approach of the appellate courts, sometimes explicitly and, more often, implicitly. This solicitude has led to an approach which holds the potential to place a wide category of companies engaged in so-called "run-of-the-mill" outsourcing beyond § 203(g)'s reach in respect to the outsourced work.

Part II analyzes the inconsistency between appellate courts' approach to § 203(g) and several established canons of statutory construction. It discusses the substantive flaws in those courts' efforts to replace the statutory language with the concepts of "economic reality," "dependence" or "functional control." It also examines the unfocused nature of the non-exhaustive "factor" balancing which appellate courts have advocated, an approach which leaves lower courts and juries without a rule of decision by which to resolve joint liability claims involving outsourcing.

Part III summarizes the approach of courts interpreting state wage and hour laws that use terminology similar to § 203(g)'s in defining the relationships covered by those laws. As a general matter, the approach of the state courts to such laws mirrors the federal courts' approach to construing and applying § 203(g). Little or no attention is given to the operative language, and refuge is sought instead in concepts, such as "economic reality," which are not found in the laws. A decision of the Supreme Court of California provides an important counterpoint to this trend.

Part IV examines the ordinary dictionary meanings of "to suffer" and "to permit" and reviews several decisions from various state appellate courts interpreting and applying the same or similar language in the child labor laws from which § 203(g) was derived. It discusses federal regulations interpreting § 203(g), which were promulgated by federal agencies responsible for enforcement of the FLSA, and the degree of deference owed by courts to those interpretations. It also undertakes a comprehensive review of the statutory scheme of which § 203(g) is a central part in order to show the context in which that provision appears.

Part V advocates a rule of decision for resolving joint liability claims which flows from the operative statutory language, the child labor law precedents, the relevant federal regulations and the statutory context. Finally, the Article concludes that a categorical safe haven for outsourcers from the reach of § 203(g) or similarly-worded state

law with respect to performance of their outsourced work cannot be justified, except in narrowly defined circumstances.

## I. Federal Courts' Treatment of the FLSA's Definition of "Employ"

### A. The FLSA's Unusual Definition of "Employ" and the Courts' Disregard of the Statutory Text in Cases Involving Joint Employment Claims

To be entitled to the protection of an employment statute, an individual must be one for whose protection the statute was enacted. Generally, this means an individual must work for a business that is an employer and be employed by that business within the meaning of the relevant statute. Disputes over whether a business is an employer are infrequent. Disputes over whether an individual is employed by a business are more common. A company may contend that an individual directly performing work for it is an independent contractor and therefore is not an employee. A company may argue that an individual indirectly performing work for it is an employee, but only of a contractor engaged by the company and not of the company itself. In a third scenario, a contractor engaged by a company may assert that a worker the contractor hired to perform certain tasks is employed by the company but not by the contractor.

Most federal employment laws do not contain a definition of "employ." The lack of such a definition is often coupled with a circular or otherwise unhelpful definition of "employee."<sup>1</sup> To overcome

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1 The following are examples of federal laws that do not include a definition of "employ" but do contain a circular or otherwise unhelpful definition of "employee": National Labor Relations Act of 1935, 29 U.S.C. § 152(3) (2011) (providing that "[t]he term 'employee' shall include any employee..."); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2010) ("employee" defined as "an individual employed by an employer"); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(f) (2011) ("employee" defined as "an individual employed by any employer"); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (2012) ("employee" defined as "an individual employed by an employer"); Employee Retirement Income Security Act of 1972, 29 U.S.C. § 1002(6) (2011) ("employee" defined as "any individual employed by an employer"); Occupational Safety & Health Act of 1970, 29 U.S.C. § 652(6) (2010) ("employee" defined as

such a gap in the law, the Supreme Court has held that in such circumstances, it is to be presumed that Congress intended to use as the definition of employment the definition for a master-servant relationship under the general common law of agency.<sup>2</sup> In determining whether there is an employment relationship between a worker and a business under the general common law, a wide variety of factors may be taken into account, the most important of which is whether the business has the right to control the manner and means by which a product is produced or a service rendered.<sup>3</sup>

Unlike the majority of employment statutes, the FLSA expressly defines when a worker-business relationship is subject to the requirements of said Act and does so in a most unusual way. FLSA Sec. 3(e)(1), 29 U.S.C. § 203(e)(1), defines “employee” generally as “any individual employed by an employer,” and Sec. 3(g), 29 U.S.C. § 203(g) provides that “employ” as used in the FLSA “includes to suffer or permit to work.” This definition was intended to reach relationships beyond those deemed employment relationships at common law.<sup>4</sup> The Supreme Court has indicated that the FLSA definition is

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- “an employee of an employer who is employed in a business of his employer which affects commerce,” even while “employ” is not defined). The Federal Employers’ Liability Act uses the terms “employ” and “employee,” but does not define either. 45 U.S.C. § 51 (2009); *see also* Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 (2013) (same). The Copyright Act of 1976 likewise uses the term “employee,” but does not define that term. 17 U.S.C. § 101 (2011). The Social Security Act of 1935 unhelpfully defines employment generally as “any service, of whatever nature, performed...by an employee for his employer....” 42 U.S.C. § 410(a) (2006).
- 2 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989)).
  - 3 *See Reid*, 490 U.S. at 751 & n.18; *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958). At common law, the test for a master-servant relationship is used to determine whether a business is liable in a tort action brought by a third party for the acts of someone whom the third party alleges acted as an agent of the business when committing the tort. In contrast, under an employment statute, it is used to determine whether the business is liable to its alleged servant for a violation of his or her rights under the statute. In *NLRB v. Hearst Publications, Inc.*, the Supreme Court expressed doubts that where a statute contains no express definition, the test devised at common law for determining the tort issue could be converted automatically into a test for determining the statutory issue. 322 U.S. 111, 120-21 (1947). As *Darden* and *Reid* illustrate, however, the Supreme Court later swallowed its doubts.
  - 4 *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (citations omitted) (“[I]n determining who are ‘employees’ under the [FLSA], com-

*significantly* broader than the common law definition.<sup>5</sup> Indeed, it has observed: “A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”<sup>6</sup>

At the same time, the Court has not determined the precise scope of the § 203(g) definition. In *Rutherford*, the leading case on a claim of joint employment under § 203(g), after a trial before a district court, the Tenth Circuit held that boners in a slaughterhouse were not only employed by a middleman who hired, paid and supervised them, but also by the company which operated the slaughterhouse and had engaged the middleman to accomplish the boning phase of production. In that posture, the only question for the Supreme Court was whether there was sufficient evidence in the record to justify the Tenth Circuit’s holding. In a single paragraph, the Court identified evidence which it concluded provided adequate support for that holding.<sup>7</sup> Thus, given the procedural posture, the Court deemed it unnecessary to undertake a full examination of the statutory language in order to resolve the case before it. Other federal statutes also use the FLSA definition of employ.<sup>8</sup> However, in the more than 65 years since *Rutherford*, the Supreme Court has not considered another joint employment claim under the FLSA or any other statute using its suffer-or-permit-to-work formulation. In fact, since *Rutherford*, the Court has decided only one case which involved

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mon law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”); accord *Darden*, 503 U.S. at 326; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

5 See *Darden*, 503 U.S. at 326 (noting “striking breadth” of § 203(g) definition and that said provision defines operative verb “expansively”); see also *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (noting that the FLSA definition is “the broadest definition [of ‘employee’] ... ‘ever included in any one act,’” quoting 81 Cong. Rec. 7657 (1937) (Statement of Sen. Hugo Black, the Act’s sponsor)).

6 *Rosenwasser*, 323 U.S. at 362.

7 See *Rutherford*, 331 U.S. at 730.

8 The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2011), was enacted as an amendment to the FLSA. See *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 551 n.12 (7th Cir. 1991). The § 203(g) definition thus applies directly to that Act. The Family & Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. § 2611(3) (2011), and the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (“AWPA”), 29 U.S.C. § 1802(5) (2011), expressly incorporate the § 203(g) definition.



any issue pertaining to the existence of an employment relationship where that terminology governed.<sup>9</sup> Thus, the framework for analyzing joint employment claims under § 203(g) has been developed primarily by the Courts of Appeals.

When an individual has performed outsourced work for an independent contractor engaged by a business and claims that the outsourcing business is jointly liable with the contractor for violations of the FLSA minimum wage or overtime compensation provisions,<sup>10</sup> the legal issue is whether the business suffered or permitted the individual to work within the meaning of the FLSA. Because the express definition of “employ” in § 203(g) constitutes a departure by Congress from its practice of writing employment laws that lack a meaningful definition of that term and because the § 203(g) definition is broader than the common law definition read into other federal laws, one would reasonably assume that a court faced with this legal issue would immediately look to the actual language of § 203(g) in determining whether the plaintiff was employed by the defendant business. As the suffer-or-permit-to-work terminology is derived from state child labor laws,<sup>11</sup> one would also reasonably assume that a court would examine state court opinions construing such laws in determining the meaning of the suffer-or-permit-to-work formulation in the FLSA.

Remarkably, however, neither assumption would be accurate. Reading appellate opinions involving joint employment claims by alleged victims of wage and hour violations, a peculiar pattern emerges: early in its opinion, a Court of Appeals will quote or cite the suffer-or-permit-to-work language in § 203(g) which governs the claim. It will note this statutory definition of “employ” is broad-

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9 See *Goldberg v. Whitaker Home Coop., Inc.*, 366 U.S. 28 (1961). In *Darden*, the Court mentioned the § 203(g) definition of “employ” but only to point out that the Employee Retirement Income Security Act (“ERISA”), the law at issue in that case, lacked the suffer-or-permit-to-work definition. *Darden*, 503 U.S. at 325-26.

10 See generally *Rutherford*, 331 U.S. at 728-29; see also 29 C.F.R. § 791.2 (2011) (recognizing joint employment under FLSA).

11 See *Darden*, 503 U.S. at 326; *Rutherford*, 331 U.S. at 728 & n.7. It should be noted that the FLSA created federal prohibitions on the employment of child labor. FLSA § 12, 29 U.S.C. § 212 (2011). See also FLSA § 3(l), 29 U.S.C. § 203(l). The § 203(g) definition of “employ” was made applicable to those prohibitions as well as to the FLSA’s minimum wage and overtime compensation guarantees. This supports the understanding that § 203(g) was derived from state child labor laws using similar terminology.



er than the common law definition. But, after that tip-of-the-cap, it will make no real attempt to construe this statutory language, much less to apply such a construction to the facts of the case. No effort will be made to examine state court decisions construing the same or similar language in state child labor laws. Federal regulations that give body to the definition in § 203(g) will likewise be ignored. Instead, the term “economic reality,” which nowhere appears in § 203(g), will be put forward as the basis for determining an employment relationship under the FLSA. A Court of Appeals may actually treat that term as embodying a substantive standard for determining the existence of such a relationship under the FLSA. It may also base its determination on another non-statutory concept, either “dependence” or “functional control.” It will then identify various “factors” said to reflect one of these non-statutory concepts and instruct that these “factors” are to be balanced against one another in determining whether the outsourcing business jointly employed the individual(s) hired by the contractor to perform the business’ outsourced work. After all that, the court will add that its set of enumerated “factors” is non-exclusive and that the district court is free to consider any and all additional “factors” it believes to be relevant.<sup>12</sup>

## B. *Zheng* and “Run-of-the-Mill” Outsourcing

The 2003 opinion in *Zheng* is demonstrative of this peculiar pattern.<sup>13</sup> That opinion warrants particular attention because it discusses openly the circumstance which appears to animate many appellate courts’ reluctance to apply § 203(g) to businesses that out-

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12 See, e.g., *Schultz v. Capital Int’l. Sec., Inc.*, 466 F.3d 298, 304-06 (4th Cir. 2006); *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 66, 69, 71-72 (2d Cir. 2003); *Baystate Alt. Staffing Inc. v. Herman*, 163 F.3d 668, 675-76 (1st Cir. 1998); *Torres-Lopez v. May*, 111 F.3d 633, 638-41 (9th Cir. 1997); *Antenor v. D & S Farms*, 88 F.3d 925, 929-33 (11th Cir. 1996); *Aimable v. Long & Scott Farms, Inc.*, 20 F.3d 434, 438-40 (11th Cir. 1994). In *Moreau v. Air France*, the Ninth Circuit actually managed to write a lengthy opinion rejecting a claim of joint employment under the FMLA without quoting or even citing the statutory suffer-or-permit-to-work language, which governed the claim before it. 356 F.3d 942 (9th Cir. 2004); see 29 U.S.C. § 2611(3) (2011) (incorporating 29 U.S.C. § 203(g)).

13 See *Zheng*, 355 F.3d 61. The author was lead counsel for the plaintiffs in *Zheng*.

source work and are sued for wage and hour violations by individuals hired by a contractor to perform the outsourced work.

In *Zheng*, a garment manufacturer outsourced to a sweatshop operator performance of the sewing and assembly phase of its production and, in turn, the sweatshop operator hired, paid and supervised individuals to perform the outsourced work.<sup>14</sup> The workers suffered substantial violations of their rights to be paid at not less than the minimum wage rates established by the FLSA and New York law and their rights to be paid for work performed each week in excess of 40 hours at one and one-half times their respective regular rates of pay.<sup>15</sup> Anticipating that they would be unable to serve process on their direct employer, the sweatshop operator, and that the latter would be judgment-proof in any event, the workers brought suit against the manufacturer (and its alleged owner-operators) as well. The plaintiffs were in fact unable to serve the sweatshop operator with process, and the district court later granted summary judgment dismissing the federal and state minimum wage and overtime compensation claims against the manufacturer defendants.<sup>16</sup> It held those claims were to be judged under, and failed to satisfy, a four-factor test, to wit, whether the manufacturer had the power to hire and fire the plaintiffs, supervised and controlled their work schedules or other conditions of employment, determined the rate and method of paying the plaintiffs and maintained records of the plaintiffs' time worked and pay.<sup>17</sup>

The Second Circuit vacated the dismissal of the FLSA minimum wage and overtime compensation claims and remanded for further proceedings, holding that the lower court had applied the wrong test for determining joint employment under the FLSA.<sup>18</sup> Although the court began by quoting § 203(g)'s "broad" definition, at no point did it purport to examine the meaning of the terminology actually used by Congress.<sup>19</sup> Instead, it stated that "economic reality" was "the test of employment."<sup>20</sup> It quoted approvingly from precedent

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14 *Id.* at 64-65.

15 *Zheng v. Liberty Apparel Co., Inc.*, 617 F.3d 182, 184 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2879 (2011).

16 *Zheng v. Liberty Apparel Co., Inc.*, No. 99 Civ. 9033(RCC), 2002 WL 398663, at \*1 (S.D.N.Y. Mar. 13, 2002), *vacated and remanded*, 355 F.3d 61 (2d Cir. 2003).

17 *See Zheng*, 355 F.3d at 66, 68-69.

18 *Id.* at 69.

19 *See id.* at 69-77.

20 *Id.* at 66.

that the “overarching concern” was “whether the alleged employer possessed the power to control the workers in question.”<sup>21</sup> Characterizing the district court’s approach as focusing on the “formal right to control,” the Second Circuit disapproved exclusive reliance on the four factors identified by that court.<sup>22</sup> It indicated the proper test was “functional control,”<sup>23</sup> or the apparently equivalent “effective control”<sup>24</sup> of the terms and conditions of employment.

The Second Circuit identified six factors which it thought the lower court would find illuminating in determining whether the garment manufacturer exercised functional control over the sewers/assemblers hired by the sweatshop operator: whether the manufacturer’s premises and equipment were used for the plaintiffs’ work; whether the sweatshop operator had a business that could or did shift as a unit from one putative joint employer to another; the extent to which the plaintiffs performed a discrete line-job which was integral to the manufacturer’s process of production; whether responsibility under a manufacturer-sweatshop operator contract could pass from one operator to another; the degree to which the manufacturer defendants or their agents supervised the plaintiffs’ work; and whether the plaintiffs worked exclusively or predominantly for the manufacturer defendants.<sup>25</sup>

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21 *Id.* (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)).

22 *Id.* at 69 (“[T]he four-part test employed by the District Court is unduly narrow, as it focuses solely on the formal right to control the physical performance of another’s work.”); *id.* at 69 (“[A] district court [should] look beyond an entity’s formal right to control”).

23 *Id.* at 72; *see also id.* at 75 n.12, 77.

24 *Id.* at 75; *see also id.* at 72.

25 *See id.* at 72. The Circuit noted that, on remand, the district court was “also free to consider any other factors it deems relevant to its assessment of the economic realities.” *Id.* at 71-72. Based upon its pre-trial dismissal of all federal claims, the lower court had declined supplemental jurisdiction of the plaintiffs’ state law claims. *See* 28 U.S.C. § 1367(c)(3) (1990). The reinstatement of the federal claims removed the predicate for declining jurisdiction of the state law claims. Accordingly, the court of appeals reinstated the latter claims as well. *See Zheng*, 355 F.3d at 78-79. Other than to note that New York courts have looked beyond common law agency principles in construing labor laws which contain language similar to that of § 203(g), the Second Circuit did not address the merits of the New York minimum wage and overtime compensation claims. *See id.*

The court displayed considerable solicitude for outsourcing as a matter of economic policy,<sup>26</sup> and its legal analysis reflected this solicitude. The court twice emphasized that not all outsourcing relationships create an employment relationship for purposes of the FLSA between an outsourcing company and individuals hired by a middleman to perform the outsourced work.<sup>27</sup> More importantly, the circuit created an exemption for outsourcers from the reach of the FLSA for what it termed “run-of-the-mill,” “typical” or “normal” outsourcing relationships. The court stated that the factors it identified as bearing on the scope of FLSA employment relationships should not be “misinterpreted to encompass run-of-the-mill subcontracting relationships.”<sup>28</sup> It acknowledged that its test for determining the existence of FLSA employment relationships was intended to “ensure . . . that the statute is not interpreted to subsume typical outsourcing relationships.”<sup>29</sup> And the court concluded: “The ‘economic reality’ test, therefore, is intended to expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the orbit of the FLSA.”<sup>30</sup> Depending how “run-of-the-mill” is defined in this context, this test could result in a wide safe haven for outsourcing companies in respect to their liability for wage and hour violations suffered by individuals who perform the outsourced work.

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26 *Id.* at 73 (“In classifying business relationships [as within or without the reach of the FLSA], we are mindful of the substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy. *See, e.g., The Outing of Outsourcing*, THE ECONOMIST, Nov. 25, 1995, at 57, 57 (noting that outsourcing ‘is part and parcel of the way American companies of all sizes do business’). We are also mindful that manufacturers, especially manufacturers of relatively sophisticated products that require multiple components, may choose to outsource the production of some of those components in order to increase efficiency. *See, e.g., Ravi Venkatesan, Strategic Sourcing: To Make or Not to Make*, HARV. BUS. REV., Nov./Dec. 1992 at 98 (arguing that manufacturers should outsource the production of components to maximize efficiency).”).

27 *Id.* at 73, 74 n.11.

28 *Id.* at 74.

29 *Id.* at 76; *see also id.* at 75 (stating that “typical, legitimate subcontracting arrangement” does not implicate joint employment liability).

30 *Id.* at 76. The court went so far as to state that even a job which “is *not* typically outsourced” should nevertheless be deemed outside the reach of the FLSA so long as there is a “substantial economic reason” for its being outsourced in a particular case. *Id.* at 74 (emphasis added).

The Second Circuit also made several statements suggesting that outsourcing relationships that are a subterfuge for evasion of the FLSA or other labor laws are within the reach of § 203(g).<sup>31</sup> These statements led some to think the court was of the view that outsourcers were beyond the reach of the FLSA in respect to outsourced work, *as long as* the outsourcing was *not* a subterfuge for evasion of the FLSA or other labor laws. However, the Second Circuit expressly rejected that argument when later advanced in *Barfield v. N.Y.C. Health & Hospitals Corp.*<sup>32</sup>

As we shall see, the approach of the courts of appeals to the question of joint employment under the FLSA is built on several surprising flaws.

## II. An Analysis of Courts' Approach to Joint Employment Claims Governed by § 203(g)

### A. Whatever Happened to Basic Norms of Federal Statutory Construction?

Where a case presents the issue whether an outsourcing business jointly employed an individual hired by a contractor to perform

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31 See *id.* at 72 (circumstances in *Rutherford* indicated outsourcing in that case “was most likely a subterfuge meant to evade the FLSA or other labor laws”); see also *id.* at 72 (subcontractor that seeks business from variety of contractors “is less likely to be part of a subterfuge arrangement” than subcontractor serving single client); *id.* at 73 (where use of subcontractors to complete particular task widespread “it is unlikely to be a mere subterfuge to avoid complying with labor laws”); *id.* at 74 (proof that subcontracting in particular industry developed historically as means of avoiding applicable labor laws may show current use of that device in that industry is for purpose of “evasion of labor laws”).

32 537 F.3d 132, 145-47 (2d Cir. 2008). The Second Circuit’s view is eminently sound. Where a company is sued under the FLSA for failing to satisfy the requirements of § 207(a)(1) and the company’s defense is that it properly classified the plaintiff as an independent contractor, as a trainee or as an administrative, executive or professional employee, the defendant’s liability is not dependent upon proof that the classification was a subterfuge for evasion of the FLSA. These examples illustrate the more general principle that liability for failure to pay minimum wages or overtime compensation as required by § 206(a)(1) or § 207(a)(1) does not require proof of an intent to violate either of those provisions.

the outsourced work within the meaning of the FLSA, the question is whether the outsourcing business suffered or permitted the individual to work within the meaning of § 203(g). In seeking to answer that question, several well-established, related canons of statutory construction apply. “The task of resolving the dispute over the meaning of [a federal statute] begins where all such inquiries *must* begin: *with the language of the statute itself*.”<sup>33</sup> Second, unless otherwise defined, words in a statute will be interpreted in accordance with their ordinary, common meaning.<sup>34</sup> And third, “in interpreting a statute a court should *always* turn first to one, cardinal canon before all others. . . . [C]ourts *must* presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>35</sup>

The approach taken by U.S. Courts of Appeals confronted with joint employment claims under the FLSA cannot be reconciled with these canons. As discussed in Part I, courts have not made any serious attempt to determine the meaning of the dispositive “suffer-or-permit-to-work” language. The judicial presumption seems to be exactly the opposite of what the Supreme Court has said it should be: courts proceed on the unarticulated presumption that Congress simply could not have meant what it said and, thus, they should be free to substitute non-statutory terms for the actual statutory language.

This disrespect for the operative language is particularly odd in view of the fact that, in other contexts, the appellate courts have encountered no difficulty in applying the same suffer-or-permit-to-work language of § 203(g). For example, in *Gulf King Shrimp Co. v. Wirtz*,<sup>36</sup> the defendant company argued it had not employed underaged minors in violation of the child labor provisions of the FLSA because it did not possess actual knowledge that minors were per-

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33 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (emphasis added); accord *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). The Supreme Court recently followed this canon in a case involving interpretation of the FLSA. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (in construing the FLSA’s anti-retaliation provision, FLSA § 15(a)(3), 29 U.S.C. § 215(a)(3), the Court stated: “We begin with the text of the statute.”).

34 *Perrin v. United States*, 444 U.S. 37, 42 (1979).

35 *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (emphasis added); accord *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000); see also *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987) (effectively applying this canon in construing FLSA’s “hot cargo” provision, FLSA § 15(a)(1), 29 U.S.C. § 215(a)(1) (1938)).

36 407 F.2d 508 (5th Cir. 1969).



forming work for it.<sup>37</sup> Focusing on the actual language of § 203(g), the Fifth Circuit held that an individual's work otherwise within the reach of § 203(g) was suffered or permitted within the meaning of § 203(g) as long as the company had the opportunity through the exercise of reasonable diligence to acquire such knowledge<sup>38</sup> and that the findings made by the trial court supported the conclusion that, under this standard, the company had suffered or permitted minors to work.<sup>39</sup>

Similarly, where a business defends its failure to compensate an individual for overtime hours worked on the basis of an argument that it did not request, or had even prohibited, performance of that work, courts resolve the issue whether the work is compensable by determining whether the business suffered or permitted performance of the work within the meaning of § 203(g).<sup>40</sup> For example, in *Gotham Registry*, where an employer failed to compensate nurses at time and one-half for performance of unscheduled overtime work, the Second Circuit held that "Gotham [is] liable for the nurses' compensation for the overtime hours only if it employed the nurses during this time, that is, if it suffered or permitted the nurses to work."<sup>41</sup> The court further held that an employer's actual or imputed knowledge that work is being performed for it is a necessary condition to a "finding [that] the employer suffers or permits that work."<sup>42</sup>

Courts' disregard of the § 203(g) language when determining existence of a joint employment relationship under the FLSA is all the more remarkable given that the Supreme Court has twice acknowl-

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37 *Id.* at 512.

38 *Id.* (quoting *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474 (N.Y. 1918) (a leading state court decision construing a New York child labor law predicated on operative language similar to that in § 203(g)); *see, e.g., Reich v. Dept. of Cons. & Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994) (also demonstrating federal court reliance on *Sheffield Farms* when deciding FLSA issues *other than* joint employment); *see also, e.g., Lenroot v. Interstate Bakeries Corp.*, 146 F.2d 325, 328 (8th Cir. 1945).

39 *Gulf King Shrimp*, 407 F.2d at 513.

40 *See, e.g., Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287-88 (2d Cir. 2008); *Reich*, 28 F.3d at 1078-84; *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981); *see also* 29 C.F.R. § 785.11 (1961) ("Work not requested but suffered or permitted is work time.")

41 *Gotham Registry*, 514 F.3d at 287, citing § 203(g).

42 *Id.*



edged that the operative language is derived from identical or similar language in numerous state child labor laws enacted in or before the early 20th Century.<sup>43</sup> At the time of passage of the FLSA, more than 30 States and the District of Columbia had child labor laws which used the phrase “employed, permitted or suffered to work” in defining the coverage of those laws.<sup>44</sup> Almost all remaining states had statutes using the similar phrase “employed or permitted to work.”<sup>45</sup> Still another canon of construction holds that where a statute uses terms which, at the time, had acquired a well-known meaning at common law or in the statutory laws of this country, those terms are presumed to have been used in that same sense unless the context compels the contrary conclusion.<sup>46</sup> Section 203(g) used terms which by 1938 had acquired a well-known meaning through state court decisions interpreting similar language in numerous child labor laws,<sup>47</sup> yet appellate courts deciding joint employment claims under the FLSA regularly eschew any meaningful examination of, much less adherence to, such child labor law precedents.<sup>48</sup> This is true even though there is nothing to suggest that, in enacting the FLSA, Congress used these terms differently than the state legislatures that enacted those child labor laws. Hence, the failure of appellate courts to construe

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43 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n.7 (1992).

44 *See Rutherford*, 331 U.S. at 729 n.7.

45 *See id.* This same formulation had also appeared in the operative definitions in the 1916 federal child labor law, Act of Sept. 1, 1916, c. 432, § 1, 39 Stat. 675, and the 1919 Child Labor Tax Law, Act of Feb. 24, 1919, c. 18, § 1200, 40 Stat. 1057, 1138. The 1916 law was declared unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), as beyond Congress’ power to regulate interstate commerce. By analogy to *Hammer* and its analysis of Congress’ power to regulate interstate commerce, the 1919 law was held unconstitutional in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), as beyond Congress’ taxing power. *Hammer* was expressly overruled in *United States v. Darby*, 312 U.S. 100, 115-17 (1941), which upheld the constitutionality of the FLSA.

46 *Lorillard v. Pons*, 434 U.S. 575, 583 (1978), quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911); *accord Perrin v. U.S.*, 444 U.S. 37, 43-45 (1979).

47 *See infra* Part III.

48 Occasionally such a state court opinion will be cited by a federal court faced with an FLSA joint employment claim but it is never *followed* in the sense that the federal court takes the same approach to construction of § 203(g) or relies on the state court’s interpretation of a child labor law using the same or similar terminology.

these terms as had the state courts and their related failure to apply these terms according to that interpretation is inconsistent with this canon of construction.

## B. The Attempted Substitution of Non-Statutory Terms for the FLSA Definition of “Employ”

The error in abandoning the actual language of § 203(g) has been compounded by appellate courts’ replacement of that text with the non-statutory concepts of “economic reality,” “dependence” and/or related concepts. These would-be substitutes are not equivalents of “to suffer or permit to work.”

### 1. “Economic Reality”

The fundamental flaw in treating “economic reality” as a replacement for “to suffer or permit to work” is that it is devoid of substantive content and, thus, cannot possibly be a substantive standard specifically directed to determining joint employment under the FLSA. Rather, the admonition to focus on economic reality is a canon of construction to be used when interpreting any part of a statute concerning employment. It is one thing to say that in determining whether a substantive standard has been satisfied, one should focus on the realities of a situation rather than on mere appearances or formalities. It is quite another to say that “reality” is a substantive standard. As one appellate judge has noted with a touch of sarcasm:

It is comforting to know that “economic reality” is the touchstone. One cringes to think that courts might decide these cases [involving the issue of employment] on the basis of economic fantasy. But “reality” encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope.<sup>49</sup>

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49 Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1988) (Easterbrook, J., concurring).

The term “reality” does not provide a substantive standard for determining whether there is an employment relationship because it does not provide a basis for determining what circumstances may be material to such a relationship.<sup>50</sup>

Congress itself has opined that “economic reality” does not provide a meaningful standard for determining the existence of an employment relationship. In 1947, executive agencies proposed a regulation by which this term would become the test of an employment relationship under certain federal laws.<sup>51</sup> In response, a resolution was promptly introduced in the House of Representatives and the Senate foreclosing adoption of the proposed regulation, and the resolution was then passed over the veto of President Truman.<sup>52</sup> Congressional opposition to the regulation was based on its lack of meaningful substance.<sup>53</sup> The report of the Senate Finance Committee referred to the proposed regulation as “a new rule of nebulous character” and one whose “basic principle . . . is a dimensionless and amorphous abstraction.”<sup>54</sup> The conclusions stated in the House Report were similar.<sup>55</sup> In a report commenting on a bill very similar to the foregoing congressional resolution, the House Committee on Ways & Means referred to the proposed regulation advocating a standard of “economic reality” as providing “some nebulous hypothesis with no bounds to its application.”<sup>56</sup>

A careful reading of the relevant case law shows the Supreme Court has admonished courts to focus on economic reality as a canon of statutory construction and not as a substantive standard. For example, referencing its earlier opinion in *Hearst Publications*, which concerned whether workers were employed by a company within the meaning of the National Labor Relations Act (“NLRA”), the Supreme Court said in *United States v. Silk*: “We concluded that ... ‘employees’

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50 See *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 407 (7th Cir. 2007) (“A reference to ‘economic reality’ tells the court to disregard economic fantasy but does not say which aspects of ‘reality’ have what legal consequences.”).

51 See *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 185 (1970).

52 *Id.* at 185-86.

53 *Id.* at 187-88.

54 S. REP. NO. 1255, 80th Cong., 2d Sess., 10, 12 (1948).

55 See H.R. REP. NO. 1319, 80th Cong., 2d Sess. (1948).

56 H.R. REP. NO. 2168, 80th Cong., 2d Sess., 9 (1948).

included workers who were such as a matter of economic reality.”<sup>57</sup> The Court was noting it had resolved the issue of the existence of an employment relationship in *Hearst Publications* by examining the reality of the situation rather than by relying on technical concepts or contractual provisions.<sup>58</sup>

One week later, in *Bartels v. Birmingham*, the Court considered whether dance band leaders and/or members were employees of the owners of dance halls within the meaning of the Social Security Act.<sup>59</sup> The defendant argued the band leaders and members were employees based “entirely” on contractual provisions characterizing them as such.<sup>60</sup> The Court stated that “employees are those who as a matter of economic reality are dependent upon the business to which they render service”<sup>61</sup> and held that the band leaders and members were not employees of the dance hall owners, notwithstanding the contractual provisions to the contrary.<sup>62</sup> Thus, the Court used “dependence” as the substantive standard for determining employment under the Social Security Act, while urging courts to focus on the reality of the circumstances, rather than on contractual formalities, in making such a determination. Similarly, in *Whitaker Home*, the Supreme Court urged a focus on economic reality in determining the existence of an employment relationship under the FLSA merely to disapprove reliance on contractual arrangements and other superficial formalities.<sup>63</sup>

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- 57 *United States v. Silk*, 331 U.S. 704, 713 (1947). In *Hearst Publications*, the Court used the similar term “economic facts.” *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 129 (1947) (“[T]he broad language of the [N.L.R.A.’s] definitions ... leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.”).
- 58 *Silk*, 331 U.S. at 713-15. Neither in the NLRA nor in the Social Security Act had Congress defined employment by use of the suffer-or-permit-to-work terminology. See *supra* note 1 and *Silk*, 331 U.S. at 711.
- 59 See *Bartels v. Birmingham*, 332 U.S. 126, 127 (1947).
- 60 *Id.* at 130.
- 61 *Id.*
- 62 *Id.* at 130-32.
- 63 *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 29-33 (1961) (although formal organization and bylaws of, and contractual agreement with, cooperative structured to create appearance that homeworkers were mere members thereof, as matter of economic reality, they were employed by cooperative within meaning of FLSA). See also H.R. REP. NO. 885, 97th Cong., 2d Sess., 7-8, reprinted in 1982 U.S.C.C.A.N. 4547, 4553 (“[I]t is economic reality, not contractual labels, nor isolated factors which is to determine employment relationships under this Act.”). This report was

Courts' frequent reliance on economic reality in deciding a variety of other legal issues further demonstrates that the term must not be viewed as a substantive standard for determining the existence of a joint employment relationship within the meaning of the FLSA. For example, courts look to economic reality in determining the existence of an enterprise within the meaning of FLSA Sec. 3(r)(1), 29 U.S.C. § 203(r)(1),<sup>64</sup> in determining whether a worker was employed in a bona fide executive, administrative or professional capacity for purposes of FLSA Sec. 13(a)(1), 29 U.S.C. § 213(a)(1),<sup>65</sup> and in determining whether an individual is personally liable for an FLSA violation as an agent of an employer within the meaning of FLSA Sec. 3(d), 29 U.S.C. § 203(d).<sup>66</sup> And as noted above, economic reality is also looked to by courts when determining the existence of an employment relationship under statutes that use a definition of "employ" which is narrower than that in § 203(g).

In sum, this term cannot have a substantive content directed to determination of a joint employment relationship within the meaning of § 203(g) given that it fails to provide any guidance as to what circumstances may be material to such a determination; it applies also to the resolution of legal issues having nothing to do with determining the existence of such an employment relationship and, further, applies when determining the existence of an employment relationship under statutes which, lacking a suffer-or-permit-to-work formulation, define "employ" more narrowly than does the FLSA.

## 2. "Dependence"

"Dependence" too is not an adequate substitute for the express definition in § 203(g). This term first appeared in Supreme Court jurisprudence in *Bartels* when the Court described employees under the Social Security Act as "those who as a matter of economic reality are dependent upon the business to which they render service."<sup>67</sup>

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issued on the bill which became the AWPA and which incorporated the FLSA definition of "employ." See, e.g., *Antenor v. D & S Farms*, 88 F.3d 925, 929 & n.4, 930 (11th Cir. 1996).

64 See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 695 & n.12 (3d Cir. 1994).

65 See *id.*

66 See *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139-40 (2d Cir. 1999);

*Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983).

67 *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

As noted, that Act does not use a “suffer-or-permit-to-work” formulation in defining relationships it covers. Instead, it uses one of the circular definitions<sup>68</sup> which the Supreme Court has specifically noted are unhelpful<sup>69</sup> and which results in application of the common law agency standard which is not as broad as the FLSA definition.<sup>70</sup> The concept of dependence is thus not equivalent to the concept of suffering or permission to work.

“Dependence” also suffers from vagueness. For what should a worker be dependent upon a company in order to be deemed employed under the Social Security Act? The *Bartels* Court did not say.<sup>71</sup> Nor did it explain what would constitute dependence. In later appellate cases, the term is said to refer to workers’ “depend[ce] on a particular business or organization for their continued employment.”<sup>72</sup> This formulation suffers from the circularity found in those statutes purporting to define “employee” as an individual employed by an employer<sup>73</sup> and leaves unclear what would constitute dependence. Would an independent contractor working on production of goods for a company in Maine be transformed into an employee simply because that company was the only manufacturer of those goods in the eastern half of the United States and, hence, the individual could say (s)he was “dependent” upon that manufacturer for continued engagement in his/her current line of work? If a worker were *somewhat* dependent upon a company for continued work, would that be enough to make him/her an employee? If so, *how much* dependence would be sufficient? On the other hand, if a worker were required to be entirely dependent on a company for continued work, that would seem to exclude from an FLSA employment relationship many work-

68 Under the Social Security Act, employment means “any service, of whatever nature, performed . . . by an employee for his employer, except . . . agricultural labor et cetera.” See *United States v. Silk*, 331 U.S. 704, 711 (1947); see also *id.* (“No definition of employer or employee applicable to these cases occurs in the Act.”).

69 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320-21, 322 (1992).

70 *Id.* at 325-26 (absence from ERISA of suffer-or-permit-to-work terminology results in use of common law definition which is narrower than § 203(g) definition).

71 See *Bartels*, 332 U.S. at 130.

72 *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985); see also *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987).

73 See *supra* note 1.



ers whom courts have held to be within such a relationship.<sup>74</sup> Thus, use of “dependence” leaves courts, employers and workers without meaningful guidance, not to mention a persuasive rationale, for determining whether a worker is employed by a particular company.

### 3. “Functional Control”

In *Zheng*, after identifying six factors it thought would illuminate whether a garment manufacturer was the joint employer of workers hired, paid and supervised by a sweatshop operator, the Second Circuit stated: “These particular factors are relevant because, when they weigh in plaintiffs’ favor, they indicate that an entity has *functional control* over workers even in the absence of the formal control measured by [the four-factor test used by the lower court].”<sup>75</sup> The court of appeals noted that the lower court’s four-factor test was even more rigid than the common law test for employment imported

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74 In *Zheng v. Liberty Apparel Co.*, approximately 25% of the garments sewn at the sweatshop by the plaintiffs were not Liberty Apparel’s garments. 389 Fed. Appx. 63, 65-66 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2879 (2011). Nevertheless, the jury found/concluded that said manufacturer was the plaintiffs’ joint employer, together with the sweatshop operator. *Id.* On the post-trial appeal, the Second Circuit held there was sufficient evidence to sustain the joint employment finding/conclusion and specifically held that the jury “could have reasonably concluded that plaintiffs worked predominantly for the defendants, given plaintiffs’ testimony that 70 to 80 percent of their work was performed for Liberty.” *Id.*

In its 2003 opinion in the same case, the Second Circuit had stated that whether the plaintiffs worked “exclusively or predominantly” for the putative joint employer was illuminative of whether there was a putative joint employment relationship. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003). It also held that performance of a mere majority of one’s work for a business would *not* evidence a joint employment relationship with that business. *Id.* This view, for which the Court offered no legal or economic rationale, is suspect. Even where a company is responsible for *less* than a majority of work performed by a subcontractor, if no other company provides as much work to the subcontractor, the former can and often does exert substantial influence over the subcontractor’s work and, more particularly, over the wages, hours and/or working conditions of the workers employed by the subcontractor. *A fortiori* this would be true where a majority of a subcontractor’s work was performed for one company.

75 *Zheng*, 355 F.3d at 72 (emphasis added).



into those federal statutes that lack an express definition of employment.<sup>76</sup>

It is settled that the suffer-or-permit-to-work standard for employment under the FLSA differs significantly from the common law standard for employment.<sup>77</sup> However, the functional control standard for determining employment under the FLSA, as articulated by the Second Circuit in *Zheng*, does not appear to be distinct in a meaningful way from the common law standard: both treat control as the basic criterion. And both follow an “economic reality” approach to control, that is, in determining whether a company or individual controls an individual’s wages, hours and/or working conditions, each test looks to the realities of a situation and not simply the formalities or appearances.

That no meaningful difference exists between the Second Circuit’s functional control standard for employment and the common law standard for employment is further demonstrated by a comparison of the Second Circuit’s approach in *Zheng* with its approach in defining employment under Title VII. The latter lacks an express definition of employment and is thus presumed to incorporate the narrower common law standard for agency.<sup>78</sup> In determining whether a company employs a plaintiff for purposes of Title VII, the Second Circuit has endorsed a multi-factor approach.<sup>79</sup> The factors identified by the Second Circuit as relevant to a determination of employment under Title VII, like the factors identified in *Zheng* as illuminative of employment under the FLSA, are directed to control. Both sets of factors are intended to uncover functional control, whether using that label or not, by focusing on economic realities.<sup>80</sup> In short, as defined

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76 *Id.* at 69-70 & n.6.

77 *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992).

78 *See, e.g., Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113 (2d Cir. 2000).

79 *Id.* at 113-14 (“[W]hether a hired person is an employee under the common law of agency depends largely on the thirteen factors articulated by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).”); *see also id.* at 114 n.1 (observing that additional factors identified in RESTATEMENT (SECOND) OF AGENCY § 220 cmt. h (1958) “some of which are not enumerated in” the *Reid* opinion “may also be considered”).

80 The factors identified in *Zheng* for an FLSA claim and in *Eisenberg* for a Title VII claim are not identical but the distinctions in the factors cited are the result of the difference in the issue presented (joint employment in *Zheng* but employee versus independent contractor in *Eisenberg*) rather than a difference in basic concept.

by the Second Circuit, the standard for determining employment under the FLSA is comparable to that for determining employment under Title VII. We already know Title VII's test for employment is not as expansive as the FLSA's.

The fundamental point is that functional control is not an equivalent of the FLSA definition of "employ" because control is not a necessary indicium of "suffer or permit to work." The § 203(g) definition is "written in the passive,"<sup>81</sup> not the active, voice. It connotes assent, acquiescence and/or tolerance despite reservations, but not necessarily control. The difference between suffer-or-permit on the one hand and control on the other may be illustrated by two hypotheticals. In the first, by the last day of a workweek, a "9 to 5" employee realizes she will not be able to complete an assignment by Friday at 5 pm. Rather than ask her manager whether she can take the work home and complete the assignment over the weekend, the worker simply declares that she is going to take the work home and finish it on Saturday, and the manager does not reply one way or the other. In the second hypothetical, a company rule prohibits the taking of work home to complete assignments not finished in the normal 40-hour workweek. An employee declares her intention to take work home on the weekend to complete an assignment. The manager knows this would be inconsistent with the company rule and that he might get into trouble if his bosses discover the overtime work was performed with his knowledge. But he also knows the company is under a deadline to complete production and unless the employee's work is finished over the weekend, that deadline will not be met. The manager says nothing in response to the employee's declaration. In these hypotheticals, the company at least suffered the performance of overtime work on the weekend. At the same time, in neither did it control the performance of the weekend work. The company did not require or even request that work be performed on the weekend.

#### 4. "Factors"

Appellate courts have come up with varying lists of "factors" said to pertain to whether or not a worker is jointly employed by

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81 *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1988) (concurring opinion).

a company within the meaning of the FLSA.<sup>82</sup> For several reasons, these lists do not capture the meaning of “to suffer or permit to work.” Courts tie their respective lists to “economic reality,” “dependence” and/or “functional control.” As we have seen, none of these concepts is equivalent to, or an adequate substitute for, § 203(g). Hence, these sets of factors are not reflective of the FLSA standard.<sup>83</sup>

A factors-based approach would be problematic even if a given set of factors were more closely reflective of “to suffer or permit to work.” Factors said to pertain to whether A was employed by B for purposes of the FLSA are not *criteria* for an employment relationship between A and B. A criterion would be a necessary component without which there could not be such a relationship between A and B. A set of criteria, like elements of a cause of action, provides a rule of decision. In contrast, a set of factors does not yield a rule for determining the existence of an employment relationship. The presence of any factor identified by one or more appellate courts as pertinent may be evidence that A was employed by B, but the absence of that factor will not be fatal to demonstrating an FLSA employment relationship.

Not only are factors not criteria or elements when it comes to formulating a rule of decision, but the appellate courts have essentially avoided valuing individual factors. Most have recognized that all factors are not created equal.<sup>84</sup> As one court has put it, resolution of a joint employment claim is not simply a baseball game in which the plaintiff scores a run with each factor favoring joint employment, the defendant scores a run with each factor opposing joint employment,

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82 Variances between the lists exist even where courts consider the same job involving the same tasks in the same industry. Compare, for example, the differing factors identified in *Torres-Lopez*, *Antenor* and *Aimable* each of which involved farmworkers hired, paid and supervised by a farm labor contractor to harvest a farmer’s crop. Compare *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996); *Aimable v. Long & Scott Farms, Inc.*, 20 F.3d 434 (11th Cir. 1994).

83 An individual factor may pertain to whether a plaintiff was employed by a defendant within the meaning of the FLSA but any one of the sets of factors, taken as a whole, is not reflective of “suffer or permit to work.”

84 For example, in *Antenor*, the Eleventh Circuit stated that “the weight of each factor depends on the light it sheds on the [worker’s] economic dependence. . .” 88 F.3d at 932. Such a statement is unhelpful to the trier of fact or a lower court on summary judgment unless accompanied by an assessment of how much light any individual factor sheds.

and the party with the most runs wins.<sup>85</sup> Nevertheless, appellate courts have failed to provide guidance as to which factors they have identified or which kinds of factors should receive more or less value in the balancing process they advocate and how much value. Moreover, these courts have repeatedly said that district courts may add additional factors to the balancing mix, a freedom the lower courts pass on to juries. Juries are thereby left without a rule of decision to apply and are given discretion in fact to indulge their own, often idiosyncratic views as to how much weight to give each identified factor, whether to throw one or more additional factors into the mix and how much weight to give each such additional factor.<sup>86</sup>

It is not only juries that are left without a rule of decision on the joint employment issue. The same lack of guidance that infects jury verdicts infects district court decisions when that same issue arises on a motion for summary judgment, a motion for judgment as a matter of law or a motion to set aside a verdict.<sup>87</sup> As we shall see, this problem does not arise only under federal law.

### III. The Approach of Courts Construing and Applying State Wage and Hour Laws Using Terminology Similar to That in § 203(g)

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85 See *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 407 (7th Cir. 2007).

86 A private litigant on an FLSA minimum wage or overtime compensation claim is entitled to a jury trial. *Lorillard v. Pons*, 434 U.S. 575, 580 & n.7 (1978). This includes a jury determination whether a defendant jointly employed a plaintiff. In *Zheng*, after the Second Circuit reinstated the plaintiffs' complaint in 2003, a district court denied the manufacturer defendants' renewed motion for summary judgment. *Zheng v. Liberty Apparel Co.*, 556 F. Supp. 2d 284, 287 (S.D.N.Y. 2008). At the subsequent trial, over the defendants' objection, the district court submitted to the jury the question whether the manufacturer jointly employed the workers hired, paid and supervised by the sweatshop operator. On the defendants' appeal from a judgment in the plaintiffs' favor, the court of appeals held that joint employment is a mixed question of fact and law and, hence, it was proper to submit that issue to the jury. See *Zheng v. Liberty Apparel Co.*, 617 F.3d 182, 185-86 (2d Cir. 2010); see also *Zheng v. Liberty Apparel Co.*, 389 Fed. Appx. 63, 65-66 (2d Cir. 2010) (jury's finding of joint employment supported by legally sufficient evidence).

87 See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1988) (concurring opinion) ("A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.").

Forty-five states have enacted minimum wage and/or overtime compensation requirements.<sup>88</sup> Twenty-six of these states use “suffer or permit to work” in defining the relationships covered by such laws.<sup>89</sup> Another eight states use the “permit-to-work” formulation.<sup>90</sup> In short, a large majority of state wage and hour provisions use operative terminology that is the same as or similar to that which Congress used in § 203(g).<sup>91</sup>

The approach of courts when determining whether a plaintiff was suffered and/or permitted to work by a defendant under a state wage and hour law using terminology similar to that in § 203(g) has generally been similar to the approach of federal appel-

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- 88 Only Alabama, Louisiana, Mississippi, South Carolina and Tennessee have failed to enact either of these kinds of protections.
- 89 These states include: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Michigan, Montana, New Mexico, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Wyoming and Utah. The District of Columbia uses the same terminology. Some of these States provide that employ “includes” suffer or permit to work. *E.g.*, ARIZ. REV. STAT. § 23-362(D) (2013); N.J. STAT. ANN. § 34:11-56a1(f) (2002); 43 PA. STAT. ANN. § 333.103(f) (2006). Others provide that employ “means” to suffer or permit to work. *E.g.*, CONN. GEN. STAT. § 31-58(h) (2013); MICH. STAT. ANN. § 408.382(d) (1997); R.I. GEN. LAWS § 28-12-2(4) (1956). Kentucky defines an employee as “any person employed by or suffered or permitted to work for an employer.” KY. REV. STAT. ANN. § 337.010(1)(e) (2012). It does not appear there is any distinction intended among these variations in formulations. Other states define employ by expressly incorporating the FLSA definition. *E.g.*, FLA CONST. art. X, § 24 (1968); OHIO CONST. art. II, § 34A (2007); OHIO REV. CODE ANN. § 4111.14(B) (2007).
- 90 These states include: Illinois, Indiana, Minnesota, Nebraska, Texas, Vermont, Washington and West Virginia. Some of these states provide that employ “includes” to permit to work. *E.g.*, 820 ILL. COMP. STAT. 105/3(d) (2009); WASH. REV. CODE § 49.46.010(2) (2013). Others provide that said term “means” to permit to work. *E.g.*, IND. CODE § 22-2-2-3 (2003); MINN. STAT. § 177.23(5) (2007).
- 91 This article uses the term “joint employment” claim when referencing the contention that two or more persons should be held liable for violations of the FLSA. This is because § 203(g) describes sufferance or permission to work as included within employment. In contrast, some child labor laws describe sufferance or permission to work as separate from employment. *See, e.g.*, KY. REV. STAT. ANN. § 337.010(1)(e). Accordingly, when referring to the contention under child labor laws or under all laws using suffer-or-permit-to-work terminology that two or more persons should be held liable for violations of those laws, this article uses the term “joint liability” claim.

late courts faced with joint employment claims under the FLSA. The actual language of the operative provision is acknowledged but then de-emphasized, if not ignored. Child labor law precedents go unmentioned.<sup>92</sup> “Economic reality” and/or “economic dependence” often become(s) the touchstone. A notable example is *Ovadia v. Office of Industrial Board of Appeals*.<sup>93</sup> A real estate developer hired a construction company as general contractor for a construction project.<sup>94</sup> The latter entered into a contract with a subcontractor for masonry work, which was performed by laborers directly employed by the subcontractor.<sup>95</sup> After underpaying the laborers for approximately three months, the subcontractor ceased paying the laborers at all, but the laborers continued to work, relying on a representation by the owner of the general contractor that if they did, they would be paid their wages for that work.<sup>96</sup> After six days, they were removed from the site without being paid.<sup>97</sup> The New York Department of Labor concluded that the general contractor had assumed the status of a joint employer and ordered it to pay the laborers their past-due wages plus the wages for their final six days, with penalties and interest pursuant to the New York Labor Law.<sup>98</sup> The Board of Industrial Appeals upheld the NY DOL’s order.<sup>99</sup> The Appellate Division, applying the

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92 Compare *Tianti ex rel. Gluck v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 651 A.2d 1286 (Conn. 1995) with *Tianti*, 651 A.2d at 1293 (concurring and dissenting opinion); see also *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 281 P.3d 289 (Wash. 2012); *State ex rel. Dep’t of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Idaho Ct. App. 1990); *Buckley v. Prof’l Plaza Clinic Corp.*, 281 Mich. App. 224, 761 N.W.2d 284 (Mich. Ct. App. 2008); *Garcia v. Am. Furniture Co.*, 101 N.M. 785, 689 P.2d 934 (N.M. Ct. App. 1984); *Fairfield Builders, Inc. v. Vattilana*, 304 A.2d 58 (Del. 1973).

93 969 N.E.2d 202 (N.Y. 2012).

94 *Id.* at 203.

95 *Id.*

96 *Id.* at 204.

97 *Id.*

98 The laborers’ claims were not under New York’s minimum wage and overtime compensation guarantees. The former provision is found in N.Y. Labor Law § 652 and the latter in 12 NYCRR § 142-2.2, a regulation promulgated by the N.Y. Department of Labor pursuant to Labor Law § 655(5)(b). Rather, the claims for unpaid wages were premised on a separate wage law appearing at Labor Law § 190 *et seq.*

99 *Ovadia*, 969 N.E.2d at 204.



six-factor test from *Zheng*, confirmed the Board's determination of joint employment.<sup>100</sup>

The Court of Appeals, New York's highest court, reversed.<sup>101</sup> It began with the now familiar bow to the actual statutory language: after quoting the definitions of "employer" and "employee" in Labor Law § 190, it stated that "to be 'employed' under the Labor Law means that a person is 'permitted or suffered to work.'"<sup>102</sup> However, in the very next sentence, the court announced that "[d]espite these seemingly broad definitions," in the "typical" general contractor/subcontractor context, "a general contractor is not an employer of its subcontractors' employees."<sup>103</sup> Criticizing the Board's contrary conclusion, the court displayed a reluctance to follow the actual statutory language if that language led to widespread general contractor responsibility for compliance with wage and hour guarantees on outsourced work.<sup>104</sup> The court concluded: "Because the Board's factual findings indicate nothing more than that the usual contractor/subcontractor relationship existed between [the general contractor] and [the subcontractor] during the three month period"<sup>105</sup> when the laborers were underpaid, the former was not a joint employer. In short, because the general contractor in *Ovadia* operated in the three month period as general contractors in the construction industry commonly do, no liability for wage or hour violations suffered by the subcontractor's laborers in that period should accrue to that general contractor.<sup>106</sup>

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100 *Ovadia v. Office of Indus. Bd. of Appeals (IBA)*, 81 A.D.3d 457, 918 N.Y.S.2d 56 (N.Y. App. Div. 2011).

101 *Ovadia*, 969 N.E.2d 202.

102 *Id.* at 204 (quoting Labor Law § 2(7)).

103 *Id.* at 205.

104 *Id.* at 205-06 ("In reaching that conclusion, however, the Board relied on several characteristics that, if applied consistently in the construction realm, would likely render most general contractors the joint employers of their subcontractors' employees – a proposition that does not reflect the actual relationships in the construction industry. For instance, the Board stated that [the general contractor] 'provided the work site and materials used by the [workers] to perform' their tasks. But this is a common occurrence at construction sites.").

105 *Id.* at 206.

106 The *Ovadia* opinion appears limited to the particular facts presented. The court noted it was not holding that a general contractor in the construction industry could *never* be deemed a joint employer of a subcontractor's laborers. *See id.* Nevertheless, it is clear that, under the court's analysis, if the relationship between a general contractor and a subcontractor is "typical" of such relationships in that industry, no liability will attach to the general



It is fruitful to compare the Court of Appeals' disregard in *Ovadia* of § 2(7)'s admittedly "seemingly broad" definition of "employ" and that court's reluctance to hold a general contractor accountable for wage and hour violations arising from a "typical" outsourcing arrangement with its prior decisions under the same or a similar statute. In *Sheffield Farms*, the defendant company employed drivers to deliver milk to customers.<sup>107</sup> A company rule prohibited drivers, on pain of dismissal, from allowing anyone not employed by the company to assist them.<sup>108</sup> Nevertheless, on his own, a driver hired and paid a 13-year-old boy to assist in preventing the theft of milk bottles, which benefitted the company.<sup>109</sup> The company was convicted of violating a section of the New York Labor Law that provided that no child under the age of 14 "shall be employed or permitted to work" in connection with certain specified mercantile establishments.<sup>110</sup> Although this section did not expressly proscribe sufferance of child labor, the Court of Appeals, per then-Judge Benjamin Cardozo, held:

[W]e think the statute draws no distinction between sufferance and permission. This is apparent from its scheme as revealed in related sections.... The two words are used indiscriminately. In such circumstances, each may take some little color from the other. Permission, like sufferance, connotes something less than consent. Sufferance, like permission, connotes some opportunity for knowledge.<sup>111</sup>

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contractor under the New York Labor Law in respect to the work performed by laborers hired by the subcontractor.

The Court of Appeals remitted to the Board for a determination of the workers' claim of entitlement to wages for work performed in the six days after the subcontractor disappeared. *Id.* at 206-07.

107 *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 475 (N.Y. 1918).

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 476. The Texas minimum wage law, Tex. Lab. Code § 62.002(4) (West 2013), which defines "employ" as including "to permit to work," likewise is deemed to include "to suffer" to work. See Revisor's Notes to § 62.002 (2006) ("The source law refers to 'suffer or permit to work.' The reference to 'suffer' is omitted from the revised law because 'suffer' is included within the meaning of 'permit.'").

The court noted: “Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge.”<sup>112</sup> It held the company had suffered/permitted the child’s work because it failed to discover and prevent the driver’s employment of the boy while it knew that drivers generally were engaging under-aged boys to assist them in their work for the company.<sup>113</sup>

In *Vincent v. Riggi & Sons, Inc.*,<sup>114</sup> the president of a construction company asked a 13-year-old if he wanted to make some money and, when the boy responded affirmatively, the president said, “If you want to cut the lawn [of a new house] go right ahead.”<sup>115</sup> There was no discussion as to how, when or at what rate of pay the job was to be done.<sup>116</sup> A few days later, the boy borrowed his father’s mower, but while cutting the lawn, his foot slipped under the mower amputating three toes.<sup>117</sup> One damage claim was for common law negligence, and the other was predicated on violation of a child labor law prohibiting employment in the relevant business of a minor under 14 years of age. As noted in *Ovadia*, Labor Law § 2(7) provides that “[e]mployed includes permitted or suffered to work.”

The trial court refused to submit the child labor law claim to the jury, and the jury returned a verdict for the company on the negligence claim, finding that the boy was an independent contractor and not an employee of the company under the common law.<sup>118</sup> The boy appealed from the refusal of the trial court to submit the child labor law claim to the jury. The Court of Appeals held that the boy’s status under common law as an independent contractor did not foreclose the claim based upon the child labor statute because that statute included conduct constituting “permission or sufferance to work” in addition to common law employment.<sup>119</sup> The court further held there was sufficient evidence from which the jury might have found permission or sufferance to work.<sup>120</sup>

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112 *Sheffield Farms-Slawson-Decker Co.*, 121 N.E. at 476.

113 *Id.* at 477.

114 285 N.E.2d 689 (1972).

115 *Id.* at 690.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.* at 691.

120 *Id.* at 691, 693-94.

Thus, in contrast to its approach in *Ovadia*, the Court of Appeals based its determinations in *Sheffield Farms* and in *Vincent* on the actual suffer-or-permit-to-work language of the relevant statute. And in neither of those precedents did it pay any attention to whether the circumstances were “typical” for the industry involved. The failure of the court in *Ovadia* to follow its own precedents for determining liability highlights the reluctance of many courts to treat the operative language of wage and hour laws as if that language says what the legislature meant and means what the legislature said when it comes to determining whether outsourcing companies are accountable for wage and hour violations committed against individuals who perform the companies’ outsourced work.

A significant counterpoint to the approach of most courts to claims under state wage and hour laws using suffer-or-permit-to-work terminology is the decision of the Supreme Court of California in *Martinez v. Combs*.<sup>121</sup> In that case, agricultural workers were directly employed by a strawberry farmer who also engaged produce brokers through whom the farmer sold strawberries.<sup>122</sup> The brokers sold the farmer’s strawberries for a commission and remitted to him the net proceeds.<sup>123</sup> The workers filed an action against the brokers and the farmer (who filed for bankruptcy) for unpaid minimum wages under Section 1194 of the California Labor Code, claiming the brokers and the farmers were joint employers.<sup>124</sup> On the plaintiffs’ appeal from a grant of summary judgment for the brokers, the intermediate appellate court applied the so-called “economic reality” test for employment developed in the federal courts under the FLSA and affirmed the dismissal of the claims against the brokers.<sup>125</sup>

In considering whether the brokers (jointly) employed the plaintiffs, the Supreme Court of California noted that the California Industrial Wage Commission’s Wage Order No. 14 “and not the common law, properly defines the employment relationship in this action under section 1194.”<sup>126</sup> That Wage Order provides: “‘Employ’ means to engage, suffer or permit to work.”<sup>127</sup> The Court observed:

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121 *Martinez v. Combs*, 231 P3d 259 (Cal. 2010).

122 *Id.* at 262-63.

123 *Id.* at 264.

124 *Id.* at 266.

125 *Id.* at 266-67.

126 *Id.* at 277.

127 *Id.* at 266 n.9.

[L]anguage consistently used by the IWC to define the employment relationship, beginning with its first wage order in 1916 (“suffer, or permit”), was commonly understood to reach irregular working arrangements that fell outside the common law, having been drawn from statutes governing child labor and occasionally that of women.<sup>128</sup>

Perhaps most importantly, in deciding whether the brokers had jointly employed the workers, the court expressly rejected the intermediate court’s use of the so-called economic reality test. This rejection was based at least in part on the court’s conclusion that the “nonstatutory” economic reality test for employment did not adequately reflect the meaning of “suffer or permit” as used in the Wage Order.<sup>129</sup> That language “by its terms imposes liability on multiple entities who divide among themselves control over those different aspects of the employment relationship.”<sup>130</sup>

Having acknowledged that the operative suffer-or-permit-to-work language was borrowed from early 20th century statutes prohibiting child labor, the court looked directly to state court decisions interpreting and applying those statutes in order to interpret the similar terminology in Wage Order No. 14.<sup>131</sup> In contrast to the federal courts’ gliding past the operative terms of § 203(g) and other state courts’ comparable handling of wage and hour provisions using similar terminology, the California Supreme Court “s[aw] no reason to refrain from giving the IWC’s definition of ‘employ’ its historical meaning.”<sup>132</sup> Thus, “employ” in the Wage Order was effectively defined to mean knowledge or reason to know of the performance of work for a company and that company’s failure to prevent that work from occurring despite its ability to prevent it.<sup>133</sup>

That meaning was well established when the IWC first used the phrase “suffer or permit” to define employment, and no reason

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128 *Id.* at 278 (footnote omitted); *see also id.* at 279 (footnote omitted) (“[T]he IWC has used the phrase ‘suffer or permit’ in wage orders to define the employment relationship since 1916, borrowing the phrase from the common, well-understood wording of contemporary child labor laws.”); *accord id.* at 281 (footnote omitted).

129 *Id.* at 279-80.

130 *Id.* at 280.

131 *See id.* at 273 n.26, 273-74, 281-82.

132 *Id.* at 281.

133 *Id.* at 282.

exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired clearly suffers or permits that work by failing to prevent it, while having the power to do so.<sup>134</sup>

The Court ultimately affirmed the summary judgment dismissing the joint employment claim on the ground that the brokers lacked the power to prevent the plaintiffs' work.<sup>135</sup> Nevertheless, the approach in *Martinez* by which the Supreme Court formulated a rule of decision was based upon the actual operative language and state courts' interpretation of the same language in the child labor laws from which the operative language was derived. The court's focus on the operative language and the child labor precedents was faithful to the canons of construction discussed above.<sup>136</sup>

#### IV. Starting Over

To this point, we have identified flaws in the current approach of many appellate courts to interpreting and applying § 203(g) or state wage and hour laws using similar terminology. But the objective of this Article is not simply to criticize the unfocused balancing act which is commonly followed; it is to propose a rule of decision which will provide meaningful guidance for resolving whether a company which outsourced part of its production process suffered or permitted the work of an individual engaged by the contractor to perform work in that process. In order to uncover such a rule of decision, we consider the actual language of § 203(g), precedents construing and applying "to suffer or permit to work" or "to permit to work" as used in the child labor statutes from which § 203(g) was derived, U.S. Department of Labor regulations interpreting the § 203(g) terminology and the overall FLSA scheme in which the § 203(g) definition of "employ" appears.

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134 *Id.* at 281.

135 *See id.* at 282. The brokers were not involved in the strawberry production and, hence, did not even have an indirect relationship to the workers insofar as that process was concerned.

136 *See supra* Part II.A.

### A. Beginning With the Statutory Language and the State Child Labor Law Precedents

The ordinary, common sense meaning of “to permit” is to give authorization; “to suffer” means to put up with or to tolerate.<sup>137</sup> The former connotes an affirmative act, the latter a passive, even reluctant, acceptance. As Congress imported these terms into the FLSA directly from state child labor laws,<sup>138</sup> decisions by state appellate courts construing those laws provide reliable guidance as to the meaning of those terms as used in the FLSA. Such decisions show the courts adopted conventional, dictionary-based constructions of the relevant terms.

A leading case is *Curtis & Gartside Co. v. Pigg*,<sup>139</sup> where damages were sought on behalf of a 14-year-old boy for loss of his hand cut off by the defendant company’s handsaw when he attempted to oil the handsaw while in motion. An Oklahoma law provided: “No child under the age of sixteen years shall be employed, permitted or suffered to work at any of the following occupations: Oiling or assisting in oiling . . . any dangerous machinery . . .”<sup>140</sup> The company contended that, in the applicable contract made between the company and the boy’s father, it was agreed that the boy should sweep the defendant’s plant, load trucks and occasionally use an ordinary handsaw, but should *not* work about nor assist in oiling the machinery while in motion.<sup>141</sup> On that basis, the company argued it had not employed the boy to perform the work in which he was injured within the meaning of the child labor law and, therefore, it should not be liable for the boy’s injuries.<sup>142</sup> Affirming a judgment for the plaintiff, the Supreme Court of Oklahoma noted that each of the operative terms in the statute “should be given its ordinary significance.”<sup>143</sup> It held:

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137 See, e.g., NEW OXFORD AMERICAN DICTIONARY 1305, 1379 (Oxford Univ. Press, 3d ed. 2010); see also BLACK’S LAW DICTIONARY 1255, 1570 (9th ed. 2009).

138 See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n.7 (1947).

139 134 P. 1125 (Okla. 1913).

140 *Id.* at 1128.

141 *Id.* at 1127 (it does not appear the boy’s father was employed by the company).

142 *Curtis & Gartside Co.*, 134 P. at 1127.

143 *Id.* at 1129.

If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that the child was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk; and if it prohibited only the *employment* and *permitting* a child to do such things, then it might still be evaded by the claim that he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even stronger than the term "*permitted*." It says that he shall neither be employed, permitted, nor *suffered* to engage in certain works. The relative significance of the words, "permit," "allow," "suffer," is illustrated by Webster under the word "permit," as follows: "To *permit* is more positive, denoting a decided assent, either directly or by implication. To *allow* is more negative, and imports only acquiescence or abstinence from prevention. To *suffer* is used in cases where our feelings are adverse but we do not think best to resist." . . . Under the word "suffer," *Id.*, it means not to forbid or hinder; to tolerate. . . . Hence, by giving the language of the statute the ordinary meaning and significance which it bears in common usage, it is clear that additional restraints to that of mere employment are placed upon the employer. It means that he shall not *employ* by contract, nor shall he permit by acquiescence, nor suffer by a failure to hinder.<sup>144</sup>

In *Purtell v. Philadelphia & Reading Coal & Iron Co.*,<sup>145</sup> a coal mining company employed car pushers to unload its coal from vessels at its coal yard. The car pushers in turn employed an 11-year-old boy to provide them with drinking water while they were engaged in pushing the cars, and the boy was injured while so employed.<sup>146</sup> A suit was brought on the boy's behalf against the company asserting that the injury resulted from its violation of a section of the Illinois Child Labor Act of 1903, which read in part: "No child under the age of fourteen years shall be employed, permitted or suffered to work at any gainful occupation in any . . . mercantile institution, . . . manufacturing establishment, . . . factory or workshop."<sup>147</sup> The com-

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144 *Id.* (emphasis in original).

145 99 N.E. 899 (Ill. 1912).

146 *Id.* at 900-01.

147 *Id.* at 902.



pany argued this act could only apply where the relationship between plaintiff and defendant was that of master and servant and, because no such relationship existed between the company and the boy, the former could not be liable to the latter.<sup>148</sup> Affirming a judgment for the plaintiff, the Supreme Court of Illinois noted that, pursuant to years-old custom, the pushers at the coal yard had employed minors as water carriers and that this custom “must have been well known” to those the company put in charge of its yard.<sup>149</sup> The court then held:

To put the construction on this statute contended for by counsel for the appellant would leave the words ‘permitted or suffered to work’ practically without meaning. It is the child’s working that is forbidden by statute, and not his hiring, and, while the statute does not require employers to police their premises in order to prevent chance violations of the act they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.<sup>150</sup>

Because the company had the right to order the pushers not to hire under-aged boys to carry water and to enforce such a directive but had not done so, it had “permitted or suffered” the boy to work in violation of the Child Labor Law.<sup>151</sup>

*Gorczynski v. Nugent*,<sup>152</sup> involving an Illinois statute materially indistinguishable from the one at issue in *Purtell*, demonstrates that where a worker is engaged by an independent contractor, rather than by an employee of the defendant business, such a circumstance does not preclude a finding/conclusion that the business suffered or permitted the work. A 13-year-old boy employed as a groom at an Illinois racetrack was injured when kicked by a horse owned by his employers.<sup>153</sup> Unlike the situation in *Purtell*, *Gorczynski*’s employers were not employed by the persons being sued but were independent contractors.<sup>154</sup> Nevertheless, the Supreme Court of Illinois, quoting

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148 *Id.*

149 *Id.* at 901.

150 *Id.* at 902.

151 *Id.*

152 83 N.E.2d 495 (Ill. 1948).

153 *Id.* at 497.

154 *Id.* at 496-97.

its language in *Purtell* quoted above, held that the rule followed in that case was fully applicable in *Gorczyński*.<sup>155</sup> Because the boy's work was performed in view of the agents of the operators, the latter had authority to suspend the boy's employers for violation of the child labor law and could have prevented the boy's entry into the stable area where he had been injured but had failed to exercise reasonable care to prevent the boy's working, the court held the operators had suffered or permitted him to work within the meaning of the Illinois law.<sup>156</sup>

In *Vida Lumber Co. v. Courson*,<sup>157</sup> an under-aged boy was killed when caught at the end of the shaft that operated machinery at the defendant company's lumber plant. It was alleged that the company "permitted or suffered" the boy to work at the plant in proximity to an unguarded gearing in violation of the Alabama Child Labor Law prohibiting certain employment or permission or sufferance of work by minors.<sup>158</sup> Noting the boy's father worked at the plant loading lumber onto trucks and pushing dollies to a planing mill, the Supreme Court of Alabama held:

The evidence was in conflict as to whether or not the boy was employed by defendant, and there was evidence tending to show that he worked with and for his father, who was paid so much per truck load, and who alone was paid by the defendant. In this latter event, the intestate would not be an employee of defendant, *yet, if so working at the plant in proximity to the unguarded gearing with knowledge or notice of those in charge thereof, such work would be violative of the Child Labor Law*.<sup>159</sup>

In *Commonwealth v. Hong*,<sup>160</sup> the defendant restaurant owner engaged an independent contractor to provide entertainment in

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155 *Id.* at 499.

156 *Id.*

157 112 So. 737 (Ala. 1926).

158 The complaint did not allege the boy was employed by the defendant, apparently to avoid application of the worker's compensation law.

159 *Vida Lumber*, 112 So. at 738 (emphasis added); *see also* *Nichols v. Smith's Bakery, Inc.*, 119 So. 638, 639 (Ala. 1928) (inclusion of "permitted or suffered" in Alabama Child Labor Law "aimed . . . at cases" where minor not employed by defendant company in common law sense).

160 *Commonwealth v. Hong*, 158 N.E. 759 (Mass. 1927).

its restaurant under the contractor's supervision. Although a child labor statute prohibited employment of a girl under 21 years of age "or permitting her to work in, about, or in connection with" certain specified establishments after 10 pm, the contractor employed under-aged girls to provide the entertainment and supervised them while they did so.<sup>161</sup> The Supreme Judicial Court of Massachusetts rejected as legally insufficient the defendant's argument that he had not employed the girls and they were employed by the contractor alone: "The fact that the performers were employed by an independent contractor is not a defense. The offense was committed if the defendant permitted them to work in his establishment within the prohibited time."<sup>162</sup> The court concluded that the foregoing facts were sufficient to support the jury's finding that the restaurant owner "permitted" the girls to work in violation of the statute.<sup>163</sup>

In *Daly v. Swift & Co.*,<sup>164</sup> the defendant meatpacking company engaged an ice company to remove an ice maker from the defendant's plant. The ice company sold the ice maker to a junk dealer on the condition that the dealer remove it.<sup>165</sup> "[I]n making the contracts and doing the work," the ice company and the junk dealer "were 'furthering solely and entirely the plan of work and the business desires and designs of defendant.'"<sup>166</sup> A 12-year-old boy employed by the junk dealer on the removal was killed in the course of his work.<sup>167</sup> The meatpacker's superintendent and foreman knew the child was working at its plant prior to the accident.<sup>168</sup> The relevant Montana statute provided: "Any corporation" which shall "knowingly employ or permit to be employed" a child under 16 years of age to perform any service or labor "whether under contract of employment or otherwise" in or about a freight elevator or where any machinery is operated, shall be guilty of a misdemeanor.<sup>169</sup> In a damage suit against the meatpacking company on the boy's behalf, the Supreme Court of Montana held that "the fact that the boy was employed by, and

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161 *Id.* at 759.

162 *Id.* at 759-60.

163 *Id.* at 760.

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

165 *Id.* at 266.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 267.

working for, an independent contractor [was] immaterial.”<sup>170</sup> That the meatpacker “had no control over the boy who was injured and no power to discharge him” was “unimportant.”<sup>171</sup> “[I]t [was] the fact that a child under the forbidden age [was] permitted to perform services or labor in a dangerous place which g[ave] rise to liability or prosecution, and not the fact of hiring.”<sup>172</sup>

In *Sheffield Farms*, described above in some detail,<sup>173</sup> although the defendant company did not know one of its drivers had employed the boy in question, it knew that in violation of its rules, its drivers were frequently employing boys to help them. Offenders had been discovered not infrequently and were reprimanded but not discharged.<sup>174</sup> The Court of Appeals held the statute imposed upon the company the duty not to suffer the prohibited condition and that it could not escape this duty by delegating it to an agent who then directly employed the under-aged minor.<sup>175</sup> By failing to discover and prevent the driver’s employment of the boy when it was aware that drivers generally were using under-aged minors to assist them in their work for it, the company had committed “a sufferance of the [boy’s] work.”<sup>176</sup>

In sum, in cases involving interpretation of the very child labor laws from which § 203(g) was derived, state appellate courts consistently focused exclusively on the “suffer-or-permit-to-work” or “permit-to-work” language of those laws and ascribed thereto the ordinary, common sense meanings of the terms therein. In none of those cases did an appellate court ascribe any significance to so-called economic dependence or to control, functional or otherwise. In *Daly*, the appellate court expressly held that the defendant’s lack of control over the activity of the plaintiff was “unimportant” and that the

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170 *Id.* at 268.

171 *Id.* at 267.

172 *Id.* at 268.

173 *See supra* Part III.

174 *People v. Sheffield Farms-Slawson-Decker*, 121 N.E. 474, 475 (N.Y. 1918).

175 *Id.* at 476.

176 *Id.* at 477. *See also* *Graham v. Goodwin*, 156 So. 513, 514 (Miss. 1934) (where under-aged boy hired by independent timber company to assist in hauling timber to defendant mill operator’s ramps and defendant’s foreman knew of boy’s work, operator violated child labor law: although operator did not employ boy, it “knowingly permitted” him to work within meaning of law “as if an employee” of the defendant).

defendant had permitted the plaintiff to work within the meaning of the Montana law, notwithstanding the defendant's lack of control.<sup>177</sup>

## B. The Relevant Federal Regulations

The meaning of "to suffer or permit to work" as used in the FLSA is further elucidated by regulations promulgated by the U.S. Department of Labor ("DOL") and the U.S. Office of Personnel Management ("OPM"). Title 29 C.F.R. § 570.113(a), a DOL regulation implementing the FLSA child labor provisions, provides:

[T]he terms "employer" and "employ" as used in [§ 203(d) and (g), respectively,] are broader than the common-law concept of employment and must be interpreted broadly in the light of the mischief to be corrected. . . The words "suffer or permit to work" include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract.

Referring to the child labor provisions of the FLSA, the regulation further provides:

A typical illustration of employment of oppressive child labor by suffering or permitting an underaged minor to work is that of an employer who knows that his employee is utilizing the services of such a minor as a helper or substitute in performing his employer's work. If the employer acquiesces in the practice or fails to exercise his power to hinder it, he is himself suffering or permitting the helper to work and is, therefore, employing him, within the meaning of the [FLSA].

As the DOL has enforced FLSA's prohibition on child labor since its enactment,<sup>178</sup> this regulation constitutes "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>179</sup>

The OPM, which is charged generally with administering the FLSA in respect to persons employed by the Government of the

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177 *Daly*, 300 P. at 267.

178 *See, e.g.*, FLSA §§ 11, 12, 16(c), 29 U.S.C. §§ 211, 212, 216(c) (2011).

179 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

United States,<sup>180</sup> has advised: “Suffered or permit to work means any work performed by an employee for the benefit of an agency, whether requested or not, provided that employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.”<sup>181</sup> This regulation too constitutes a body of experience and informed judgment to which courts and litigants may properly resort for guidance.<sup>182</sup>

The DOL’s and OPM’s respective interpretations of § 203(g) were “made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.”<sup>183</sup> The weight which a court should give to a DOL regulation such as § 570.113(a) or an OPM regulation such as § 551.104 “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>184</sup> Sections 570.113(a) and 551.104 are long-standing regulations, and the part of each quoted here is fully consistent with both “the ordinary meaning and significance which it bears in common usage”<sup>185</sup> and the case law interpreting the state child labor laws from which the language of § 203(g) was derived. It follows that § 570.113(a) and § 551.104 are each entitled to so-called “*Skidmore* deference.”

### C. The Statutory Scheme in Which § 203(g)’s Operative Language Is Found

As pointed out earlier, when it comes to the issue of joint employment, appellate courts have been reluctant to apply § 203(g) in accordance with its terms. It is not simply that the courts have

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180 See FLSA §§ 3(e)(2), 4(f), 29 U.S.C. §§ 203(e)(2), 204(f).

181 5 C.F.R. § 551.104 (emphasis in original).

182 While by its terms § 551.104 applies only to federal employees identified in § 203(e)(2), the FLSA uses the same § 203(g) definition in defining employment relationships involving persons other than those working for the U.S. government. Hence, the definition set forth in that regulation is persuasive in determining the meaning of § 203(g) as applied as well to individuals not working for the U.S. government.

183 *Skidmore*, 323 U.S. at 134.

184 *Id.*

185 *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913).

declined to focus on the actual statutory language; they have also turned a blind eye to the child labor laws from which § 203(g) was derived and the appellate opinions construing those laws. We have suggested that part of the problem appears to be a judicial love affair with the economics of outsourcing and a concern that application of the FLSA to outsourcers in respect to outsourced work would deter companies from making such arrangements. Another aspect of the problem is the failure to appreciate the context in which § 203(g) appears. The statutory scheme as a whole demonstrates a congressional intent to make the FLSA's minimum wage and overtime compensation guarantees widely applicable and effective.<sup>186</sup>

"The legislative debates indicate 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."<sup>187</sup> Congress saw that "the unequal bargaining power as between employer and employee"<sup>188</sup> had created "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>189</sup> The solution adopted by Congress was the establishment of standards of minimum wages and maximum hours.<sup>190</sup> Congress' aim was to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of

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186 See *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (relying on "the cardinal rule that '[s]tatutory language must be read in context [since] a phrase "gathers meaning from the words around it"'), quoting *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); *United Savings Assoc. of Tex. v. Timber of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (noting that "[s]tatutory construction . . . is a holistic endeavor" and relying on other provisions of Bankruptcy Code to interpret disputed section thereof); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 124 (1947) (where word not treated by Congress as word of art, "'it takes color from its surroundings . . . [in] the statute where it appears' . . . and derives meaning from the context of that statute . . ."), quoting *United States v. Am. Trucking Assocs., Inc.*, 310 U.S. 534, 545 (1940).

187 *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citing legislative debates). A complementary purpose was to redress the competitive disadvantage suffered by companies which adhere to labor standards while their competitors do not. See FLSA § 2(a)(3), 29 U.S.C. § 202(a)(3) (1974).

188 *Brooklyn Sav. Bank*, 324 U.S. at 706.

189 See FLSA § 2(a), 29 U.S.C. § 202(a).

190 *Brooklyn Sav. Bank*, 324 U.S. at 706-07.



others.”<sup>191</sup> Clearly then, the FLSA is “remedial and humanitarian in purpose.”<sup>192</sup> It follows that the Act should be liberally interpreted to effectuate its goals.<sup>193</sup> The Supreme Court has specifically held that the definition of “employ” in § 203(g) is “remedial and humanitarian in purpose” and, therefore, “must not be interpreted or applied in a narrow, grudging manner.”<sup>194</sup>

The definition of “employ” in § 203(g) should not be liberally construed simply because the FLSA is a remedial statute, however. In enacting the FLSA, Congress created a comprehensive, integrated scheme for making the federal minimum wage and overtime compensation provisions effective far and wide, and § 203(g) was an important component of this overall scheme. The requirements that employees be compensated for their labor at not less than a specified hourly wage rate and compensated for time worked in excess of 40 hours per week at one and one-half times their regular rates of pay<sup>195</sup> were only the FLSA’s starting point. To secure these rights, Congress carefully constructed a tripartite scheme. It surrounded the rights to a minimum wage rate and to overtime compensation with provisions making those rights effective.<sup>196</sup> It provided mechanisms and remedies to assure the availability of meaningful redress in the event of a violation of those rights.<sup>197</sup> And perhaps most important to a demonstration of the expansive scope of § 203(g), it made those rights and remedies widely available by defining broadly the companies and individuals constituting employers within the meaning of the FLSA, the individuals deemed employees covered by the Act and the relationships between employers and individuals constituting employment relationships within the reach of the Act.<sup>198</sup> In short, the statutory scheme is an integration of effective rights, meaningful remedies and broad entitlements.

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191 *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 153*, 321 U.S. 590, 597 (1944).

192 *Id.*

193 *See* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011) (quoting *Tennessee Coal*, 321 U.S. at 597); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *see also* *Tony & Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 296 (1983), quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959).

194 *Tennessee Coal*, 321 U.S. at 597.

195 *See* FLSA § 6(a), 7(a), 29 U.S.C. §§ 206(a), 207(a) (2007).

196 *See infra* Subsection 1.

197 *See infra* Subsection 2.

198 *See infra* Subsection 3.

1. *The Complementary Safeguards of the Rights to Minimum Wages and Overtime Compensation*

Congress recognized that abstract creation of rights to be paid at a specified minimum wage rate and to receive compensation for hours worked in excess of 40 hours per week at one and one-half times an employee's regular rate of pay would not *ipso facto* make such rights effective. It therefore provided complementary safeguards. It insisted that minimum wages and overtime compensation, once earned, should be paid on a timely basis.<sup>199</sup> This requirement was implicit in Congress' investiture of courts with the authority to award liquidated damages to compensate for a "delay in payment of sums due under the Act."<sup>200</sup> As a consequence of the timeliness requirement, an employer that delays payment of wages or overtime compensation until an employee complains or until an employee actually commences litigation may thereby avoid an adverse judgment for non-payment or underpayment of minimum wages or overtime compensation, but the employer will still be subject to an award of liquidated damages in an amount equal to the wages not timely paid, to compensate for the delay in payment.<sup>201</sup>

199 See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 & n.20, 709, 711 (1945) (referring to employer's obligation to pay statutory minimum wage "on time," necessity for "prompt payment," availability of action redressing "delay in payment" and employer's obligation for "overdue wages"); see also *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), and authorities cited.

200 *Brooklyn Sav. Bank*, 324 U.S. at 715; see also FLSA § 16(b), 29 U.S.C. § 216(b) (2008).

201 See, e.g., *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944); *Birbalas v. Cuneo Printing Indus., Inc.*, 140 F.2d 826, 827-29 (7th Cir. 1944); *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943); *Seneca Coal & Coke Co. v. Lofton*, 136 F.2d 359, 363 (10th Cir. 1943); accord *O'Neil v. Brooklyn Sav. Bank*, 293 N.Y. 666, 667-68, 56 N.E.2d 259 (N.Y. 1944), *aff'd*, 324 U.S. 697 (1945). Under the express terms of 29 U.S.C. § 260, an employer is liable for such liquidated damages unless the employer "shows to the satisfaction of the court that" the failure to timely pay the minimum or overtime wages due "was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . as amended." Even then, a court "may in its sound discretion, . . . award any amount [of liquidated damages] not to exceed the amount specified [in 29 U.S.C. § 216]." *Id.* See, e.g., *Featsent v. City of Youngstown*, 70 F.3d 900, 903 (6th Cir. 1995).

To protect employees from use of a bi-weekly or longer period within which an employer could offset overtime hours worked in one week by a reduction of hours worked in other weeks, whereby the employer could claim that an employee had not worked any overtime hours in the relevant time frame, Congress established a weekly standard for determining an entitlement to overtime compensation.

<sup>202</sup> An employee is entitled to overtime compensation determined on a weekly basis whether or not (s)he is paid on a weekly basis.<sup>203</sup>

The inequality in bargaining power between companies and their actual or putative employees also led to employer attempts to condition hiring or continued employment upon a worker's agreement to accept wages below the statutory minimum rate and/or the payment of overtime compensation at less than one and one-half times the regular rate of pay. Similarly, employer offers to make "corrective" wage payments were conditioned upon an employee's execution of a release of any and all wage and/or hour or related claims. These attempts to overcome FLSA rights were flatly rejected: as Congress created the guarantees to minimum wages and overtime compensation precisely to overcome such consequences of the inequality in bargaining power, the courts held ineluctably that written or oral contracts by which workers purported to agree that they could be paid at less than the statutory minimum wage rate or could be compensated for overtime work at less than one and one-half times the regular rate of pay or would not assert claims to redress wage or hour violations are void and unenforceable as contrary to the public policy embodied by the FLSA.<sup>204</sup> An agreement by which

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202 See 29 U.S.C. § 206(a)(1) (2007) (defining obligation to pay wages at specified minimum rate on basis of hours worked in "workweek"); *id.* § 207(a)(1) (2007) (defining obligation to pay overtime compensation on basis of work performed in excess of 40 hours in a "workweek"); see also 29 C.F.R. § 778.104 (1968) ("The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks."); see *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579 (1942).

203 See 29 C.F.R. § 778.104 (workweek standard governs "regardless of whether" employee "paid on a daily, weekly, biweekly, monthly or other basis").

204 See *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 153*, 321 U.S. 590, 602 (1944) ("Congress . . . intended to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any . . . contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."); accord *Brooklyn Sav. Bank*, 324 U.S. at 707 ("No one can doubt but that to allow

an employee purported to forego liquidated damages is likewise void and unenforceable.<sup>205</sup> The rule barring waiver by contract of rights under §§ 206(a)(1), 207(a)(1) and/or 260 as contrary to public policy applies to collective bargaining agreements as well as to individual agreements.<sup>206</sup> Similarly, a purported settlement of minimum wage, overtime compensation and/or liquidated damages claims and/or release of such claims is not enforceable unless approved by a court in the form of a stipulated judgment<sup>207</sup> or supervised by the DOL.<sup>208</sup>

## 2. *Mechanisms and Remedies for Meaningful Enforcement of §§ 206(a)(1) and 207(a)(1)*

Congress was aware that rights are valuable only if violations thereof are subject to meaningful redress. It thus undertook to create an effective scheme for the redress of violations of the FLSA's minimum wage and overtime compensation provisions. For example, Congress created protection for those who would challenge such violations by prohibiting retaliation by any person against any employee because the employee files "any complaint" or institutes or causes to be instituted any proceeding directed to a violation of the FLSA

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waiver of statutory wages by agreement would nullify the purposes of the Act."); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) ("[F]reedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes").

205 *Brooklyn Sav. Bank*, 324 U.S. at 708 ("[T]he same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damages is called for."); *accord D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946).

206 *See, e.g., Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173, 177-78 (1946); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430-32 (1945); *Jewel Ridge Corp. v. Mine Workers*, 325 U.S. 161, 166-67 (1945).

207 *See* 29 U.S.C. § 216(b) (2008); *see also D.A. Schulte*, 328 U.S. at 113 n.8; *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1306-09 (11th Cir. 2013); *Lynn's Food Servs., Inc. v. United States*, 679 F.2d 1350, 1352-55 (11th Cir. 1982); *Druffner v. Mrs. Fields Inc.*, 828 P.2d 1075, 1078-79 (Utah 1992).

208 *See* 29 U.S.C. § 216(c) (2008); *see also Lynn's Food Servs., Inc.*, 679 F.2d at 1352-55; *Druffner*, 828 P.2d at 1078-79.

or because the employee testifies or is about to testify in any such proceeding.<sup>209</sup>

Normally an employee bears the burden of demonstrating a violation of §§ 206(a)(1) and/or 207(a)(1) by the employer in question and the extent of the resulting injury. However, Congress substantially eased a prospective plaintiff's burden by imposing upon every employer which normally makes wage payments to an employee and is subject to any part of the FLSA the legal duty to make, keep and preserve records of wages paid to and hours worked by each individual employed by that employer.<sup>210</sup> An employer may not delegate this recordkeeping obligation to the employee.<sup>211</sup> If an employer has breached its recordkeeping obligation under § 211(c), an employee need only show (s)he performed work for which (s)he was not properly compensated and the amount and extent of that work "as a matter of just and reasonable inference" and *the burden then shifts to the employer* to come forward with evidence "of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."<sup>212</sup> Absent such employer evidence, the court may award damages to the employee, "even though the result be only approximate."<sup>213</sup>

An employee who establishes a violation of §§ 206(a)(1) or 207(a)(1) is entitled to monetary relief in the amount of the underpayment of minimum wages or overtime compensation due and, unless the *employer* proves both that the violation was committed in subjective good faith and that it had objectively reasonable grounds

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209 See FLSA § 15(a)(3), 29 U.S.C. § 215(a)(3) (1938). "[A]ny complaint" includes oral, as well as written, complaints. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). Any employer violating § 215(a)(3) was made liable "for such legal or equitable relief as may be appropriate . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." FLSA § 16(b), 29 U.S.C. § 216(b).

210 See FLSA § 11(c), 29 U.S.C. § 211(c) (1985) (stating that "every" covered employer "shall" make, keep and preserve records of wages paid to and hours worked by each employee); see also 29 C.F.R. §§ 516.1 – 516.34 (2011).

211 See *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946-47 (2d Cir. 1959); accord *Goldberg v. Cockrell*, 303 F.2d 811, 812 n.1 (5th Cir. 1962).

212 *Id.*

213 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946).

for believing its conduct was lawful,<sup>214</sup> an additional amount equal to the underpayment as liquidated damages.<sup>215</sup>

To ensure that FLSA violations will not go unredressed for lack of competent counsel to represent victims thereof, Congress provided for fee-shifting whereby the court in an FLSA action “shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”<sup>216</sup> Neither a contingent retainer agreement between a plaintiff and counsel nor the amount of a judgment or settlement operates as a cap on what is a “reasonable” fee award under § 216(b).<sup>217</sup>

In addition to private enforcement, Congress provided for public enforcement of §§ 206(a)(1) and 207(a)(1), authorizing the Secretary of Labor to sue on behalf of employees for unpaid minimum wages and overtime compensation, plus an equal amount as liquidated damages,<sup>218</sup> and/or for injunctive relief, including a restitutionary injunction against the withholding of previously unpaid minimum wages and overtime compensation.<sup>219</sup>

Congress also prohibited “any person,” whether the employer or not, from introducing into interstate or foreign commerce goods produced in violation of the minimum wage or overtime compensation provisions of the FLSA.<sup>220</sup> Thus the prohibition extends to wholesalers or retailers that come into possession of goods previously produced in violation of the FLSA.<sup>221</sup> This so-called “hot cargo” provision is not dependent upon proof the defendant knew the goods

214 See 29 U.S.C. § 260 (1954).

215 See 29 U.S.C. § 216(b) (2008).

216 *Id.* (emphasis added).

217 See, e.g., *United Slate, Tile and Composition Roofers, Local 307 v. G & M Roofing and Sheet Metal Co., Inc.*, 732 F.2d 495, 504 (6th Cir. 1984) (rejecting contention that contingent fee arrangement established ceiling on amount of FLSA fee award); *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994) (affirming FLSA fee award of \$40,000 where plaintiff’s damages only \$7,680). As the Sixth Circuit observed: “Courts should not place an undue emphasis on the amount of the plaintiff’s recovery because an award of attorney’s fees [on an FLSA claim] ‘encourage[s] the vindication of congressionally identified policies and rights.’” *Id.* at 1134-35 (quoting *United Slate*, 732 F.2d at 503).

218 See FLSA § 16(c), 29 U.S.C. § 216(c) (2008).

219 See FLSA § 17, 29 U.S.C. § 217 (1961); see also *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1062-63 (2d Cir. 1988).

220 See FLSA § 15(a)(1), 29 U.S.C. § 215(a)(1) (1949); see also *Citicorp Indus. Credit v. Brock*, 483 U.S. 27, 33-35 (1987).

221 *Citicorp Indus. Credit*, 483 U.S. at 33-35.



had been produced in violation of §§ 206(a)(1) and/or 207(a)(1).<sup>222</sup> The Secretary is authorized to seek injunctive relief against violation of § 215(a)(1).<sup>223</sup>

3. *The Broad Reach of the Minimum Wage and Overtime Compensation Guarantees*

Congress declared it “to be the policy of [the FLSA] . . . to correct and as rapidly as practicable to eliminate the conditions . . . referred to [in FLSA Sec. 2(a), 29 U.S.C. § 202(a)],”<sup>224</sup> to wit, “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . .”<sup>225</sup> It was expressly recognized that substandard labor conditions constituted “an unfair method of competition” because they disadvantaged businesses that adhered to fair labor standards when competing with those that did not.<sup>226</sup> Even with the creation of federal minimum wage and overtime compensation guarantees, together with complementary safeguards, and even with the provision of meaningful remedies to redress violations of those rights, the congressional objective could not be realized unless those rights and remedies were made widely applicable.

[The FLSA] seeks to eliminate substandard labor conditions . . . on a scale *throughout the nation*. The purpose is to raise living standards. *This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.*<sup>227</sup>

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222 See *Herman v. Fashion Headquarters, Inc.*, 992 F. Supp. 677, 679 (S.D.N.Y. 1988) (citing *Walling v. J. Friedman & Co.*, 61 F. Supp. 325, 326 (S.D.N.Y. 1945)); *Mitchell v. Hormando Bros. Co.*, 134 F. Supp. 707, 709 (S.D.N.Y. 1955).

223 See FLSA § 11(a), 29 U.S.C. § 211(a) (1985).

224 FLSA § 2(b), 29 U.S.C. § 202(b) (1974).

225 *Id.* § 202(a).

226 *Id.* § 202(a)(1).

227 *Roland Electrical Co. v. Walling*, 326 U.S. 657, 669-70 (1946) (emphasis added).



In short, “[b]readth of coverage was vital to [Congress’] mission [in enacting the FLSA].”<sup>228</sup> This breadth of coverage was obtained by broadly defining “employer,” “employee” and “employ” as well as those employees entitled to the protection of the minimum wage rate and overtime compensation guarantees.<sup>229</sup> Thus the expansive suffer-or-permit-to-work definition of “employ” was a component of a broader plan to make the FLSA’s rights widely available.

a. The FLSA Definition of “Employer”

Congress defined “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>230</sup> “Person,” in turn, was defined to include “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.”<sup>231</sup> This served to safeguard the rights created by §§ 206(a)(1) and 207(a)(1) by creating broad categories of persons which/who might be liable for violations of such rights and, hence, from which/whom redress might be obtained. Under Congress’ usual approach to remedial legislation, absent grounds for piercing the corporate veil, there is no individual liability for violation of an employment statute.<sup>232</sup> In the FLSA, Congress sought to balance “the [traditional] shield from personal

228 *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950).

229 In *Tony & Susan Alamo Foundation*, the Supreme Court expressly linked the FLSA’s broad definitions of “employ,” “employee” and “employer” to attainment of the “broad coverage” Congress intended in enacting the FLSA. See *Tony & Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 296 (1983) (noting “broad coverage” essential to achievement of Congress’ goal in enacting the FLSA), and *id.* at n.12 (citing its own FLSA precedents, including *Rutherford*, involving meanings of “employ,” “employee” and “employer”). In *RSR Sec. Servs. Ltd.*, the Second Circuit likewise tied the expansive FLSA definition of “employer” to Congress’ aim that the FLSA have the widest possible impact on the national economy. See *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

230 FLSA § 3(d), 29 U.S.C. § 203(d) (2006).

231 *Id.* § 203(a).

232 See, e.g., *White Oak Coal Co.*, 318 NLRB 732 (1995), *enforced*, *NLRB v. White Oak Coal Co.*, 81 F.3d 150 (4th Cir. 1996) (NLRA); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (citing cases) (Title VII); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994) (ADEA); *Miller v. Maxwell’s Intern., Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (same); *Roman-Oliveras v. P.R. Elec. Power Auth.*, 655 F.3d 43, 50-52 (1st Cir. 2011)

liability [that] is one of the major purposes of doing business in a corporate form”<sup>233</sup> against the perceived need to assure the availability of one or more persons against whom/which FLSA rights and remedies could be enforced. What if a company committed egregious violations of the FLSA but then declared bankruptcy or, even without such a declaration, had few, if any, assets? In either situation, the victims of those violations would be left with scant recourse against that company. By defining “employer” as it did in § 203(d), Congress created individual liability for corporate owners and officers who possess operational control of a corporation’s covered enterprise or are otherwise instrumental in causing the corporation to violate the FLSA.<sup>234</sup> And, as we have seen, Congress also created joint and several liability for joint employers,<sup>235</sup> which allows victims of FLSA violations to obtain redress against an alternative corporate entity, often one with deeper pockets.<sup>236</sup> In short, the broad definition of “employer” increased the promise that a worker victimized by an FLSA violation could obtain enforceable redress.

In 1974, responding to the growth of public sector employment, Congress broadened the FLSA definition of “employer” to include a “public agency.”<sup>237</sup> “Public agency” meant the government of the United States, the government of a State or political subdivision thereof, any agency of the United States including the Postal Service and Postal Regulatory Commission or of a state or political subdivision of a state, and any interstate governmental agency.<sup>238</sup>

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- (citing cases) (Title I of ADA); *Hiler v. Brown*, 177 F.3d 542, 545-47 (6th Cir. 1999) (Rehabilitation Act of 1973).
- 233 *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983).
- 234 *See, e.g., RSR Sec. Servs. Ltd.*, 172 F.3d at 135-41; *Reich v. Circle C Invs.*, 998 F.2d 324, 329 (5th Cir. 1993); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965-66 (6th Cir. 1991); *Agnew*, 712 F.2d at 1511-14; *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir. 1983).
- 235 *See* 29 C.F.R. § 791.2(a) (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).
- 236 Joint employment does not only permit redress against a company that indirectly employed workers. Under § 203(d), a victimized worker may seek redress against a company that served as an agent for the primary business in respect to the worker. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Greenberg v. Arsenal Bldg. Corp.*, 144 F.2d 292, 294 (2d Cir.), *rev'd in part on other grounds*, 324 U.S. 697 (1945).
- 237 *See* Employee Retirement Income Security Act of April 18, 1974, § 6(a)(1), 88 Stat. 58, 29 U.S.C. § 203(d).
- 238 *See* 29 U.S.C. § 203(x) (1999).

Congress further provided that an individual employed by a public agency means various employees of the United States, any employee of the Postal Service or Postal Regulatory Commission, and almost all employees of a state, political subdivision thereof or interstate governmental agency.<sup>239</sup> This amendment substantially extended the reach of the FLSA.<sup>240</sup>

The FLSA definition of “employer” is also notable for what it does not include. Unlike its approach in several other employment statutes, Congress did not limit the FLSA definition to companies that employ a specified minimum number of employees.<sup>241</sup>

b. The Broad Definitions of “Employee” and of Those Employees Protected by the Minimum Wage and Overtime Compensation Guarantees

In addition to the expansive definition given to “employer,” Congress also broadly defined “employee” and the employees entitled to protection of the FLSA minimum wage and overtime compensation guarantees. To be entitled to the protection of the FLSA’s minimum wage and overtime compensation guarantees, an individual must be an employee as defined in FLSA Sec. 3(e)(1), 29 U.S.C. § 203(e)(1), and be covered by §§ 206(a)(1) and 207(a)(1). With narrow exceptions for certain public employees, § 203(e)(1) defines “employee” as “any individual employed by an employer.” (Emphasis added). Congress’ use of “any” in this definition made clear

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239 *See id.* § 203(e)(2).

240 The Supreme Court held that the Eleventh Amendment to the U.S. Constitution bars private FLSA claims for monetary relief against a state or entity of a state. *Alden v. Maine*, 527 U.S. 706 (1999). Of course, the Court’s understanding of the Eleventh Amendment as expressed in *Alden* did not modify Congress’ intent in amending the FLSA so as to include many public employers within the scope thereof.

241 *Compare*, for example, Title VII, which applies to a business only if it employs at least 15 persons, *see* 42 U.S.C. § 2000e(b) (1991); the ADA, which has the same definition of employer as Title VII, *see* 42 U.S.C. § 12111(5)(A) (2008); the ADEA, which applies to a business only if it has at least 20 employees, *see* 29 U.S.C. § 630(b) (1990); the FMLA, which applies to a business only if it employs at least 50 persons, *see* 29 U.S.C. §§ 2611(4)(A)(i) (2009), 2611(2)(B)(ii) (2009); and the WARN Act, which applies to a business only if it employs at least 100 employees. *See* 29 U.S.C. § 2101(a)(1) (1988).

that § 203(e)(1) encompasses, for example, undocumented workers who constitute a significant percentage of the American workforce, particularly in low wage industries such as garment, farming, restaurant and delicatessens.<sup>242</sup> The use of “each of his employees” in § 206(a)(1) and “any of his employees” in § 207(a)(1), together with § 203(e)(1), makes clear “the Congressional intention to include all employees” within the scope of §§ 206(a)(1) and 207(a)(1) “unless specifically excluded.”<sup>243</sup> “And ‘each’ and ‘any’ employee obviously and necessarily includes one compensated by [any] unit of time, by the piece or by any other measurement.”<sup>244</sup>

In 1938, Congress expressly defined those employees entitled to the protection of the FLSA’s minimum wage and overtime compensation guarantees to include all those “engaged in commerce or in the production of goods for commerce.”<sup>245</sup> As used in the FLSA, “[c]ommerce’ means trade, commerce, transportation, transmission, or communication among the several States or between any State and any other place outside thereof.”<sup>246</sup> Every employee whose engagement in activities in commerce or in the production of goods for commerce, even if small in amount, is regular and recurring, is covered by the FLSA.<sup>247</sup> If an employee is covered by the FLSA, so too is his/her employer.<sup>248</sup> Except as narrowly defined in FLSA Sec. 3(b),

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242 See, e.g., *Patel v. Quality Inn So.*, 846 F.2d 700 (11th Cir. 1988). Recently, the Eighth Circuit followed *Patel*, the Eleventh Circuit reaffirmed that decision, and both courts held that monetary recoveries by undocumented workers for violations of §§ 206(a)(1) and/or 207(a)(1) are entirely consistent with the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2004). See *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 933-37 (8th Cir. 2013); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1306-08 (11th Cir. 2013).

243 *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945).

244 *Id.*

245 FLSA §§ 6(a)(1), 7(a)(1), 29 U.S.C. §§ 206(a)(1) (2007), 207(a)(1) (2010).

246 FLSA § 3(b), 29 U.S.C. § 203(b) (2006). “State” includes “the District of Columbia or any Territory or possession of the United States.” FLSA § 3(c), 29 U.S.C. § 203(c). The terms “goods” and “produced” are defined in FLSA Sec. 3(i) and 3(j), 29 U.S.C. §§ 203(i) (2006) and 203(j) (2006), respectively. See also 29 C.F.R. § 776.20 (1950) (goods) and § 776.15 (1950) (production).

247 See, e.g., *Boutell v. Walling*, 327 U.S. 463, 466 (1946); *Overstreet v. No. Shore Corp.*, 318 U.S. 125, 130 (1943); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-69 (1943).

248 See 29 C.F.R. § 776.2(a) (“If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his

(c) and (j), 29 U.S.C. § 203(b), (c) and (j), the FLSA contains no limitation as to where an employee must work to come within its coverage. Thus employees otherwise within the reach of the FLSA are entitled to its protections even if they do not perform their work on the premises of the defendant.<sup>249</sup>

FLSA coverage predicated on engagement in commerce reaches every employee employed in the channels of such commerce or in activities so closely related thereto as a practical matter that they should also be considered part of that commerce.<sup>250</sup> Employees working in industries which are the actual instrumentalities and channels of interstate commerce, such as the telephone, radio, television, transportation and shipping industries, are covered.<sup>251</sup> So too are employees of businesses, such as banks, insurance companies and newspaper publishers, which regularly use channels of interstate and/or foreign commerce.<sup>252</sup>

Employees whose work is essential to the stream of interstate or foreign commerce are likewise within the FLSA's coverage.<sup>253</sup> Employees whose work involves maintenance, repair or improvement of existing instrumentalities of commerce, such as railroads, city streets, pipe lines, bus terminals, bridges and docks, are too.<sup>254</sup> Employees who contribute directly to movement of commerce by pro-

obligations to them under the Act on the ground that he is not 'engaged in commerce or in the production of goods for commerce.' To the extent that his employees are so engaged, he is himself so engaged." (Citations omitted).

- 249 See, e.g., *Zheng v. Liberty Apparel Co., Inc.*, 617 F.3d 182 (2d Cir. 2010) (plaintiffs employed by garment manufacturer despite fact that they worked at sweatshop neither owned nor leased by manufacturer); *McComb v. Homeworkers' Handicraft Coop.*, 176 F.2d 633, 636 (4th Cir. 1949); *Walling v. Twyeffort Inc.*, 158 F.2d 944, 947 (2d Cir. 1947) (tailor covered by FLSA although work not performed on premises of defendant).
- 250 See, e.g., *Boutell*, 327 U.S. at 466; *Overstreet*, 318 U.S. at 129.
- 251 See, e.g., *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579 (1942) (rate clerk performing duties unrelated to safety for company engaged in interstate motor transportation).
- 252 See, e.g., *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (newspaper publishing company); *Freeman v. Nat'l Broad. Co.*, 80 F.3d 78 (2d Cir. 1996) (television news writers, editors, producers).
- 253 For example, employees in a company's warehouse or central office whose activities are connected to receipt or distribution of goods across State lines are covered. See *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).
- 254 See, e.g., *J. F. Fitzgerald Const. Co. v. Pedersen*, 324 U.S. 720, 724-25 (1945) (citing cases).

viding goods or facilities to be used or consumed by instrumentalities of commerce in the direct furtherance of their activities of transportation, communication, transmission or other movement in interstate or foreign commerce are also covered. Employees who transport materials or equipment or other persons across state lines or within a state as part of an interstate movement are plainly engaged in commerce as are employees who regularly travel across state lines in performance of their duties.

As noted, Congress also covered employees engaged in the production of goods for commerce. It is unnecessary that this category of employees participate directly in the actual process of production of goods,<sup>255</sup> as long as they were employed in “any process or occupation necessary to the production thereof, in any State.”<sup>256</sup> Generally, an employee will be deemed within the FLSA’s individual coverage if (s)he is working in a location where goods to be sold/shipped in interstate or foreign commerce are being produced, even if not directly involved in that production, so long as his/her work is necessary to the production of goods for commerce.<sup>257</sup> For example, maintenance employees working in a building where goods are manufactured or even in a building where the production of goods is only administered, managed and controlled, are covered by the FLSA even if not employed directly by the producer, because maintenance of a safe, habitable building with adequate light, heat and power is “necessary” to the production of goods for commerce.<sup>258</sup>

Production under the FLSA includes, for example, “all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce” and “every kind of incidental operation preparatory to putting goods into the stream of commerce.”<sup>259</sup> Goods are produced “for” commerce where the employer expects or has rea-

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255 *Borden Co. v. Borella*, 325 U.S. 679, 682 (1945).

256 FLSA § 3(j), 29 U.S.C. § 203(j) (2006).

257 *Kirschbaum v. Walling*, 316 U.S. 517, 525-26 (1942).

258 *Borden*, 325 U.S. at 682-83; *Armour & Co. v. Wantock*, 323 U.S. 126, 129-32 (1944); *see also* FLSA § 3(j), 29 U.S.C. § 203(j).

259 *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 503 (1945). In 1949, the FLSA § 3(j) definition of “produced” was amended so as to broaden the phrase “in any process or occupation necessary to the production” of goods for commerce into the current “in any closely related process or occupation directly essential to the production” thereof.



son to believe that the goods or any unseparated part will move in interstate or foreign commerce.<sup>260</sup>

It is clear from the foregoing discussion and the cited precedents that the coverage accomplished by the provisions enacted in 1938 was broad. Indeed, it has been so characterized by the Supreme Court and the DOL.<sup>261</sup> Nevertheless, Congress later concluded that the coverage provided in 1938 was not broad enough. In 1961, it extended the rights created by §§ 206(a)(1) and 207(a)(1) to those employees “employed in an enterprise engaged in commerce or in the production of goods for commerce.”<sup>262</sup> Such an enterprise has three main elements: related activities, unified operation or common control and a common business purpose.<sup>263</sup> As a consequence of this enlargement of coverage, an employee no longer needs to satisfy the individual coverage test in order to be entitled to minimum wage rates and overtime compensation under the FLSA. Now, it is enough if his/her employer is an “enterprise engaged in commerce or in the production of goods for commerce.” This 1961 amendment “substantially broadened” what was already an expansive coverage.<sup>264</sup>

The third leg of the statutory scheme in particular demonstrates an intent by Congress to make the FLSA rights broadly available to workers and, in so doing, to eliminate the unfair competitive disadvantage suffered by employers who adhere to fair labor standards. Both of these objectives are implicated when determining whether an outsourcing business is responsible for compliance with the FLSA in respect to those persons performing its outsourced work. Turning a blind eye to the expansive suffer-or-permit-to-work language when determining a joint liability claim results in a narrowing of the FLSA’s coverage that leaves businesses in the same industry that comply with fair labor standards at a competitive disadvantage

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260 *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 118-21 (1946); *see also* *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 92 (1942).

261 *See* 29 C.F.R. § 776.8(b) (2014) (“[T]he term ‘commerce’ is very broadly defined.”); *id.* at n.22 (term “goods” is “broadly defined” in the FLSA); *see also* *Warren-Bradshaw Drilling*, 317 U.S. at 91 (“Congress has broadly defined the term, ‘produced’”).

262 *See* Pub. L. 87-30, 75 Stat. 65, 67, 69 (1961).

263 *See* FLSA § 3(r)(1), 29 U.S.C. § 203(r)(1) (1938); *see also* *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518 (1973).

264 *Brennan*, 410 U.S. at 516. The definition of “enterprise engaged in commerce or in the production of goods for commerce” was expanded in 1966. *See* Pub. L. 89-601, 80 Stat. 830-32 (1966).



and that effectively deprives the workers who perform outsourced work of FLSA rights or remedies. For example, in the garment industry, some garment manufacturers, albeit a relatively small percentage, do not outsource the sewing and assembly phase of production and acknowledge their responsibility under wage and hour laws to those persons who directly perform that phase. These manufacturers must compete against manufacturers that outsource sewing and assembly and that would enjoy a competitive advantage were they not also legally responsible for FLSA violations suffered by those who perform the sewing and assembly work for them.

Outsourcing is common in low-wage industries such as garment and farming, for example. The middleman who engages individuals to perform the outsourced work in low-wage industries invariably lacks sufficient assets to satisfy an FLSA judgment, even if the workers are able to serve the middleman with process. Thus, if workers performing outsourced work are denied the ability to hold the manufacturer or farmer, for example, jointly liable, the FLSA or comparable wage and hour law will be rendered a dead letter as far as such workers are concerned. A definition of “suffer or permit to work” that allowed either of the foregoing consequences would be inconsistent not only with the express operative language but with the full scheme Congress wrote into law.<sup>265</sup>

## **V. What Is the Sum of the Express Operative Statutory Language Plus Child Labor Law Precedents Plus Federal Regulations Plus Statutory Context?**

### **A. Proposed Rule of Decision for Joint Liability Claims Under Wage and Hour Laws Containing Suffer-or-Permit-to-Work Terminology**

There is nothing in the FLSA (nor in state wage and hour laws) indicating that the terms “to permit” and/or “to suffer” to work should be interpreted other than in accordance with their

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265 Compare *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999), quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1982) (provisions defining employment relationships within meaning of FLSA should be construed expansively “so that they will have ‘the widest possible impact in the national economy’”).

ordinary, dictionary meanings.<sup>266</sup> As noted above, “to permit” means to assent or agree to or to acquiesce in. “To suffer,” which is more passive, means to tolerate, even if with reluctance. The ordinary meaning of the operative language, together with the state court opinions construing the child labor laws from which the suffer-or-permit-to-work terminology was derived, the federal regulations construing § 203(g) and the statutory context, particularly the definitions of “employer” and “employee” and the scope of employee coverage, all support the following rule of decision:

Where a company outsources part of its process for producing goods or providing services by engaging a contractor-middleman to perform the outsourced work and the work is performed by individuals employed by the contractor-middleman for that purpose, the company has suffered or permitted the work of the individuals and is therefore jointly liable (together with the contractor-middleman) for violations of the FLSA or other wage or hour laws using similar terminology if:

- (i) the work performed by the individuals was part of the company’s integrated process for producing goods or providing services;
- (ii) the company knew or had reason to know that those individuals were engaged in the performance of the company’s outsourced work yet failed to prevent or hinder performance of that work; and
- (iii) the outsourced work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company.

It is readily apparent that a necessary element of a company’s sufferance or permission of an individual’s work as used in the FLSA or a similar wage and hour law is the company’s possession of knowledge that the individual was performing that work or the existence of circumstances such that the company had the opportunity through the exercise of reasonable diligence to acquire such knowledge. This follows not only from the ordinary understand-

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266 See also *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913) (stating that “permitted” and “suffered” in child labor law “should [each] be given its ordinary significance”).

ing of the operative terms but from the FLSA precedents involving disclaimers by defendants of liability for work performed for their benefit by their employees.<sup>267</sup> This follows as well from state child labor precedents holding that liability for suffering or permitting an under-aged minor to work did or could exist where there was evidence the defendant knew or had reason to know of the minor's work.<sup>268</sup> It should be noted that the FLSA and similarly-framed laws, by their terms, speak of sufferance and/or permission of *work*, not of a violation of the law. Thus, joint liability under these laws is not dependent upon a showing that a company knew or had reason to know of the minimum wage or overtime compensation violation.

At the same time, that a company knew or had reason to know of an individual's work is not, by itself, sufficient to establish that the company suffered or permitted that work. Otherwise, a company which was a stranger to the contractor-middleman's business and had no relationship to the individual's performance of the outsourced work, could be held jointly liable for wage or hour violations suffered by the individual. The question is: what is the nature or extent of the relationship which must exist between the middleman employing the individual and the company which knows or has reason to know of the individual's work for it before the company may be said to have suffered or permitted the individual's work? The answer to this question supplies the remaining criteria for the proposed rule of decision: the work performed by the individual must be work that was outsourced by the company and

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267 See, e.g., *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008); *Reich v. Dep't of Cons. & Natural Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994); *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969); see also 29 C.F.R. § 785.11 (2011).

268 See, e.g., *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 476 (N.Y. 1918) ("Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge."); *Gorzynski v. Nugent*, 83 N.E.2d 495, 499 (Ill. 1948) (defendants "knew or could have known by the exercise of reasonable care" of individual's work); *Purtell v. Phila. & Reading Coal & Iron Co.*, 99 N.E. 899, 901 (Ill. 1912) (custom of car pushers to engage minors to carry water "must have been well known" to defendant's agents); *Vida Lumber Co. v. Courson*, 112 So. 737, 738 (Ala. 1926) (minor working "with knowledge or notice of" defendant's agents).

the performance of which is integral to that company's process of production,<sup>269</sup> and the work must be such that its performance does not require any specialized expertise or experience. In other words, the contractor must have been engaged by the company to perform work for the company that the company itself could readily have had performed by individuals employed directly by the company, but that it allowed to be performed by employees of the contractor despite its ability to prevent that work.<sup>270</sup>

### B. Back to the Future: “Run-of-the-Mill” Outsourcing and “Suffer or Permit to Work”

It is important to analyze so-called “run-of-the-mill” outsourcing in light of the proposed rule of decision. As shown above, the Second Circuit has suggested that “run-of-the-mill” outsourcers should be deemed exempt from the reach of the FLSA in respect to the individuals performing their outsourced work.<sup>271</sup> At the outset, it should be noted that court did not cite *anything* in support of this view. It cited absolutely no statutory language, no legislative history, no supporting regulation(s) and no case law from any court. Second, in announcing its *ipse dixit*, the court did not explain what it meant by “run-of-the-mill” outsourcing.

The relevant legislative history tends to undermine the categorical safe haven from the FLSA suggested by the Second Circuit.

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269 See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (work outsourced by defendant company was “part of the [company’s] integrated unit of production”); *McComb v. Homeworkers’ Handicraft*, 176 F.2d 633, 635, 639-40 (4th Cir. 1949) (work performed by homeworkers “essential step” in bag manufacturers’ process of production; homework “benefits” manufacturers and was performed “for” them notwithstanding that manufacturers paid middleman, not homeworkers, for work performed by homeworkers); *Gorzynski*, 83 N.E.2d at 498 (work performed by individual “essential” to defendant’s preparation of racehorse to race).

270 See *Rutherford*, 331 U.S. at 729 (company cannot escape obligation under FLSA to treat individual as its employee where work performed by that individual “follows the usual path of an employee”); *Graham v. Goodwin*, 156 So. 513, 514 (Miss. 1934) (employment relationship not necessary to establish coverage; sufficient that child was suffered or permitted to work “as if an employee”).

271 See *supra* Part I.B.

The Black-Connery bill, which ultimately became the FLSA, provided for establishment of a wage and hour board to determine appropriate wage rates, issue wage orders and secure their enforcement.<sup>272</sup> After defining “employee,” the bill included a provision in § 6(a) thereof investing the board with authority to define and determine who were employees of a particular employer.<sup>273</sup> The bill also included an explicit directive that the definitions 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.<sup>274</sup>

It has been noted that one purpose of this provision “was to prevent evasion [of the proposed federal wage and hour requirements] by cutting large businesses into smaller units.”<sup>275</sup> Thereafter an expanded definition of “employee,” which included “any individual suffered or permitted to work by an employer,” was inserted in place of the § 6(a) language quoted above. As one court has explained:

The Senate Committee which reported the bill on July 8, 1937, accomplished the purposes of Section 6(a) as quoted above, by merging that section in an expanded definition of “employee.” The words “suffered or permitted to work,” then introduced for the first time, were unquestionably designed to comprehend all the classes of relationship which previously had been designated individually, and regarded as likely means for attempts at circumvention of the Act.<sup>276</sup>

In sum, the suffer-or-permit-to-work language was inserted into the bill which became the FLSA precisely to bring within the

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272 See *Fleming v. Demeritt Co.*, 56 F. Supp. 376, 380 (D. Vt. 1944).

273 *Id.*

274 *Id.*; see also *Walling v. Am. Needlecrafts, Inc.*, 139 F.2d 60, 64 (6th Cir. 1943).

275 John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBLEMS 464, 484 n.114 (1939).

276 *Demeritt Co.*, 56 F. Supp. at 381; accord *Am. Needlecrafts*, 139 F.2d at 64.

reach of the FLSA all means for attempts at circumvention of the requirements of the Act, and one of those means specifically identified by the section, the suffer-or-permit-to-work language, was intended to embody was the use of independent contractors to accomplish a company's production.

Following passage of the FLSA, it was argued that said Act did not encompass individuals who worked for a company as independent contractors. This argument was quickly quashed, often by reference to the legislative history recounted above.<sup>277</sup> As, then, a person who would be deemed an independent contractor at common law while directly performing certain tasks for a company may not be categorically excluded from the protections of the FLSA or similar wage and hour laws as against that company, and as the circumstance that the person hiring individuals to perform such outsourced tasks is an independent contractor does not negate the possibility that the outsourcing company may be jointly liable with the contractor for wage and hour violations suffered by those individuals,<sup>278</sup> it would appear illogical to say that such individuals hired by a middleman may be categorically deprived of a wage and hour claim against the outsourcing company.

The *Zheng* court's *ipse dixit*, if broadly construed, would be inconsistent with the proposed rule of decision, which provides an outsourcing company with a safe haven from responsibility for compliance with the FLSA in respect to individuals engaged by the contractor to perform the outsourced work only where the company has outsourced due to a real lack of needed expertise or experience. A company is not entitled to a safe haven merely because its outsourcing may not be motivated by an intent to evade the labor laws.<sup>279</sup> Nor should a safe haven be available to an outsourcer whenever an outsourcing is "run-of-the-mill" in the sense that it is common throughout a particular industry.<sup>280</sup> Indeed, *Zheng* itself is inconsistent with such an exception to liability: manufacturers' outsourcing of sewing and assembly of garments to sweatshops is widespread. If

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277 See, e.g., *Am. Needlecrafts*, 139 F.2d at 64, *rev'g.*, 46 F. Supp. 16 (W.D. Ken. 1942); *Demeritt Co.*, 56 F. Supp. at 381.

278 See also *supra* Part IV.A.

279 See *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132, 145-47 (2d Cir. 2008); see also *supra* note 32.

280 See *Barfield*, 537 F.3d at 146 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 73-74 (2d Cir. 2003)).

this circumstance were sufficient to place wage and/or hour claims by persons performing the outsourced work beyond the reach of the FLSA, the claims in *Zheng* against the manufacturer defendants would have been foreclosed.

A company should not be entitled to a safe haven from wage and hour claims by individuals performing its outsourced work if it engages in outsourcing primarily to reduce its labor costs. There is no meaningful line between outsourcing to reduce labor costs and outsourcing that results in wage and hour violations committed against those individuals performing the outsourced work. This is because the wage rates of individuals who are or would be directly employed by the company wishing to outsource usually are or would be at the minimal levels required by law or only ever-so-slightly above those levels. For example, if farmers directly employed laborers to harvest their crops, garment manufacturers directly employed workers to sew and assemble their garments or fast-food companies directly employed workers to sell their fast-food, the wage standards for such directly-employed workers would not be significantly above those required by law, if at all. Thus, any outsourcing of the work performed by such individuals, if for the purpose of reducing labor costs, almost inevitably produces or would produce wage and hour violations in order to accomplish those reductions. In sum, a categorical safe haven for so-called “run-of-the-mill” outsourcing only makes sense if it is limited to outsourcing that requires a specialized expertise or experience such that the work could not be performed by individuals directly employed by the would-be outsourcer.

### Conclusion

There is no evidence that in adopting a suffer-or-permit-to-work (or similar) standard for determining accountability under a wage and hour law, Congress and state legislatures did not say what they meant or mean what they said. Accordingly, when faced with a joint liability claim under such a law, courts are obliged to focus on the ordinary meaning of the operative language as reinforced by the ample body of court decisions interpreting and applying that language in the state child labor laws from which this terminology in wage and hour laws was derived. Where administrative regulations and/or statutory context also illuminate the legislative purpose, these too must be considered. If this recognized method for interpreting and applying statutes is followed, a company that outsources work



to a contractor ordinarily should be deemed jointly liable for wage and hour violations suffered by individuals employed by the contractor to perform the outsourced work where that work was an integral part of the company's process of production of goods or provision of services, the company knew or had reason to know that individuals hired by the contractor were performing its outsourced work but did not prevent that performance despite its ability to do so, and performance of that work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company. This standard for determining whether a defendant suffered or permitted an individual to work in the context of determining whether that defendant is jointly liable for wage or hour violations is consistent with the federal courts' well-established standard for determining whether a defendant suffered or permitted an individual to work in the context of determining that defendant's liability for child labor or for other work performed by an employee for that defendant's benefit. Under the foregoing test, a company may not escape responsibility for wage and hour violations suffered by individuals performing its outsourced work where its primary reason for the outsourcing was to avoid the labor costs that would be incurred were the company to employ these individuals directly in the performance of the same work.

## Half-Time or Time and One-Half? Recent Developments Deprive Employees of their Rightful Overtime Compensation under the FLSA

*Christina Harris Schwinn\**

### Introduction

This Article discusses why the Seventh Circuit Court of Appeals erred in *Urnikis-Negro v. American Family Property Services, et al.*,<sup>1</sup> when it sanctioned the application of the fluctuating workweek (“FWW”) methodology of retroactively paying overtime premiums in misclassification cases under the Fair Labor Standards Act of 1938 (“FLSA”). Part One will discuss the legislative history and the applicable statutory provisions and regulations. Part Two will analyze why the Seventh Circuit’s holding in the *Urnikis-Negro* decision was wrong. Part Three will discuss appellate court decisions that have properly applied the FWW method. Part Four concludes by stating that the Supreme Court needs to once again weigh in on this issue. The Court must reaffirm its true holding in *Overnight Motor Transp. Co., Inc. v. Missel*,<sup>2</sup> clarify that application of the FWW methodology of paying the required overtime retroactively in a misclassification case is improper, and state that all five requirements under 29 CFR § 778.114(a) must be satisfied before an employer may pay an employee overtime based upon the FWW method. Alternatively, Congress should take action to amend the FLSA to protect employees as originally intended in 1938.

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1 616 F.3d 665 (7th Cir. 2010). This article does not discuss the liquidated damages aspect of the Seventh Circuit’s holding in *Urnikis-Negro*.

2 316 U.S. 572 (1942).

## I. Legislative Intent

To fully comprehend why the *Urnikis-Negro* decision and its progeny<sup>3</sup> erred when they sanctioned the retroactive application of the FWW methodology in overtime misclassification cases, one must first understand the FLSA's rationales behind the minimum wage and overtime requirements and also the criteria that must be satisfied before an employer may use the FWW method of payment.

### A. Legislative History

To further understand the legislative history we need to evaluate these issues in context. During the New Deal era, President Franklin D. Roosevelt implemented numerous initiatives aimed at raising living standards. Some initiatives — like the National Industrial Recovery Act (“NIRA”) <sup>4</sup> which was later defeated by the Supreme Court — found initial success in Congress.<sup>5</sup> Like the NIRA, the FLSA was championed by President Roosevelt in response to the Depression's living and working conditions. After winning his landslide victory in 1936, and against the backdrop of the Supreme Court decisions invalidating laws to improve working conditions as unconstitutional,<sup>6</sup> President Roosevelt achieved victory thereafter and signed the FLSA into law on June 25, 1938 to be effective October 24, 1938.<sup>7</sup>

Why was the FLSA enacted? Because Congress determined that the FLSA was necessary to improve working conditions by establishing minimum standards regarding the payment of wages to employees. In particular, the FLSA requires covered employers<sup>8</sup>

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3 *Urnikis-Negro*, 616 F.3d 665; *Ahle v. Veracity Research Co.*, 738 F.Supp.2d 896 (D. Minn. 2010); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F. 3d 351, 359 (4th Cir. 2011).

4 15 U.S.C. § 703 (2006).

5 *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935).

6 John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW AND CONTEMP. PROBS. 468 (1939); *see also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm> (last visited Apr. 26, 2014).

7 Grossman, *supra* note 6, at 8.

8 A covered employer is one that meets one of the following criteria:

(A) (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or

to pay nonexempt employees both a minimum wage and an overtime premium when they work more than the statutorily set number hours in a given workweek.<sup>9</sup> Enactment of the overtime provision was intended to ensure that employees who were required to work long hours in excess of the statutory weekly maximum were compensated for their extra hours of work.<sup>10</sup>

When Congress passed the FLSA, its stated rationales were, in part, “that the existence ... of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of [employees]” is adverse to the interests of interstate commerce.<sup>11</sup> Both the minimum wage and overtime premium requirements were—and still are—intended to raise the minimum standard of living and to encourage employers to hire new workers rather than work an existing employee beyond the statutory minimum without additional overtime compensation.<sup>12</sup>

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otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$ 500,000 (exclusive of excise taxes at the retail level that are separately stated);

- (B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or
- (C) is an activity of a public agency. 29 U.S.C. § 203(s)(1) (2006).

9 29 U.S.C. § 207(a)(1) (2006); *see also id.* § 207(a)(2)(C) (setting the statutory workweek for non-exempt employees to forty hours).

10 29 U.S.C. § 202(a) (2006) (“[T]he 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.”); *see also* *Overnight Transp. Co. v. Missel*, 316 U.S. 572, 574 (1942); 29 U.S.C. § 207(a).

11 29 U.S.C. § 202(a) (2006).

12 29 U.S.C. § 202; *see also* *St. John v. Brown*, D.C., 38 F.Supp. 385, 390 (N.D. Tex. 1941) (stating that “the ‘one and one-half times’ provision is akin to a penal-

## B. Applicable Statutory Provisions

The minimum wage provision currently requires employers engaged in interstate commerce with annual gross revenues of \$500,000 to pay nonexempt employees a minimum wage of \$7.25 per hour<sup>13</sup> and the overtime provision requires covered employers to pay nonexempt employees an overtime premium at one and one-half times their regular rate of pay for each hour worked in excess of forty hours in a workweek.<sup>14</sup>

The statute provides a methodology for determining an employee's regular hourly rate of pay, subject to permissible exclusions.<sup>15</sup> For example, if a nonexempt employee is paid \$10 per hour, the regular rate is calculated by multiplying the total number of hours worked times \$10. Once this calculation has been made, the employer must determine whether the employee was paid any additional compensation, for example, a nondiscretionary bonus. If the employee in the above example worked forty hours of regular time for the week and she received a nondiscretionary bonus in the amount of \$100, her regular hourly rate of pay for that workweek would be \$12.50 ( $\$400 + 100 \div 40 = \$12.50$ ).

Under the statute and implementing rules, an employer may exclude, inter alia, discretionary bonuses, employer contributions for insurance premiums, employer pension contributions and de minimus amounts, e.g. a \$25 gift card at the holidays.

## C. Right to Overtime is Not Waivable

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ty, intended to discourage overtime employment and to encourage a greater spread of employment").

13 29 U.S.C. § 206(a)(1)(C) (1938) amended by 29 U.S.C. § 203(s)(1) (2006) (setting the initial minimum wage at \$.25 per hour, which has subsequently been increased).

14 29 U.S.C. § 207(a)(1) (2006). When originally enacted, the FLSA established the maximum workweek at forty-four hours which was phased down over a two year period to the present day maximum workweek of forty hours before the overtime obligation triggers for nonexempt employees. 29 U.S.C. § 207(a)(2)(A)-(C).

15 29 U.S.C. § 207(e).

Under the FLSA, an employee cannot waive her right to overtime nor can an employer and employee contract around that right.<sup>16</sup> The Supreme Court has stated that “the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours worked in excess of forty.”<sup>17</sup> Further, the Court has held “FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”<sup>18</sup>

#### D. Applicable Regulations

The following regulations are pertinent when analyzing whether a half-time or time and one-half overtime premium is the proper overtime premium when the employee works more than forty hours in the workweek:

Section 29 C.F.R. § 778.107 provides that a nonexempt employee is to be compensated for each overtime hour worked at one and one-half times the employee’s regular hourly rate.<sup>19</sup>

Section 29 C.F.R. § 778.108 provides that the parties are not free to negotiate what amounts will be included in an employee’s compensation when determining the employee’s regular hourly rate of pay.<sup>20</sup>

Section 29 C.F.R. § 778.113(a) provides that, for the purposes of determining the regular hourly rate of a salaried employee, the employee’s salary is divided by the number of non-overtime hours worked, i.e. forty hours.<sup>21</sup>

Section 29 C.F.R. § 778.114(a) provides for the FWW alternative method of paying the required overtime premium if an employee’s hours of work fluctuate from week to week and are not determinable in advance.<sup>22</sup> The Department of Labor adopted the regulation in 1968 to address the payment of overtime to salaried employees

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16 *Barrentine v. Arkansas-Best Freight Train Sys., Inc.*, 450 U.S. 728, 740(1981); see also *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945).

17 *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944).

18 *Barrentine*, 450 U.S. at 740 (citing *Brooklyn Sav. Bank*, 324 U.S. at 704, 707).

19 29 C.F.R. § 778.107 (2014).

20 29 C.F.R. § 778.108 (2014).

21 29 C.F.R. § 778.113(a) (2014).

22 29 C.F.R. § 778.114(a) (2014).

“whose hours of work do not customarily follow a regular schedule but vary from week to week.”<sup>23</sup>

Under the FWW method, an employee’s regular hourly rate is determined by taking the salary paid to an employee that week and dividing it by the total number of hours worked. If an employee’s hours fluctuate from week to week, so does the employee’s regular hourly rate. Absent application of the FWW method, an employee’s regular hourly rate is determined by taking the total compensation earned for the week and dividing it by hours worked.<sup>24</sup>

An employee who is paid based upon the FWW method earns more per hour when the employee works less than forty hours per week and less per hour when the employee works more than forty hours per week. For example, if an employee only works thirty-five hours and is paid a salary of \$600 for the week, the employee’s regular hourly rate for the week is \$17.14 per hour. But if the same employee works fifty hours, the employee’s regular hourly rate is reduced to \$12 per hour. As an employee’s regular hourly rate fluctuates under the FWW method, so does the overtime premium.

The following example illustrates the difference between paying overtime based upon one and one-half times an employee’s regular hourly rate versus one-half and the resulting effect that the FWW method has on an employee’s regularly hourly rate:

Time and One-Half based upon a 45 hour workweek	Half-Time based upon a 45 hour workweek
Weekly Salary $\$600/40 = \$15$ $\$15 \text{ per hour} \times 1/2 = \$22.50$	Weekly Salary = $\$600/45 = \$13.33$ $\$13.33 \text{ per hour} \times 1/2 = \$6.66$

Based upon the above example, if an employee worked forty-five hours in a workweek and was paid time and one-half, she would be paid a total of \$712.50 ( $\$600/40 = \$15$  (regular hourly rate) plus overtime in the amount of  $\$112.50$  ( $\$15 \times 1.5 = \$22.50$ )) for the

23 33 Fed. Reg. 986, 991 (Jan. 26, 1968), *codified as* 29 C.F.R. § 778 (2011).

24 An employee’s regular rate may fluctuate from week to week due to extra pay received during the workweek; this fluctuation is not a result of the number of hours the employee worked, as the divisor is always forty or the regular number of hours the employee is scheduled to work per week. 29 C.F.R. § 778.113(a). There are some exceptions to the general rule of including all compensation earned in a workweek when determining an employee’s regular hourly rate. *See* 29 U.S.C. § 207(e).



week. On the other hand, if she worked forty-five hours and was paid based upon the FWW method, she would be paid a total of \$633.30 ( $\$600/45 = \$13.33$  (regular hourly rate) plus overtime of \$33.30 ( $\$13.33 \times .5 = \$6.66$  (half-time rate)) for the week. In this one-week example, an employee who is paid based upon the FWW method would receive \$79.20 less in pay for the week. When this hypothetical example is annualized, a misclassified employee who worked forty-five hours per week and was paid retroactively based upon the FWW method would be paid \$7,592 less than she would have been under the normal methodology.<sup>25</sup>

Similar to the overtime premium, an employee's regular rate is less under the FWW method since the regular hourly rate is determined by dividing total compensation earned for the week by the total number of hours worked, effectively reducing an employee's regular hourly rate.<sup>26</sup> Herein lies the reason why employers argue that the FWW methodology should apply in misclassification cases: a significantly reduced financial liability on the part of the employer.

It is important to understand the criteria that must be met under 29 C.F.R. § 778.114(a) before an employer may compensate an employee based on the FWW method. Specifically, the FWW method is acceptable only when the following factors are present: there is a prospective mutual understanding between the employee and the employer,<sup>27</sup> the number of hours that an employee works each week fluctuates as a result of the nature of the work being performed,<sup>28</sup> the employee's salary is the same from week to week regardless of the number of hours worked (less or more than forty) during the week,<sup>29</sup> the number of hours worked each week are not determinable in advance,<sup>30</sup> and the employer must contemporaneously pay the employee the additional half-time overtime premium for each hour worked over forty in a given workweek.<sup>31</sup>

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25 Based upon the example cited above, an employee who worked forty-five hours each week for fifty-two weeks would be paid \$31,200 for straight time and \$5,850 for overtime absent the FWW method for a total of \$37,050. Based upon the FWW method, the same employee would be paid \$27,726.40 for straight time pay and \$1,731.60 in overtime pay for a total of \$29,458.

26 29 U.S.C. § 207(e).

27 29 C.F.R. § 778.114(a).

28 *Id.*

29 *Id.*

30 *Id.*; see also *id.* § 778.114(b).

31 *Id.* (emphasis added).

While this Article discusses cases that rejected application of the FWW methodology because an employer failed to satisfy all five criteria under 29 C.F.R. § 778.114(a), courts tend to focus on two of the five criteria: 1) whether a “mutual understanding” exists between the parties and 2) the contemporaneous payment of the half-time overtime premium requirement.<sup>32</sup>

## II. Urnikis-Negro

### A. The Seventh Circuit’s Holding in Urnikis-Negro

One of the more recent appellate courts to sanction retroactive application of the FWW methodology for the payment of overtime in a misclassification case is the Seventh Circuit in *Urnikis-Negro*. Urnikis-Negro was misclassified as an administrative exempt employee by her employer when she was hired.<sup>33</sup> She was paid a set salary per week.<sup>34</sup> She regularly worked more than forty hours a week, but not less than forty.<sup>35</sup> She was not paid any overtime premium while she was employed.<sup>36</sup> Following the termination of her employment, she filed suit seeking overtime compensation at one and one-half times her regular hourly rate for all overtime hours worked.<sup>37</sup>

The district court ruled in Urnikis-Negro’s favor and awarded her overtime compensation, but not based upon one and one-half times her regular hourly rate. Rather, the district court awarded overtime compensation using the FWW method.<sup>38</sup> Because the district court applied the FWW method of paying the overtime premium, Urnikis-Negro’s overtime compensation award was reduced significantly. Excluding liquidated damages and the attorney’s fees, she was paid \$12,233 in overtime<sup>39</sup> — less than one-quarter of what she should have been paid had she been paid overtime at one and one-

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32 See, e.g., *Clements v Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008).

33 *Urnikis-Negro v. Am. Family Property Servs.*, 616 F.3d 665, 665-66 (7th Cir. 2010).

34 *Id.* at 667.

35 *Id.* at 669.

36 *Id.*

37 *Id.* at 670; see also 29 U.S.C. § 216(b) (2006).

38 *Urnikis-Negro*, 616 F.3d at 666, 675.

39 *Id.* at 672.

half times her regular hourly rate.<sup>40</sup> Had the Seventh Circuit properly construed the holding in an earlier Supreme Court case, *Overnight Motor Trans. Co., Inc. v. Missel*,<sup>41</sup> Urnikis-Negro would have been paid \$55,893.75 in overtime compensation, excluding liquidated damages and attorney fees.<sup>42</sup>

While the Seventh Circuit disagreed with the district court's reasoning, it nonetheless found that paying overtime in a misclassification case retroactively based upon the FWW method was the appropriate way of compensating her for her overtime. It did, however, acknowledge that "section 778.114(a) itself does not provide the authority for applying the FWW method in a misclassification case," nor is it intended to act as "a remedial measure that specifies how damages are to be calculated when a court finds that an employer has breached its statutory obligations."<sup>43</sup> Additionally, the Seventh Circuit noted that "[s]ection 718.114(a) is a dubious source of authority for calculating a misclassified employee's damages in the way that the court did here."<sup>44</sup> The court acknowledged that a number of district courts, noting that the rule's requirements invariably have not been satisfied in employee misclassification cases, have "thus rejected reliance on the rule in calculating an employee's regular rate of pay."<sup>45</sup> And, the court acknowledged that cases "where the employee has routinely worked more than a 40-hour week, do not truly fit the [FWW] paradigm, in that the employee's hours rarely if ever drop below 40 ... [t]he fit between section 778.114(a) and the misclassified employee is an imperfect one ... [b]esides looking forward rather than backward, the interpretive rule plainly envisions the employee's contemporaneous receipt of a premium apart from his fixed wage for any overtime work he has performed."<sup>46</sup>

Nonetheless, even though the Seventh Circuit purports to reject its application in *Urnikis-Negro*, acknowledging that the FWW methodology for paying overtime in a misclassification case is imperfect, it still found that Urnikis-Negro was only entitled to an overtime

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40 *Id.*

41 316 U.S. 572 (1942).

42 *Urnikis-Negro*, 616 F.3d at 672.

43 *Id.* at 666.

44 *Id.* at 679.

45 *Id.* at 675.

46 *Id.* at 678, 683.

premium based upon half-time because it misconstrued the United States Supreme Court's holding in *Missel*.<sup>47</sup>

In *Urnikis-Negro*, the Seventh Circuit correctly observed that 29 C.F.R. § 778.114(a) “sets forth one way in which an employer may lawfully compensate a nonexempt employee for fluctuating work hours,”<sup>48</sup> but its analysis fell short when it stopped at this broad statement and glossed over the fact that the FWW method of compensation is acceptable only when all five criteria under 29 C.F.R. § 778.114(a) are met.<sup>49</sup> The court ignored the following pertinent facts when it applied the FWW methodology, even though it purported to reject it: *Urnikis-Negro* was never contemporaneously paid any overtime premium and her work hours did not fluctuate above and below forty hours per week.<sup>50</sup>

On this last point, the Seventh Circuit accepted the district court's determination that a mutual understanding existed even though “*Urnikis-Negro* when hired believed she would be working a 40-hour week, as she had for the bank ... [but nonetheless found that] her salary was intended to compensate her for whatever hours she happened to work.”<sup>51</sup> Based upon *Urnikis-Negro*'s testimony, the court should have determined that no mutual understanding existed and applied 29 C.F.R. § 778.113(a), which provides that the regular hourly rate for someone who is paid on a salary basis for a regular workweek is determined by dividing the salary paid by forty, not by dividing the total number of hours worked by her salary.<sup>52</sup>

As legal support for its conclusion that she was only entitled to an overtime premium at the half-time rate, the Seventh Circuit relied upon the United States Supreme Court's holding in *Missel*.<sup>53</sup> However, *Missel*'s true holding addressed the proper method of calculating an employee's regular hourly rate when there was no agreement between the parties as to the number of hours the employee would be called upon to work, i.e. overtime at one and one-half times the employee's regular hourly rate. More notably, 29 C.F.R. §

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47 *Id.* at 681; *see also* *Perkins v. S. New England Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 4460248, at \*2 n.3 (D. Conn. Sep. 27, 2011) (characterizing the Seventh Circuit's reasoning in *Urnikis-Negro*).

48 *Urnikis-Negro*, 616 F.3d at 666.

49 *Id.*

50 *Id.* at 671-72.

51 *Id.* at 674.

52 29 C.F.R. § 778.113(a) (2014).

53 *Id.* at 666, 681.

778.114(a) had not yet been adopted by the United States Department of Labor when *Missel* was decided. The Seventh Circuit therefore misinterpreted the Supreme Court's holding in *Missel* by using it to find *Urnikis-Negro* was only entitled to overtime based upon half-time,<sup>54</sup> instead of time and one-half. In addition to relying on *Missel*, the Seventh Circuit also cited to its decision in *Condo v. Sysco Corp.*<sup>55</sup> Each of these cases will be examined below.

## B. The Supreme Court's Holding in *Missel*

Like *Urnikis-Negro*, *Missel* was required to work long hours and was not paid any overtime. In *Missel*, the plaintiff was a rate clerk who worked sixty-five hours a week on average.<sup>56</sup> There was no actual agreement regarding how many hours per week he would work.<sup>57</sup> He was initially hired prior to the enactment of the FLSA at a set salary of \$25.50 per week.<sup>58</sup> Following passage of the FLSA, his set salary was \$27.50 per week.<sup>59</sup> He was never paid any additional compensation for overtime hours.<sup>60</sup> He filed suit seeking to recover his overtime compensation at one and one-half times his regularly hourly rate plus liquidated damages.<sup>61</sup> His employer argued that the salary that he was paid was sufficient to cover both the minimum wage and any overtime premium required under the FLSA.<sup>62</sup> The trial court ruled in favor of *Missel's* employer.<sup>63</sup> The Fourth Circuit Court of Appeals reversed the trial court.<sup>64</sup> The Supreme Court affirmed judgment in favor of *Missel* and awarded him time and one-half his regular hourly rate, not half-time.<sup>65</sup>

The Supreme Court's holding in *Missel* addressed the proper method for calculating an employee's regular hourly rate when an employee was paid a set salary, not whether application of the pay-

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54 *Id.* at 676.

55 *Id.* at 683 (citing *Condo v. Sysco Corp.*, 1 F.3d 599 (1993)).

56 *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 574 (1942).

57 *Id.* at 578.

58 *Id.* at 574.

59 *Id.*

60 *Id.*

61 *Id.* at 575; *see also* 29 U.S.C. § 216 (2006) (providing for an award of liquidated damages equal to the unpaid wages).

62 *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 575 (1942).

63 *Id.* at 574-75.

64 *Id.* at 575.

65 *Id.* at 578.

ment of the overtime premium based upon half-time was permissible. In *Missel*, the petitioner, *Missel's* employer, argued that *Missel's* set salary was sufficient to pay him the required statutory minimum wage for all straight time hours plus a half-time overtime premium for each hour worked in excess of forty hours per week.<sup>66</sup> The Supreme Court acknowledged the sufficiently large salary paid to the employee.<sup>67</sup> However, it found that there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage.<sup>68</sup>

Further, the Court rejected the employer's contention that, so long as the salary paid equates to more than the minimum wage plus the overtime premium required under the FLSA, the employer has complied with the law.<sup>69</sup> In the end, the Supreme Court found that *Missel* was due overtime at one and one-half times his regular hourly rate because there was no agreement regarding the maximum number of hours that *Missel* was required to work and he was not paid an overtime premium.<sup>70</sup>

Each of the pertinent facts in *Missel* are consistent with those present in *Urnikis-Negro*, yet the Seventh Circuit glossed over or ignored them when it instead focused on *Missel's* dicta stating that the "wage paid was sufficiently large to cover both base pay and the fifty percent additional for the hours actually worked over the statutory maximum."<sup>71</sup> The Seventh Circuit's incorrect interpretation of the Supreme Court's holding in *Missel* presumes that any time an employee is paid a fixed weekly salary that the proper method of determining the employee's regular hourly rate is to divide total compensation earned by the employee during the week by the total number of hours worked to determine the regular hourly rate. Had the Seventh Circuit correctly construed *Missel* it would have awarded *Urnikis-Negro* overtime based upon one and one-half times her regularly hourly rate of pay.

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66 *Id.* at 581.

67 *Id.*

68 *Id.*

69 *Id.* at 580.

70 *Id.* at 578.

71 *Id.*

### C. The Seventh Circuit's Ruling in Condo

In addition to misinterpreting the Supreme Court's holding in *Missel*, the Seventh Circuit erroneously relied upon the holding in *Condo*. The court cited *Condo* for the proposition that an employer can pay an employee based upon the FWW method even though the employee's hours from week-to-week do not fluctuate below forty,<sup>72</sup> but it ignored other pertinent facts of the case. First, the requirement for the contemporaneous payment of the half-time overtime premium was satisfied in *Condo*,<sup>73</sup> whereas in *Urnikis-Negro* it was not. Second, the facts supported the finding that a true mutual understanding existed because there was a written contract between the parties that described how *Condo* would be compensated.<sup>74</sup> Whereas in *Urnikis-Negro*, there was no reference by the court to the existence of a written contract to support the contention of a mutual understanding, and the plaintiff was not paid overtime.<sup>75</sup> Additionally, the agreement between the parties in *Condo* was applied prospectively, not retroactively, and satisfied the requirements under 29 C.F.R. § 718.114.<sup>76</sup>

In *Condo*, unlike *Urnikis-Negro*, the Seventh Circuit correctly determined the parties had a true mutual understanding that *Condo*'s salary was intended to compensate him for all straight time hours.<sup>77</sup> Further, *Condo* was actually paid the required overtime premium.<sup>78</sup> As a result, payment of overtime based upon the FWW method was appropriate in *Condo*.

## III. Decisions Properly Applying the FWW Method

### A. 29 C.F.R. § 778.114(a)

Even though a number of federal district and appellate courts had rejected application of the FWW methodology of paying an overtime premium at half-time in misclassification cases prior to

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72 *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 667, 677 (7th Cir. 2010).

73 *Condo v. Sysco Corp.*, 1 F.3d 599, 602 (7th Cir. 1993).

74 *Id.*

75 *Urnikis-Negro*, 616 F.3d at 669.

76 *Condo*, 1 F.3d at 602.

77 *Id.*

78 *Id.*



*Urnikis-Negro*,<sup>79</sup> the Seventh Circuit rejected such holdings when it misinterpreted the Supreme Court's holding in *Missel* to mean that there was no mutual understanding regarding the number of hours Missel was required to work.<sup>80</sup> Contrary to the Seventh Circuit's understanding, it was determined that there was no mutual understanding regarding the number of hours Missel was expected to work.<sup>81</sup>

Respectively, the following sections will examine cases decided both prior to and after *Urnikis-Negro* in which the respective courts refused to retroactively apply the FWW methodology of paying the overtime premium in exemption misclassification cases.

## B. Cases Decided Prior to *Urnikis-Negro*

The Seventh Circuit's holding in *Urnikis-Negro* is even more perplexing in light of the fact that it had available to it a number of well-reasoned decisions on whether the methodology of paying the overtime premium retroactively in a misclassification case under the FWW method was appropriate. The only logical conclusion to account for the Seventh Circuit's failure to follow these decisions is that the Seventh Circuit was convinced that the holding in *Missel* required it to find that *Urnikis-Negro* was only entitled to be paid overtime based upon one-half of her regular hourly rate.

### 1. *Griffin v. Wake County*

Unlike the Seventh Circuit in *Urnikis-Negro*, the Fourth Circuit fully analyzed the mutual understanding issue in *Griffin v. Wake County*.<sup>82</sup> In *Griffin*, the dispute between Wake County and its emergency medical technicians ("EMTs") arose after Wake County prospective-

79 *Cowan v. Treetop Enters., Inc.*, 163 F.Supp.2d 930, 940 (6th Cir. 2001); *West v. Verizon Servs. Corp.*, No.08-CV-1325-T-33 (MAP), 2011 WL 208314 (M.D. Fla. Jan. 21, 2011); *Monahan v. Emerald Performance Materials, LLC*, 705 F.Supp.2d 1206, (9th Cir. 2010); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1013-14 (N.D. Cal. 2009); *In re Texas Ezpawn Fair Labor Standards Act Litig.*, 633 F. Supp. 2d 395,401 (W.D. Tex. 2008); *Scott v. OTS, Inc.*, No. 02-CV-1950 (AJB), 2006 WL 870369 (N.D. Ga. Mar. 31, 2006); *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 100-01 (D.D.C. 1998).

80 *Urnikis-Negro*, 616 F.3d at 666-67.

81 *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 578 (1942).

82 142 F.3d 712 (4th Cir. 1998).

ly implemented the FWW method of compensating its EMTs.<sup>83</sup> Prior to adopting the FWW method, Wake County held meetings with its EMTs and it issued a memorandum explaining how the FWW method actually worked.<sup>84</sup> Following the county's adoption of the FWW method, the affected EMTs filed suit against the county alleging that there must be a "clear and mutual understanding" between the parties that the fixed salary is intended to compensate the employee for all hours worked at straight time and that an employee must also understand how the employee is being compensated for overtime purposes.<sup>85</sup>

The *Griffin* court found that a mutual understanding existed between Wake County and its EMTs that their salary was intended to compensate them for all straight time hours.<sup>86</sup> The court based its conclusion on the fact that Wake County ensured that its EMTs were provided plenty of information about how the FWW method worked when it held meetings with the EMTs and issued a memorandum of explanation prior to converting to the FWW method.<sup>87</sup> The court, relying on the holding in a prior case,<sup>88</sup> found it sufficient to establish that a mutual understanding existed regarding the intention that EMTs' salaries compensate them for all straight time hours worked, regardless of whether the EMTs fully understood how the overtime premium was calculated.<sup>89</sup>

While the Fourth Circuit's holding in *Griffin* is consistent with the Seventh Circuit's holding in *Condo*, the only reference by the Seventh Circuit to the decision in *Griffin* is in a footnote wherein *Griffin* is cited for the proposition that a mutual understanding between the parties that a fixed salary is intended to compensate an employee for all straight time hours worked does not have to be in writing.<sup>90</sup> It is unfortunate that the Seventh Circuit focused on such a narrow aspect of the holding in *Griffin*. Had the Seventh Circuit given more thought to the pertinent holding in *Griffin*, coupled with its own holding in *Condo*, the result in *Urnikis-Negro* might have been different.

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83 *Id.* at 715.

84 *Id.* at 716.

85 *Id.*

86 *Id.* at 717, n.2.

87 *Id.* at 716.

88 *Id.* (citing *Bailey v. Cnty. of Georgetown*, 94 F.2d 152, 156 (4th Cir. 1996)).

89 *Griffin*, 142 F.3d at 717.

90 *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 666, 681, n.8 (7th Cir. 2010).

2. *Cowan v. Treetop Enterprises, Inc.*

In 2001, the Sixth Circuit also addressed whether the payment of overtime based upon the FWW methodology in a misclassification case was appropriate. In *Cowan v. Treetop Enterprises, Inc.*, as in *Griffin*, the court properly analyzed the requirements that have to be met under the FWW method and when its applicaiton is appropriate.<sup>91</sup>

In *Cowan*, the lead plaintiff brought a cause of action on his behalf along with several others against his employer for failure to pay overtime.<sup>92</sup> In defense of the plaintiff's allegations, Treetop Enterprises alleged that Cowan and the other employees were bona fide executive employees under the FLSA and therefore not entitled to overtime.<sup>93</sup> Cowan alleged that he and his fellow class plaintiffs who operated grills, waited on tables, and had no staffing responsibilities, were misclassified nonexempt employees.<sup>94</sup>

Treetop Enterprises admitted that the plaintiffs were required to work more than forty hours per week<sup>95</sup> and that it did not keep records of the total number of hours worked.<sup>96</sup> The court sided with the employees and determined that the plaintiffs were nonexempt employees entitled to an overtime premium of time and one-half.<sup>97</sup> In response, Treetop Enterprises argued that the FWW method of paying half-time should apply.<sup>98</sup> The court disagreed and found that Treetop Enterprises failed to show that there was a mutual understanding that the employees' salaries were intended to compensate them for all straight time hours worked.<sup>99</sup> Further, the court found that Treetop Enterprises failed to satisfy the requirement that overtime be paid contemporaneously with straight pay when earned.<sup>100</sup> Based upon these facts and conclusions by the court, Treetop Enterprises was precluded from availing itself of the FWW method under 29 C.F.R. § 778.114.<sup>101</sup>

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91 *Cowan v. Treetop Enters., Inc.*, 163 F.Supp.2d 930, 940 (6th Cir. 2001).

92 *Id.* at 931.

93 *Id.*

94 *Id.*

95 *Id.* at 933-34.

96 *Id.* at 934.

97 *Id.* at 938.

98 *Id.* at 939.

99 *Id.* at 940.

100 *Id.* at 941.

101 *Id.* at 940.

The *Cowan* court rejected application of the FWW methodology for paying the overtime premium because Treetop Enterprises had failed to pay any overtime premium when it was due.<sup>102</sup> Additionally, the *Cowan* court found that there was no mutual understanding between the parties “that their compensation was intended to cover whatever hours they worked rather than some other fixed weekly period.”<sup>103</sup> Because Treetop Enterprises failed to establish that a mutual understanding existed between the parties on the compensation issue and it failed to pay the required contemporaneous overtime premium, the *Cowan* court ruled that the misclassified employees were entitled to overtime at time and one-half their regular hourly rate, not half-time.<sup>104</sup>

Like its cursory reference to *Griffin*, the Seventh Circuit did cite *Cowan* in *Urnikis-Negro*. Interestingly, the Seventh Circuit cited *Cowan* for the proposition that 29 C.F.R. § 778.114(a) “plainly envisions the employee’s contemporaneous receipt of a premium apart from his fixed wage for any overtime work he has performed,”<sup>105</sup> yet it affirmed that *Urnikis-Negro* was only entitled an overtime premium based upon half-time even though *Urnikis-Negro* was never paid a contemporaneous overtime premium.<sup>106</sup>

### 3. *In re Texas Ezpawn Fair Labor Standards Act Litigation*

*In re Texas Ezpawn Fair Labor Standards Act Litigation* also rejected application of the FWW method retroactively in a misclassification case prior to the Seventh Circuit’s decision in *Urnikis-Negro*.<sup>107</sup> The plaintiffs in *Ezpawn*, like *Urnikis-Negro*, had been misclassified when initially hired.<sup>108</sup> Following the filing of a lawsuit to recover overtime based upon one and one-half times their regular hourly rate, the employer argued that the employees were exempt under the FLSA, or alternatively, if the plaintiffs were not exempt, then calculating

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102 *Id.*

103 *Id.*; see also *Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp.2d 1206 (9th Cir. 2010).

104 *Cowan*, 163 F. Supp. 2d at 939.

105 *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 666, 678 (7th Cir. 2010).

106 *Id.* at 670.

107 *In re Tex. Ezpawn Fair Labor Standards Act Litig.*, 633 F.Supp.2d 395 (W.D. Texas 2008).

108 *Id.* at 405.

overtime based upon the FWW method was the proper method of calculating any overtime due to the plaintiffs.<sup>109</sup> The court disagreed and acknowledged that “cases which apply the fluctuating workweek method to calculate damages struggle in their analysis with several elements of the bulletin... these analytical struggles are the result of the old ‘square peg in a round hole’ problem—here, attempting to apply § 778.114 to a situation that it was not intended to address.”<sup>110</sup> The court recognized that § 778.114(a) is intended to apply prospectively, not retroactively, and refused to apply the FWW method for paying overtime retroactively in a misclassification case.<sup>111</sup> In comparison, the Seventh Circuit in *Urnikis-Negro* acknowledged that application of the FWW method was not a perfect fit, but nonetheless affirmed that *Urnikis-Negro* was only entitled to a half-time overtime premium.<sup>112</sup>

### C. Cases Decided After *Urnikis-Negro*

While the number of federal district and appellate courts rejecting the Seventh Circuit’s holding in *Urnikis-Negro* represent the minority, this minority has correctly interpreted when the FWW method of paying the overtime premium under 29 C.F.R. § 778.114(a) is appropriate as well as the Supreme Court’s true holding in *Missel*.<sup>113</sup>

#### 1. *Kaiser v. At The Beach, Inc.*

Four months after the Seventh Circuit’s ruling in *Urnikis-Negro*, the Tenth Circuit in *Kaiser v. At The Beach, Inc.* declined to approve the FWW methodology of paying the required overtime premium in a misclassification case despite the defendant’s argument urging the court to do so.<sup>114</sup>

109 *Id.* at 397.

110 *Id.* at 399.

111 *Id.* at 400 (“The plain language of the statute ... requires that an employer violating § 207(a) is liable to an employee for the compensation required by § 207(a)—one and one-half times the employee’s regular rate.”).

112 *Urnikis-Negro v. Am. Family Props. Servs.*, 616 F.3d 666, 679 (7th Cir. 2010).

113 *Griffin v. Wake Cnty.*, 142 F.3d 712 (4th Cir. 1998); *West v. Verizon Servs. Corp.*, No 8:08-CV-1325-T-33 (MAP) 2011 WL 208314, at \*1 (M.D. Fla. Jan. 21, 2001); *Kaiser v. At the Beach, Inc.*, No. 08-CV-586-TCK-FHM, 2010 WL 5114729, at \*1 (N.D. Okla. Dec. 9, 2010).

114 *Kaiser*, 2010 WL 5114729, at \*20, 23.

To begin with, the *Kaiser* court rejected the defendant's argument that there was a mutual understanding between the parties because it determined that no agreement existed between the employee and employer regarding a fixed weekly salary.<sup>115</sup> The court, citing *Clements v. Serco, Inc.*,<sup>116</sup> stated that "the proper inquiry is whether the employee and employer 'had a clear and mutual understanding that they would be paid on a salary basis for all hours worked, even those worked in excess of forty hours per week.'"<sup>117</sup> In *Clements*, the court found that employees had actually affirmatively agreed to accept a salary for all hours worked which was supported by their testimony and written statements provided to the Department of Labor by employees.<sup>118</sup> Using the holding in *Clements* as its guide, the *Kaiser* court analyzed the evidence presented in the case before it and found that the only evidence offered to support the defendant's contention that a mutual understanding existed between the company and the employees that the salaries paid to the employees were intended to compensate them for all straight time hours worked was that management expected employees to work more than forty hours a week.<sup>119</sup> Due to the lack of evidence supporting the existence of a mutual understanding, the Tenth Circuit rejected the holding in *Urnikis-Negro* and ruled that the FWW method was improper.<sup>120</sup>

## 2. *West v. Verizon Services Corp*

The Eleventh Circuit Court of Appeals also rejected the Seventh Circuit's analysis in *Urnikis-Negro*. In its January 2011 decision in *West v. Verizon Services Corp.*, the Eleventh Circuit rejected the FWW methodology of paying overtime in the misclassification case.<sup>121</sup>

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115 *Id.* at \*19-20.

116 *Clements v Serco, Inc.*, 530 F.3d. 1224, 1230 (10th Cir. 2008); *Perkins v. S. England Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 336715, at \*1 (D. Conn. Sept. 27, 2011).

117 *Kaiser*, 2010 WL 5114729, at \*19 (citing *Clements*, 530 F.3d at 1230).

118 *Clements*, 530 F.3d at 1230 (discussing the mutual understanding prong of § 778.114(a), but not addressing *Missel* nor the requirement under § 778.114(a) for the contemporaneous payment of overtime).

119 *Kaiser*, 2010 WL 5114729, at \*20.

120 *Id.*; see also *Peterson v. Snodgrass*, 683 F. Supp. 2d 1107 (D. Or. 2010).

121 *West v. Verizon Servs. Corp.*, No. 8:08-CV-1325-T-33 (MAP), 2011 WL 208314, at \*1 (M.D. Fla. Jan. 21, 2011). *West* also addressed whether Verizon or a staffing firm was West's employer. For purposes of this Article, the joint employer

In *West*, Verizon contracted with PDS Technical Services, Inc. to recruit personal account managers,<sup>122</sup> and it created a position titled as “Personal Account Manager.”<sup>123</sup> Personal Account Managers were required to carry a Blackberry Phone<sup>124</sup> and were assigned a certain number of customers.<sup>125</sup> Further, Personal Account Managers were required to answer customer calls between 9:00 a.m. and 9:00 p.m. Monday through Saturday.<sup>126</sup> Even though *West* filed a claim for unpaid overtime,<sup>127</sup> Verizon took the position that it believed Personal Account Managers would work less than forty hours a week because they could work from their own selected location.<sup>128</sup> Contrary to Verizon’s testimony, *West* contended that she worked seventy-two hours per week.<sup>129</sup>

On the issue of overtime compensation, Verizon first argued that *West* was not entitled to overtime compensation because it was not *West*’s employer,<sup>130</sup> and PDS argued that if she was entitled to overtime she was only entitled to a half-time overtime premium under the FWW method.<sup>131</sup> To Verizon’s chagrin, the Eleventh Circuit declined to apply the FWW methodology retroactively because Verizon failed to satisfy the requirements of 29 C.F.R. § 778.114(a)<sup>132</sup> and instead found that the employees in *West* were entitled to overtime at one and one-half times their regular rate, not half-time.<sup>133</sup>

### 3. *Ransom v. M. Patel Enters, Inc.*

In November 2011, another federal district court — unconstrained by the precedent in the Seventh Circuit — further analyzed

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analysis is not relevant or pertinent to the issue being discussed herein. *Id.* at \*8.

122 *Id.* at \*2.

123 *Id.* at \*1.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at \*4.

128 *Id.* at \*2.

129 *Id.* at \*3,9.

130 *Id.* at \*6.

131 *Id.*

132 *Id.* at \*11; see also *Brown v. Nipper Auto Parts & Supplies, Inc.*, No. 7:08-CV-00521, 2009 WL 1437836 (W.D. Va. May 21, 2009); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008 (N.D. Cal. 2009).

133 *West*, 2011 WL 208134 at \*12.



the mutual understanding aspect of the FWW method and rejected the holding in *Urnikis-Negro*. In *Ransom v. M. Patel Enters., Inc.*, the court acknowledged that a mutual understanding could be inferred from the facts.<sup>134</sup> However, the district court in *Ransom*, like the court in *Griffin*, fully analyzed what it means to have a mutual understanding,<sup>135</sup> concluding that an inference alone was insufficient to establish the existence of a mutual understanding when a misclassified employee accepts a salary because “the parties have based their actions on a mutual mistake: the Plaintiffs went to work without demanding overtime payments, and [the employer] employed them believing they were not entitled to overtime pay.”<sup>136</sup> Further, the court stated “[b]y definition, in a misclassification case the employee will have been ‘paid a fixed weekly sum for any and all hours that she worked,’ will have ‘routinely worked substantial amounts of overtime,’ and will have ‘never received any overtime premium for hours she worked’ ... [i]f this is all it takes to require that the FWW be used to calculate the regular rate, then the facts really don’t matter.”<sup>137</sup>

The district court holding in *Ransom* is consistent with the Supreme Court’s holding in *Missel*. In *Missel*, agreeing with the trial court, the Supreme Court found that there was no agreement between the parties regarding the maximum number of hours *Missel* would be required to work for his employer.<sup>138</sup> *Ransom* reminds us that facts do matter and if the facts do not support the existence of a mutual understanding, then a court should not infer the existence of a mutual understanding in exemption misclassification cases.

In a subsequent proceeding for liquidated damages, the district court modified its ruling in an unreported decision and determined that there was a mutual understanding that the employees were required to work fifty-five hours a week and awarded a half-time premium for those hours worked between forty and fifty, but it awarded time and one-half for hours in excess of fifty-five per week.<sup>139</sup>

The cases decided both before and after *Urnikis-Negro* that reject the FWW methodology for paying the overtime premium in

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134 *Ransom v. M. Patel Enters., Inc.*, 825 F.Supp. 2d 799 (W.D. Tex. 2011).

135 *Id.* at 802.

136 *Id.* at 809.

137 *Id.* (quotations omitted); see also *Scott v. OTS, Inc.*, No. 02-CV-1950 (AJB), 2006 WL 870369 (N.D. Ga. Mar. 31, 2006).

138 *Overnight Motor Transp. Co, Inc. v. Missel*, 316 U.S. 572 (1942).

139 *Ransom*, 825 F. Supp. 2d at 809.

misclassification cases all share striking similarities: 1) each court analyzed the facts to determine whether a mutual understanding existed;<sup>140</sup> 2) each court determined whether the required contemporaneous payment of overtime was met;<sup>141</sup> and 3) each court honored the intent of the FLSA and its objectives.<sup>142</sup> As such, the courts refused to allow an employer to avoid its financial obligations to employees under the FLSA.

### Conclusion

While much about business and employment has changed in the movement from the industrial age that existed in the 1930s to the technological age of today, the underlying purposes of the FLSA have not. Congress passed the FLSA to ensure that covered employees were paid the minimum wage, to ensure they were compensated for overtime work, and to encourage employers to hire new employees rather than working existing employees long hours.<sup>143</sup>

The FLSA requires employers to pay nonexempt employees overtime when they work more than forty hours per week at a rate of one and one-half times the employee's regular hourly rate unless the employee is being paid under the alternative method under 29 C.F.R. § 778.114(a).<sup>144</sup> Even though 29 C.F.R. § 778.114(a) is not intended to be a remedial measure, it operates as one when courts, like the Seventh Circuit in *Urnikis-Negro*, apply its methodology retroactively in a misclassification case<sup>145</sup> by concluding after the fact that the parties had a mutual understanding that an employee's salary was intended to compensate her for all straight time hours worked and therefore she is only entitled to an overtime premium based upon half-time.<sup>146</sup> Further, courts like the Seventh Circuit that sanction payment of the overtime premium at half-time in misclassification cases fail to fur-

140 *Kaiser v. At the Beach, Inc.*, No. 08-CV-586-TCK-FHM, 2010 WL 5114729, at \*1 (10th Cir. Dec. 9, 2010); *Griffin v. Wake Cnty.*, 142 F.3d 712 (4th Cir. 1998); *Ransom v. M. Patel Enters., Inc.*, 825 F. Supp. 2d 799 (W.D. Tex. 2011); *West v. Verizon Servs. Corp.*, No. 8:08-CV-1325-T-33 (MAP), 2011 WL 208314, at \*1 (M.D. Fla. Jan. 21, 2011).

141 *Griffin*, 142 F. 3d at 717.

142 *See also supra*, Part I.

143 § 29 U.S.C. §202 (1974).

144 § 29 U.S.C. § 207(a)(1) (1938); 29 C.F.R. § 778.114(a) (2011).

145 *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 671 (7th Cir. 2010).

146 *Id.*

ther the FLSA's purpose of eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . ." <sup>147</sup>

The FWW method under 29 C.F.R. § 778.114(a) is permissible when it is applied prospectively, meaning that there is a clear and mutual understanding between the parties that the salary is intended to compensate the employee for all straight time hours worked (whether less or more than forty hours) per week, and that the employee is contemporaneously paid the half-time overtime premium. When applied prospectively, the purposes of the FLSA are accomplished, but when applied retroactively in an exemption misclassification case, the purposes of the FLSA are nullified because the methodology abridges an employee's right to time and one-half wages for overtime hours. <sup>148</sup>

Moreover, application of the FWW methodology retroactively in a misclassification case like *Urnikis-Negro v. American Family Property Services*, <sup>149</sup> its progeny, <sup>150</sup> and prior decisions <sup>151</sup> only serve to reward—and potentially encourage—an employer to misclassify a nonexempt employee as exempt at the inception of the employment relationship; to deny an employee the employee's rightful overtime compensation when due; <sup>152</sup> and to force an employee to complain to the U.S. Department of Labor <sup>153</sup> or file suit to collect unpaid overtime. <sup>154</sup>

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147 29 U.S.C. § 202.

148 *Barrentine v. Ark. Best Freight Train Sys., Inc.*, 450 U.S. 728, 740 (1981) (stating that FLSA rights cannot be abridged by contract or otherwise waived because it would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate (citing *Brooklyn Savings Bank*, 324 U.S. at 707)).

149 *Urnikis-Negro*, 616 F.3d at 666.

150 *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 359 (4th Cir. 2011) (applying FWW method, though denying that it was applying it retroactively in reliance on 29 U.S.C. § 216(b), *Urnikis-Negro* and *Missel*); *Ahle v. Veracity Research Co.*, 738 F.Supp. 2d 896 (D. Minn. 2010).

151 *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988) (recognizing application of FWW method of paying overtime in misclassification case, but providing no analysis); see also *Saizan v. Delta Concrete Products Company, Inc.*, 209 F. Supp. 2d 639 (9th Cir. 2002) (applying *Blackmon* without analysis of the underlying issue).

152 29 U.S.C. § 207(a) (1938).

153 The United States Department of Labor is the entity responsible for enforcing the FLSA with power being vested in the Secretary of Labor. *Id.* § 204.

154 *Id.* § 216(p).

The FLSA requires that a nonexempt employee working for a covered employer be paid at least the minimum wage and compensated for overtime work in accordance with the law.<sup>155</sup> Decisions like *Urnikis-Negro* and its progeny jeopardize these statutory rights<sup>156</sup> because they may: 1) encourage employers to misclassify nonexempt employees as being exempt; 2) ignore the fact that the FWW method is not a remedial measure and its application is intended to be prospective; and 3) reward employers that violate the law. How? Because when an employer is permitted to take advantage of the FWW method of paying overtime retroactively the employer only has to pay approximately 25% or less of what it would have been required to pay and the employer does not have to pay the overtime premium until ordered by a court.<sup>157</sup>

The time has come for the United States Supreme Court to affirm its true holding in *Missel* and to declare that the required overtime premium that is due an employee in an exemption misclassification case under the FLSA is time and one-half the employee's regular hourly rate, and to further declare that the alternative method of paying overtime under 29 C.F.R. § 778.114(a) only applies when an employer fully complies with all of its requirements.<sup>158</sup> Alternatively, Congress should follow California's lead and amend the FLSA to provide that a non-exempt employee's salary compensates the employee for forty straight time hours<sup>159</sup> only, unless all five prongs of the FWW method are satisfied.

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155 *Id.* §§ 206(a)(1), 207(a)(1).

156 *Barrentine v. Ark. Best Freight Train Sys., Inc.*, 450 U.S. 728, 740 (1981) (stating that FLSA rights cannot be abridged by contract or otherwise waived because it would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate).

157 *See Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 671 (7th Cir. 2010).

158 29 U.S.C. § 207(a), (e) (2008); 29 C.F.R. § 778.114(a) (2011).

159 A.B. 2103, 2011-12 Leg. (Cal. 2012).

## Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers' Right to Know their Rights?

Kimberly S. Webster\*

### Introduction

A right does not exist in any meaningful sense unless people know about it and have the means to exercise it.<sup>1</sup> For a variety of reasons, workers' access to these prerequisites—the knowledge and means to exercise their rights—has become increasingly difficult. A significant factor in this development is the rise of fissured employment relationships.<sup>2</sup> One of the problems that fissured employment relationships pose is they impair development and maintenance of unions. Unions have historically played an important role in providing workers with knowledge of their statutory rights and helping to enforce those rights through the grievance process.<sup>3</sup>

With the decline of union density since its peak in the mid-1950s<sup>4</sup> other means by which workers learn of their rights have

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1 DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 245 (2014) [hereinafter WEIL, *FISSURED WORKPLACE*].

2 See David Weil, *Improving Workplace Conditions through Strategic Enforcement* 75–76 (2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>; see also WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 79–80; David Weil, *Examining the Underpinnings of Labor Standards Compliance in Low Wage Industries*, RUSSELL SAGE FOUND. (July 31, 2012), <http://www.russellsage.org/sites/all/files/Weil.Final%20Report%202012.pdf>. David Weil, President Obama's nominee for Administrator of the Wage and Hour Division of the U.S. Department of Labor, was confirmed by the Senate on April 28, 2014. Ben James, *DOL Finally Gets New Boss Confirmed for Wage and Hour Unit*, L. 360 (Apr. 28, 2014, 8:07 PM), <http://www.law360.com/articles/526906/dol-finally-gets-new-boss-confirmed-for-wage-and-hour-unit>.

3 See, e.g., Proposed Rules Governing Notification of Employee Rights Under the NLRA, 75 Fed. Reg. 80,410-11 (proposed Dec. 22, 2010) (codified at 29 C.F.R. pt. 104); WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 253; Weil, *Improving Workplace Conditions through Strategic Enforcement*, *supra* note 2, at 10.

4 Victor G. Devinatz, *The Crisis of U.S. Trade Unionism and What Needs to be Done*, 64 LAB. L.J. 5, 5 (2013), available at <http://www.homeworkmarket.com/sites/>

become increasingly important. As union membership levels declined, government agencies that regulate the employment sphere—such as the Department of Labor and the Equal Employment Opportunity Commission (EEOC)—successfully implemented regulations requiring employers to inform workers of their rights via posters describing those rights. In 2011 the National Labor Relations Board (NLRB, or Board) promulgated a regulation requiring its own poster that describes workers' rights under the National Labor Relations Act (NLRA).<sup>5</sup> However, employer associations quickly challenged this Board regulation. In 2013 two circuit courts struck down the regulation requiring the poster.<sup>6</sup> The Board declined to seek certiorari.<sup>7</sup>

This Article makes three main arguments about workers' access to knowledge about their rights and the means to exercise those rights. The first main argument concerns employee rights notifications in general, the second addresses problems posed by the D.C. Circuit's problematic decision striking down the Board's poster regulation,<sup>8</sup> and the third specifically addresses rights granted under the NLRA.

First, the main approach to workers' rights disclosures is outdated. Because fewer people work at their employer's worksite and technology developments have made people more accustomed to receiving important information directly, rights notification posters should be supplemented or replaced with a framework of mandatory affirmative disclosure to individual employees. This measure would simply make disclosure of workplace protections similar to the financial industry's disclosure of consumer protections.

Second, the D.C. Circuit's decision striking down the NLRB's poster requirement—in part on First Amendment grounds—means that new efforts to expand and improve employee rights disclosure requirements must be careful to avoid First Amendment challenges. If new or existing disclosure requirements are challenged, it may help

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default/files/the\_crisis\_of\_us\_trade.pdf.

5 Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006-01 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104).

6 *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

7 Press Release, National Labor Relations Board, The NLRB's Notice Posting Rule (Jan. 6, 2014), available at <http://www.nlr.gov/news-outreach/news-story/nlrbs-notice-posting-rule>.

8 *Chamber of Commerce*, 717 F.3d 947.



to point out the flaws in the D.C. Circuit's First Amendment analysis, some of which are discussed below.

The third argument is that the NLRB's rights disclosure regulation—while necessary for improving workers' access to their rights under the NLRA—is not *sufficient*. Workers' right to collective (or as the Act states, "concerted") activity necessitates access to coworkers by its very definition and fissured employment relationships often place barriers between coworkers. A regulatory framework facilitating coworkers' contact with each other is necessary in order for some workers to have a meaningful right to concerted activity under the NLRA.

### **I. Employee Rights Posting Requirements Should Be Supplemented By An Affirmative Obligation to Disclose Rights to Each Individual Employee.**

It is not a "foregone conclusion" that government notices to workers be communicated on a wall.<sup>9</sup> Regulations designed to inform workers of their rights should take a cue from different frameworks of legal rights disclosures that are better equipped for the present day and more likely to achieve their goal.

#### **A. Work Relationships Have Changed since the Enactment of Posting Requirements.**

The Federal government first required posters informing workers of their rights with Title VII of the Civil Rights Act of 1964.<sup>10</sup> Since then, trends such as the misclassification of employees as independent contractors,<sup>11</sup> the increase in franchising arrangements,<sup>12</sup>

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9 See Amanda L. Ireland, *Notification of Employee Rights under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 938 (2013) (stating it is a "foregone conclusion" that government notices about workers' rights are communicated this way).

10 See Title VII of the Civil Rights Act of 1964 § 711, 42 U.S.C. § 2000e-10 (2012).

11 See WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 90–91 (noting the early shift of security and janitorial work from in-house employment to contract arrangements).

12 See *id.* at 197–99 (discussing the influential case *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010)); David Weil, *Protecting Workers in Fissured Workplaces*, PERSPECTIVES ON WORK 38, Winter 2011/Winter 2012 [hereinafter Weil, *Protecting Workers*].



communications technology,<sup>13</sup> and the rise in temporary employment relationships<sup>14</sup> have increasingly disconnected workers from their employer's physical worksite. Posters at the employer's worksite simply do not help workers who never set foot there.<sup>15</sup>

There are likely many reasons why “[f]issured employment coincides with . . . high rates of violations of basic labor standards.”<sup>16</sup> Perhaps one of these many reasons why employers' abuses are especially high in the most fissured types of employment relationships—such as those where the workers do not work at the employer's place of business—is because the workers never see these “conspicuous” posters designed to inform them of their rights.<sup>17</sup>

### B. Indications of Adaptation of Rights Disclosure Requirements to Fissured Employment Relationships.

In response to fissured employment relationships and the lower level of labor and employment law compliance they present, an alternative framework for informing workers of their rights is necessary<sup>18</sup> and beginning to emerge. This new framework—encompassing electronic and/or active methods of disclosure—is a better fit for the current landscape of employment relationships and implementing it more broadly is an important measure to take against violations of workers' rights.

13 See, e.g., WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 4.

14 See, e.g., Katherine Van Wezel Stone, *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting*, *Association of American Law Schools Section on Labor Relations and Employment Law*, 10 *EMP. RTS. & EMP. POL'Y J.* 233, 238, 240 (2006) (noting that “Fordist production methods, along with employers' use of internal labor” has been replaced by temporary work, which has “grown . . . with each successive economic cycle” since 1973).

15 See *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9, \*3, 2010-2011 NLRB Dec. (CCH) ¶ 15,325, \*3 (Oct. 22, 2010).

16 Weil, *Protecting Workers*, *supra* note 12, at 39; see also WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 8–9.

17 See WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 253 (noting that informing workers of their rights under the NLRA presents a “unique challenge[]” because it is “the only major federal workplace statute that does not currently require that employers post notices informing workers of their rights under the law”).

18 See WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 184, 252 (noting that “broader legislative initiatives” are necessary for improving workers' knowledge of their rights).

1. *The National Labor Relations Board and Electronic Disclosures*

First, the NLRB has finally begun to allow “posting” of “notice remedies”—rights disclosures to workers in response to one or more unfair labor practices by their employer—electronically as a matter of course.<sup>19</sup> In *J & R Flooring* the NLRB “consider[ed] whether employers . . . should be required to distribute remedial notices electronically . . . in addition to the traditional posting of a paper notice on a bulletin board.”<sup>20</sup> The Board found that “the increasing prevalence of electronic communications” required that employers “distribute remedial notices electronically” whenever electronic communication between the company and its employees is customary.<sup>21</sup>

In its decision the Board stated obvious facts about the evolution of both work relationships and communication in the workplace since Congress passed the NLRA.<sup>22</sup> Finding that the “efficacy of the Board’s remedial notice” was “in jeopardy” given that “paper notices and wall mounted bulletin boards” have “gone the way of the telephone message pad,” it followed that “[a]s a matter of general policy” electronic dissemination of the notices should supplement the usual bulletin board posting.<sup>23</sup> The Board’s second related rationale for this ruling was the “growth of telecommuting and the decentralization of workspaces permitted by new technologies mean that an increasing number of employees will never see a paper notice posted at an employer’s facility.”<sup>24</sup> The Board also took its argument a step further in noting that for it to “ignore the revolution in communications technology that has reshaped our economy and society would be to abdicate our responsibility to ‘adapt the [NLRA] to changing patterns of industrial life.’”<sup>25</sup> *J & R Flooring* represents an important shift in the way that workers learn information about their

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19 *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9, 2010-2011 NLRB Dec. (CCH) ¶ 15,325 (Board decision), *modifying* *J & R Flooring, Inc.*, 355 N.L.R.B. 606 (2010) (ALJ decision); *see also* Alexander R. Rivera, *J & R Flooring: The NLRA Notice Remedy goes Electronic*, 32 BERKELEY J. EMP. & LAB. L. 569 (2012).

20 356 N.L.R.B. No. 9 at \*2, 2010-2011 NLRB Dec. (CCH) ¶ 15,325 at \*2.

21 *Id.*

22 *See id.* at \*3.

23 *Id.*

24 *Id.* (footnote omitted).

25 *Id.* at \*4 (quoting *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975)).

rights. Given its potential importance in that respect it seems strange there was little reaction to it.

Notably, the *J & R Flooring* decision came exactly two months before the proposal of the NLRB regulation requiring a general posting of NLRA rights at all covered employers.<sup>26</sup> The Board's poster regulation incorporated the electronic distribution provision described in the *J & R Flooring* decision.<sup>27</sup> Although this electronic distribution provision was completely ignored in the 4th Circuit decision<sup>28</sup> and mentioned only in passing in the D.C. Circuit,<sup>29</sup> the provision—itsself or in conjunction with the portion requiring translation in certain circumstances<sup>30</sup>—is perhaps the reason why the rule received such strong opposition from business groups, which in turn helped lead to its defeat in the appellate courts.

Other government agencies have also begun to address how to ensure compliance with employee rights posting laws that have little if any effect in certain contexts, and there are hints that some are beginning to recognize the advantages of the electronic disclosure model. For example, some of the laws concerning employee rights also confer rights upon applicants. Title VII prohibits discrimination based on an applicant's membership in a protected class and EEOC regulations require that posters describing rights under Title VII be conspicuous to applicants as well as to employees.<sup>31</sup> Also, within the United States Department of Labor's list of Frequently Asked Questions on its website is the following: "No applicants for employment are interviewed in person. We post job openings online and interview applicants on the phone. How can I post the [required] posters?"<sup>32</sup> The Department of Labor responds: "Most of our poster regulations were written before the Internet was used for job postings. Until the regulations are revised, please place a prominent notice on the website where the job postings are listed

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26 See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006-01 (Aug. 30, 2011) (noting that the regulation was proposed on Dec. 22, 2010).

27 See also 29 C.F.R. § 104.202(f)(1) (2014).

28 See *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

29 *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 950 (D.C. Cir. 2013).

30 See § 104.202(f)(2).

31 See, e.g., § 1601.30.

32 *Frequently Asked Questions*, U.S. DEP'T LAB., <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=533&faqsub=General&faqtop=Posters&topicid=17> (last visited May 18, 2014).

stating that ‘Applicants have rights under Federal Employment Laws’ and link to the [required] posters.’<sup>33</sup>

### 1. Targeted Disclosures

Illinois and Massachusetts provide examples of an affirmative, individualized rights disclosure framework to address violations in the temporary work industry—where abuses of basic workers’ rights are especially prevalent.<sup>34</sup> The Day and Temporary Labor Services Act in Illinois became effective in 2006 and requires disclosure of

- (1) the name of the day or temporary laborer;
- (2) the name and nature of the work to be performed;
- (3) the wages offered;
- (4) the name and address of the destination of each day or temporary laborer;
- (5) terms of transportation; and
- (6) whether a meal or equipment, or both, provided, either by the day and temporary labor service agency or the third party client, and the cost of the meal and equipment, if any.<sup>35</sup>

Following passage of the Day and Temporary Labor Services Act in Illinois a coalition developed for similar legislation in Massachusetts. After years of lobbying a range of organizations including the Massachusetts Coalition for Occupational Safety and Health,<sup>36</sup> the Massachusetts AFL-CIO,<sup>37</sup> and Greater Boston Legal Services’ Employment Law Unit<sup>38</sup> finally saw the Massachusetts

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33 *Id.*

34 820 ILL. COMP. STAT. 175/2 (2014).

35 820 ILL. COMP. STAT. 175/10 (2014).

36 *Temp Workers Right to Know Law*, MASS. COALITION OCCUPATIONAL SAFETY & HEALTH, <http://www.masscosh.org/policy-advocacy/temp-workers-right-know-law> (last visited May 18, 2014).

37 *Temporary Workers’ Right to Know*, MASS. AFL-CIO, <http://www.massafclcio.org/temporary-workers%2526%2523039%3B-right-know> (last visited May 18, 2014).

38 *Employment Impact Advocacy*, GREATER BOS. LEGAL SERVICES (2012), <http://www.gbls.org/impact-advocacy/employment>.

Temporary Workers' Right to Know Law (TWRKL) passed in 2012.<sup>39</sup> TWRKL, like the Illinois legislation, requires staffing agencies to disclose certain information to temporary employees before each new assignment.<sup>40</sup> In practice these laws give workers the basic right to know, among other information, *who their employer is*.<sup>41</sup> This right would have seemed laughably unnecessary in the vast majority of working relationships at the time the first employee rights posting requirements were enacted. However, because knowledge of an employer's identity can no longer be taken for granted and is instrumental in the enforcement of most other workplace rights<sup>42</sup> the duty to disclose this information to each individual employee in writing upon each work assignment was considered necessary and important enough to become a law with serious teeth.<sup>43</sup>

## 2. State Wage and Hour Disclosure-at-Hire Model

A New York State law goes a step further than the Illinois and Massachusetts laws described above: It requires disclosure of basic job information to *all* private sector employees—first upon hire and then annually thereafter.<sup>44</sup> Several states—including Connecticut,<sup>45</sup>

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39 See An Act Establishing a Temporary Workers Right to Know, 2012 Mass. Adv. Legis. Serv. 225 (LexisNexis) (codified at MASS. GEN. LAWS ch. 149, § 159C).

40 See MASS. GEN. LAWS ch. 149, § 159C (2013). Under TWRKL, staffing agencies must (1) inform temporary workers that certain payroll deductions are illegal under Massachusetts law, (2) provide the contact information of the agency that oversees TWRKL (the Massachusetts Department of Labor Standards), (3) provide certain basic information about the employee's work assignment, and (4) provide all of this information on paper. See *id.*

41 Jane Slaughter, *Massachusetts Temp Workers Win Right to Know Their Employer*, LAB. NOTES (Aug. 30, 2012), <http://www.labornotes.org/2012/08/massachusetts-temp-workers-win-right-know-their-employer>; see also WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 114 (noting that employees who thought they had been working for Hershey learned otherwise only after receiving their first paycheck).

42 See, e.g., Weil, *Protecting Workers*, *supra* note 123, at \*38.

43 See § 159C(g) (noting that violation leads to punishment according to § 27C). Section 27C imposes, e.g., a fine of up to \$25,000 or imprisonment for up to one year for a first willful offense.

44 N.Y. LAB. LAW § 195 (McKinney 2014).

45 CONN. GEN. STAT. § 31-71f (2014).

Hawaii,<sup>46</sup> Idaho,<sup>47</sup> Maryland,<sup>48</sup> New Hampshire,<sup>49</sup> New Jersey,<sup>50</sup> North Carolina,<sup>51</sup> and Pennsylvania<sup>52</sup>—have similar provisions for basic job information disclosure upon hire, though not periodically afterward. As an increasing number of states adopt this disclosure-at-hire model, the prospect of a federal version becomes more likely.<sup>53</sup>

### C. Recommended Action: Employees Should Receive Comprehensive Rights Notifications Directly upon Hire and Periodically Thereafter.

#### 1. Precedent from Financial Industry Disclosures

In the credit and financial services industries, consumers receive mandated rights disclosures as a matter of course. The Truth-in-Lending Act, for example, mandates “disclosure of credit terms” to consumers in order to solve information asymmetry between the business and the consumer, which in turn empowers the consumer against illegal, inaccurate, or unfair business practices.<sup>54</sup> It reflects an overall “transition in Congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose.”<sup>55</sup> Such financial information is incredibly important for consumers to have because it can affect their credit history, which in turn controls access to credit and in some cases even employment.

Anyone with a credit card knows the extra page or two of the statement filled with nothing but mandatory disclosures in small print. Anyone with a 401(k) retirement savings account is familiar with the Summary Annual Report informing the account holder of

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46 HAW. REV. STAT. § 388-7 (2014).

47 IDAHO CODE ANN. § 44-1507 (2014).

48 MD. CODE ANN., LAB. & EMPL. § 3-504 (West 2014).

49 N.H. REV. STAT. ANN. § 275:49 (2014); N.H. CODE ADMIN. R. ANN. Lab 803.03 (2014).

50 N.J. STAT. ANN. § 34:11-4.6 (West 2014).

51 N.C. GEN. STAT. § 95-25.13 (2014).

52 43 PA. CONS. STAT. ANN. § 260.4 (2014).

53 WEIL, FISSURED WORKPLACE, *supra* note 1, at 212 (noting that “passage of legislation in some states” can “change the political dynamic at the federal level”).

54 See, e.g., 15 U.S.C. § 1601 (2012).

55 *Allen v. Beneficial Fin. Co.*, 393 F. Supp. 1382, 1384 (N.D. Ind. 1975), *aff'd sub nom. Allen v. Beneficial Fin. Co. of Gary, Inc.*, 531 F.2d 797 (7th Cir. 1976), *cert. denied* 429 U.S. 885 (1976).



the plan's performance throughout the past year.<sup>56</sup> Anyone who has a mortgage has seen the deluge of disclosures upon closing the deal. These disclosures are all related to transactions with potentially some of the most important financial consequences of a person's life. That is probably why the information is provided directly to each individual consumer. The default disclosure is usually in print format, but can also be in electronic format if the consumer (or account holder) explicitly makes that choice.

The most important asset that most people have, however, is completely unaffected by these important financial disclosures. It is not a good credit history, or a retirement account, or even home equity that is the most important factor in Americans' financial health and hence deserves the highest level of protection: Rather, it is the capacity to earn money through work.<sup>57</sup> Employer disregard of workers' rights can do severe damage to a person's lifetime earnings and net worth—to say nothing of the psychological consequences and the more indirect financial implications. For example, a typical American female can expect to lose about \$431,000 in wages over her lifetime as a result of gender discrimination in pay,<sup>58</sup> and a study that surveyed low-wage workers in New York City found that on average employers stole about 15% of each paycheck.<sup>59</sup>

Workers—and the government, which collects taxes from paychecks, and society, which benefits from those taxes—cannot afford such prevalent and systematic violations of the law. Given this precedent of addressing what used to and would otherwise continue to be prevalent information asymmetry between financial services companies and their account-holding customers, a similar model is warranted to correct information asymmetry in the workplace.<sup>60</sup>

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56 See 29 C.F.R. § 2520.104B-10 (2014).

57 Liz Davidson, *The Biggest Threat To Your Biggest Asset*, FORBES (Apr. 11, 2013, 9:00 AM), <http://www.forbes.com/sites/financialfinesse/2013/04/11/the-biggest-threat-to-your-biggest-asset/>.

58 *Did You Know That Women Are Still Paid Less Than Men?*, WHITE HOUSE, <http://www.whitehouse.gov/equal-pay/career> (last visited May 18, 2014); see also EVELYN MURPHY, *GETTING EVEN: WHY WOMEN DON'T GET PAID LIKE MEN, AND WHAT TO DO ABOUT IT* (2006).

59 Annette Bernhardt, Diana Polson & James DeFilippis, *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City*, NAT'L EMP. L. PROJECT 44 (2010), [http://nelp.3cdn.net/990687e422dcf919d3\\_h6m6bf6ki.pdf](http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf).

60 See WEIL, *FISSURED WORKPLACE*, *supra* note 1, at 80 (noting that fissuring of employment relationships has increased information asymmetry in the



Further, these rights should be disclosed not only upon hire, but at least annually thereafter. Periodic disclosure would have the benefit of prompting workers to critically consider their employer or employers' practices since the previous disclosure. This should in turn help with meeting some of the shorter statutes of limitation regarding workers' rights and incentivizing employer compliance. This would hardly be an unprecedented regulatory measure given it has already been in practice in consumer finance for over a decade.<sup>61</sup> With corporate profit at an all-time high<sup>62</sup> and wages stagnated to a record low of GDP<sup>63</sup> employers can afford to take this one small measure to disclose valuable rights and other information.

## 2. *"The Medium is the Message"*<sup>64</sup> and Narrowcasting

The direct-to-worker rights and information disclosure model would not simply combine and replicate information already available. The direct-to-worker model of relating these rights would itself carry new implicit messages, which could in turn increase compliance. World-renowned communications theorist Marshall McLuhan famously observed that "the medium is the message," and explained that concept thus:

[T]he "message" of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs. The railway did not introduce movement or transportation or wheel or road into human society, but it accelerated and enlarged the scale of previous human functions, creating totally new kinds of cities and new kinds of work and leisure.

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workplace).

61 See, e.g., 17 C.F.R. § 248.5(a)(1) (annual privacy policy disclosures required for some consumer-business relationships).

62 Ed Dolan, *U.S. Corporate Profits at All-Time High as GDP Growth Holds at 2.5 Percent*, ECONOMONITOR.COM (Sept. 26, 2013), <http://www.economonitor.com/dolanecon/2013/09/26/us-corporate-profits-at-all-time-high-as-gdp-growth-holds-at-2-5-percent/>.

63 Steven Greenhouse, *Our Economic Pickle: America's Productivity Climbs, but Wages Stagnate*, N.Y. TIMES, Jan. 13, 2013, at SR5, available at <http://www.nytimes.com/2013/01/13/sunday-review/americas-productivity-climbs-but-wages-stagnate.html>.

64 See generally MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

. . . . “the medium is the message” because it is the medium that shapes and controls the scale and form of human association and action. . . . The effect of the medium is made strong and intense just because it is given another medium as “content.” The content of a movie is a novel or a play or an opera. The effect of the movie form is not related to its program content. The “content” of writing or print is speech, but the reader is almost entirely unaware either of print or of speech.<sup>65</sup>

The medium of a poster on a wall in a break room communicates that its content is not sufficiently important for direct assurance—from either the employer’s or the government’s standpoint—that workers even read it, let alone understand it. This is, for example, the difference between receiving a forum letter and one addressed specifically to the recipient: The latter commands more attention and perceived importance because the sender made more of an investment in communicating the contents. This may also be because “narrowcasting”—information disclosure to an individual or small audience—“encourages people to share content that is useful to the message recipient” relative to the traditional “broadcasting” method,<sup>66</sup> which encompasses the practice of putting a poster in the break room. As an example, the utter lack of regard that workers tend to give “broadcasted” wall postings is depicted especially well in John Irving’s novel *The Cider House Rules*.<sup>67</sup> As another example, union organizers who shout and wave their arms from road medians outside of a workplace (thanks to a long line of decisions pitting employer property rights against employee freedom of association rights) hardly command the type of positive regard that a worker might desire in a representative.<sup>68</sup>

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65 *Id.* at 8, 9, 18.

66 Alixandra Barasch & Jonah Berger, Broadcasting and Narrowcasting: How Audience Size Impacts What People Share (unpublished manuscript), available at <https://marketing.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=5344>.

67 See JOHN IRVING, *THE CIDER HOUSE RULES* (1985) (novel in which migrant workers are long oblivious to the namesake notice of rules posted on the wall of their workplace).

68 See generally Micah Wissinger, Note, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331 (2003).

It is also increasingly the case that people expect important information disclosures—especially those involving legal rights and important financial consequences—be made to them directly. As the NLRB explained in *J & R Flooring*, “[n]otices posted on traditional bulletin boards may be inadequate to reach employees . . . who are accustomed to receiving important information . . . electronically and are not accustomed to looking for such information on a traditional bulletin board.”<sup>69</sup>

An individual disclosure of the rights described in the various posters upon hire with receipt verified by the employee’s signature would—in contrast to the current wall poster framework—elevate the perceived importance of the contents. This change of medium suggesting increased importance would in turn make it more likely that employees would indeed read the materials, become aware of the rights described in them, and ultimately be more likely to ensure that those rights are respected and enforced. (Employers are also likely to act differently when faced with a workforce that knows its rights.) Given the precedent of financial industry regulatory disclosures and state regulations concerning individualized wage and hour disclosures there is simply no compelling reason why this framework cannot also be adopted for general workers’ rights disclosures—unless challenged on First Amendment grounds.

## II. The Challenge of the D.C. Circuit’s First Amendment Analysis of the National Labor Relations Board’s Posting Regulation.

### A. Background on the NLRB’s Enjoined Posting Requirement

Among the range of workplace rights, those conferred by the NLRA are “arguably the most important . . . of all,”<sup>70</sup> because they encourage activity that helps enforce and even establish other workplace rights. The explicit purpose of the NLRA is to “encourag[e]” and “protect” workers’ use of their right to collective action, which is “fundamental to” developing “equality of bargaining power”

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69 *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9, \*3, 2010-2011 NLRB Dec. (CCH) ¶ 15,325, \*3 (Oct. 22, 2010).

70 Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 470 (1995).

between employers and workers.<sup>71</sup> The Act could not be clearer in its endorsement of concerted worker action:

It is hereby declared to be the policy of the United States to . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>72</sup>

Section 6 of the Act explicitly allows the Board to promulgate necessary regulations.<sup>73</sup>

The Board determined that many workers are ignorant of their rights under the Act.<sup>74</sup> The Board concluded that a posting requirement is necessary for “carry[ing] out the provisions of” the Act.<sup>75</sup> “[E]ncouraging” the “exercise by workers of full freedom of association”<sup>76</sup> is a provision of the Act. In short, the Board used its explicitly granted rule-making authority<sup>77</sup> to encourage exercise of rights to collective activity by simply ensuring that workers are informed of these rights.<sup>78</sup> As the Supreme Court noted in *Weingarten*,<sup>79</sup> it is the NLRB’s job—not the courts’—to “determine whether or not the ‘need’ [for a Board rule] exists in light of changing industrial practices and the Board’s cumulative experience in dealing with labor-

71 29 U.S.C. § 151 (2012).

72 *Id.*

73 *Id.* § 156.

74 Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006-01 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (“The Board believes that many employees protected by the NLRA are unaware of their rights under the [Act] . . .”).

75 *Id.* (“[B]y promulgating the notice-posting rule, the Board is taking a modest step that is ‘necessary to carry out the provisions’ of the Act, 29 U.S.C. 156, and that also fills a statutory gap . . .”).

76 *Id.* § 151.

77 *Id.* § 156 (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary . . .”).

78 Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80410-01 (proposed Dec. 22, 2010) (codified at 29 C.F.R. pt. 104).

79 *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

management relations.”<sup>80</sup> The *Weingarten* Court argued further that the NLRB’s “special competence in this field is the justification for the deference accorded its determination.”<sup>81</sup>

Given the commanding statutory language from Congress to the Board, the Board’s explicit rule-making authority, the Board’s adherence to Administrative Procedure Act rules in exercising this authority, and Supreme Court decisions urging courts to allow the Board to do its job without interference, it was reasonable for Peter DeChiara to state in 1995 that “the Board has the authority to promulgate” a notice-posting rule, and that if such a rule were adopted, it “*would easily withstand judicial scrutiny.*”<sup>82</sup> If only it were so.

Instead, the 4th<sup>83</sup> and D.C.<sup>84</sup> Circuits struck down the Board’s notice posting rule. Further, the D.C. Circuit—despite concluding that the Board lacked authority to promulgate the regulation<sup>85</sup> and thus rendering additional analysis unnecessary—went out of its way to strike the rule on First Amendment grounds.

The rationale used in the D.C. Circuit’s First Amendment challenge, though flawed, casts a shadow on the many worker and consumer rights disclosures currently on the books. The decision also creates a new challenge for any new legislation and regulation designed to inform workers of their rights. As new laws and regulations informing workers (and consumers or the general public) of their rights continue to pass<sup>86</sup> they risk this First Amendment

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80 *Id.* at 266.

81 *Id.* Further, in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the Court noted it had “long recognized that considerable weight should be accorded to” an agency’s interpretation of its own statute. 467 U.S. 837, 844 (1984). Recognizing that agency interpretations have the benefits of agency expertise, *id.* at 865, the Court held that “regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. Further, legal challenges to “the wisdom of the agency’s policy . . . must fail.” *Id.* at 866. *But see* *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (holding that agencies can claim no special expertise in interpreting a statute confining its jurisdiction). The question becomes whether the NLRB is interpreting its area of expertise or a restriction on its power within its enabling statute.

82 DeChiara, *supra* note 70, at 435 (emphasis supplied).

83 *Chamber of Commerce v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013).

84 *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

85 *Id.* at 960–64 (arguing that the board lacked authority for the equitable tolling provision of the posting rule and then striking the remainder of the rule as non-severable).

86 *See supra* Part I.B.2–3.

challenge. It is therefore necessary to outline the rationales provided by the D.C. Circuit as well as the arguments against them.

### B. Flaws in National Association's First Amendment Analysis

There are a number of problems with the *National Association*<sup>87</sup> decision. First, it seems to directly contradict a ruling the same court made ten years prior. In 2003 the D.C. Circuit upheld a Bush Executive Order that government contractors post anti-union notices in their work areas.<sup>88</sup> In that case, *UAW-Labor Employment & Training Corp. v. Chao* (“UAW”), the D.C. Circuit stated that it “did not reach the question whether the posting requirement violated the [government] contractors’ freedom of speech” because that question was not before it.<sup>89</sup> Despite “not reaching” the question, it proclaimed that “the First Amendment includes not only the right to speak, but also the right not to speak” and yet “an employer’s right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks.”<sup>90</sup>

*National Association* examines the same “poster requirement” issue in more or less the opposite context: Whereas the posting regulation in *UAW* was designed to stifle the United States’ official policy to encourage collective bargaining,<sup>91</sup> the poster at issue in *National Association* was designed according to this official policy—and (unlike *UAW*) on the authority of the administrative body charged with “carrying out the provisions of”<sup>92</sup> that official policy. In *National Association*, the D.C. Circuit again claimed to “not reach” the constitutional question,<sup>93</sup> yet the vast majority of its analysis of the posting requirement uses precedent considering First Amendment

87 717 F.3d 947.

88 *UAW-Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 362 (D.C. Cir. 2003).

89 717 F.3d at 958 (asserting that the scope of its *UAW* decision did not reach constitutional matters).

90 *UAW*, 325 F.3d at 365 (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–16 (2d Cir. 2001); *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975)).

91 *See* 29 U.S.C. § 151 (2012).

92 *Id.* at § 156.

93 717 F.3d at 955 n.8 (stating that “we need not decide” whether the scope of the First Amendment in the context of considering NLRA § 8(c) “is an issue”).



issues.<sup>94</sup> The D.C. Circuit offers no justification for examining First Amendment precedent instead of precedent directly addressing the NLRA.<sup>95</sup>

A second flaw in *National Association* is that it uses three inapposite cases about the First Amendment rights of individual persons to support its opinion that the posting regulation violates the First Amendment. The first case, *Barnette*, held that children cannot be required to salute the American flag and recite the Pledge of Allegiance.<sup>96</sup> In other words, *Barnette* concerns compelled ideological and political speech and action of individual minors. The second, *Wooley*, held that drivers cannot be required to display a license plate that has the New Hampshire state motto “Live Free or Die” embossed on it.<sup>97</sup> This compelled ideological/political message was imposed on individual drivers and did not serve an important and established government interest. Finally, *Riley* held that a statute could not force fundraising professionals to disclose to potential donors facts about the “percentage of gross receipts actually turned over to charities by the fundraiser.”<sup>98</sup> *Riley* therefore stands for the idea that individual persons cannot be compelled to disclose facts.

The Board’s posting regulation does not compel any individual to speak or act. This is a key point because there is precedent that, regarding “compelled” speech, companies necessitate less First Amendment protection than individuals do.<sup>99</sup> The NLRB’s poster

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94 See *id.* at 956–58.

95 See *id.* at 956 (“Our doubt stems, in part, from a comparison of § 8(c) with the law established under the First Amendment. We approach the question by considering some firmly established principles of First Amendment free-speech law.”).

96 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625–26, 642 (1943).

97 *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

98 *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 786 (1988).

99 See, e.g., *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637, 651 (1985) (noting that, regarding “commercial speech,” which deserves “less extensive” protection “than that afforded [to] ‘noncommercial speech,’” the “constitutionally protected interest in *not* providing any particular *factual information* . . . is minimal.”) (emphasis added) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980)); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) (holding that a state law mandating environmental/safety disclosure about mercury in lightbulbs did not offend the First Amendment and recognizing that, while “compelled disclosure of truthful, factual information” can sometimes “trench on privacy concerns,” there is “less weight . . . however, in commercial



also does not contain ideological or political speech, as addressed in *Barnette* and *Wooley*. Rather, the poster simply states the law.

Third, the *National Association* decision mischaracterizes a 2013 Supreme Court case in its assertion that “the ‘dissemination’ of messages others have created is *entitled to the same level of protection* as the ‘creation’ of messages.”<sup>100</sup> The D.C. Circuit cited *Sorrell v. IMS Health Inc.* to support this assertion, but *Sorrell* only states that “the creation and dissemination of information are speech *within the meaning of* the First Amendment.”<sup>101</sup> *Sorrell* made no assertion about whether dissemination of messages requires the same level of protection as their creation.<sup>102</sup>

Finally, the decision ignores the well-established twin principles that courts should avoid constitutional issues,<sup>103</sup> and—when unavoidably faced with them—err on the side of upholding constitutionality.<sup>104</sup> Its broad pronouncements, such as “[t]he right to disseminate another’s speech necessarily includes the right to decide not to disseminate it,”<sup>105</sup> unnecessarily and quite directly challenge the notice provisions of decades of established statutes and regulations. In the realm of employment law, these statutes and regulations include, but are not limited to, relevant provisions of the Age Discrimination in Employment Act (ADEA),<sup>106</sup> the Americans with Disabilities Act (ADA),<sup>107</sup> the Consolidated Omnibus Budget Reconciliation Act (COBRA),<sup>108</sup> the Employee Polygraph Protection

settings”) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Am. Future Sys., Inc. v. Pa. State Univ.*, 688 F.2d 907, 915–16 (3d Cir.1982)).

100 *Nat’l Ass’n of Mfrs.*, 717 F.3d at 956 (emphasis added) (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011)).

101 *Sorrell*, 131 S. Ct. at 2667.

102 *See id.*

103 The decision struck the Board’s posting regulation on other grounds, so the First Amendment analysis was unnecessary. *See id. passim*. On the issue of avoiding constitutional questions, *see, e.g.*, *Jones v. United States*, 529 U.S. 848, 857 (2000); *Edmond v. United States*, 520 U.S. 651, 658 (1997) (stating that court “must avoid” constitutional issues where possible); *Nw. Hosp., Inc. v. Hosp. Serv. Corp.*, 687 F.2d 985, 992 (7th Cir. 1982) (“The same principle” of “avoid[ing] potential constitutional” problems with statutes “applies equally to administrative regulations.”); *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939) (same).

104 *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

105 *Nat’l Ass’n of Mfrs.*, 717 F.3d at 956.

106 29 U.S.C. § 627 (2012).

107 42 U.S.C. § 12115 (2012).

108 29 U.S.C. § 1166 (2012).

Act,<sup>109</sup> the Fair Labor Standards Act (FLSA),<sup>110</sup> the Family and Medical Leave Act (FMLA),<sup>111</sup> the Genetic Information Nondiscrimination Act,<sup>112</sup> the Migrant & Seasonal Agricultural Workers Protection Act,<sup>113</sup> the Occupational Safety and Health (OSH) Act,<sup>114</sup> Title VII,<sup>115</sup> the Uniformed Services Employment & Reemployment Rights Act,<sup>116</sup> and the Vietnam Era Veterans Readjustment Act.<sup>117</sup> It also implicates disclosure provisions of laws and regulations in the areas of public safety, public information, or consumer protection, such as Material Safety Data Sheet information,<sup>118</sup> the Truth-in-Lending Act,<sup>119</sup> the Byrd Amendment to the Lobbying Disclosure Act,<sup>120</sup> and even the FDA's mandated nutrition labeling on food and beverages.<sup>121</sup>

In this context, it is no wonder that the Board declined to appeal *National Association*. For all of the decision's flaws, the prospect of creating unfavorable precedent at the Supreme Court level was too risky. But steady passage of notification laws at the state level (such as TWRKL in Massachusetts) may help attenuate this threat.<sup>122</sup> So too may pointing out the sheer number of laws and regulations that would be invalidated if this D.C. Circuit reasoning were applied to them—including the ubiquitous financial disclosure regulations.

### III. Workers Must Have Access to Each Other For Meaningful Labor Rights.

Workers' rights under the NLRA are more complex than their other rights because the NLRA, unlike other laws, confers collective rights as opposed to individual rights. In order to have any meaningful access to exercising this collective right workers need access to their coworkers. Access to coworkers was taken for granted

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109 29 U.S.C. § 2003 (2012).

110 29 C.F.R. § 516.4 (2014).

111 29 U.S.C. § 2619 (2012).

112 29 C.F.R. § 1601.30 (2014).

113 29 U.S.C. § 1821(b) (2012).

114 29 U.S.C. § 657(c)(1) (2012).

115 42 U.S.C. § 2000e-10 (2012).

116 38 U.S.C. § 4334 (2012).

117 41 C.F.R. § 60-250.5(a)(9)-(11) (2014).

118 *See, e.g.*, 40 C.F.R. § 370.20 (2014).

119 *See, e.g.*, 15 U.S.C. § 1631 (2012).

120 31 U.S.C. § 1352 (2012).

121 21 C.F.R. § 101.9 (2014).

122 *See supra* notes 1, 53.

in the industrial workplace model of the first half of the 20th Century when Congress passed the NLRA. Just as workers can no longer necessarily take knowledge of who their employer is for granted,<sup>123</sup> many cannot take coworker access for granted.

As union density continues to decline from its mid-1950s peak, the relative importance of Section 7 rights—the “best kept secret”<sup>124</sup> of the NLRA—increases. For exercising this right to “protected, concerted activity” workers need knowledge of who their coworkers are and the means to communicate with them. While organizing unions can get names and addresses of workers within a proposed collective bargaining unit shortly before an election through what is called an “*Excelsior* list,”<sup>125</sup> there is no recognized right or means by which an individual non-union worker covered under the NLRA may obtain this information. The final section of this Article argues that for the NLRA to be effective in the 21st Century, rights disclosure requirements must be paired with a coworker access or communication right. Such a right could arguably be read into Section 8(a)(1) of the Act, especially given recent extensions to *Weingarten*<sup>126</sup> rights. Further, especially given the precedent of *J & R Flooring*<sup>127</sup> (discussed in Part I, *supra*), there is a good argument that coworker contact information should include e-mail or other electronic access.<sup>128</sup>

### A. Sections 7 and 8(a)(1) of the NLRA and *Weingarten* Rights Support a Right to Coworker Access or Communication.

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123 See *supra* note 41 and accompanying text.

124 William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 298 (2002) (“The rights and protections of nonunion employees under the NLRA are perhaps the best-kept secret in labor law.”); see also Wissinger, *supra* note 68, at 331.

125 See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (holding that during a union organizing drive the Board may order the employer to provide the organizing union with names and addresses of eligible voters within a week of an election agreement).

126 *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975) (holding that unionized employee had the right to have a shop steward present in a meeting that she reasonably believed could result in discipline).

127 356 N.L.R.B. No. 9, 2010-2011 NLRB Dec. (CCH) ¶ 15,325 (Oct. 22, 2010).

128 See also Wissinger, *supra* note 68, at 333.

Section 7 of the NLRA confers the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”<sup>129</sup> and Section 8(a)(1) enforces this right by forbidding employers from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in” Section 7.<sup>130</sup> To violate Section 8(a)(1) is an Unfair Labor Practice (ULP).<sup>131</sup> Paired with the extension of *Weingarten* rights to non-union employees from a 2001 D.C. Circuit case<sup>132</sup> it becomes clear that—at least in situations where *Weingarten* rights apply—employers commit a ULP when they deny a non-union worker access to a coworker.

This should logically also be the case outside of the *Weingarten* context (which only applies to situations with the potential for discipline). After all, Section 7 provides the most fundamental of labor rights—the right of employees to “engage” with each other not only “for the purpose of” collective bargaining through a union, but also for other forms of “mutual aid or protection.”<sup>133</sup> If a worker wished to communicate with other workers about the prospect of forming a union, but could not due to the geographical or informational constraints that fissured employment relationships increasingly impose, she should have a right to access a coworker, or at least that coworker’s contact information for exercise of her Section 7 rights. If an employee cannot engage in concerted activity because she does not have the knowledge and/or means to contact a coworker then the employer should have a duty to provide contact with coworkers, or else provide their contact information. Further, if her employer refuses to provide means of contact, the Board should interpret that refusal as an unlawful “interfere[nce] with” or “restrain[t]” of the employee’s Section 7 right to protected, concerted activity. In other words, refusal to provide such means or information should constitute a ULP pursuant to Section 8(a)(1). Without access to coworkers, Section 7 rights simply disappear. In passing the NLRA, Congress explicitly encouraged unionization, and it is entirely inconsistent with the NLRA for employers to circumvent Section 7 rights by choosing organizational structures that render exercise of Section 7 rights (to say nothing of actual unionization) all but impossible.

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129 29 U.S.C. § 157 (2012).

130 *Id.* at § 158(a)(1).

131 *Id.*

132 *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001).

133 29 U.S.C. § 157.

## B. The Rationale of *Excelsior* Supports a Coworker Contact Right.

An *Excelsior* list provides union organizers with a list of the employees in a proposed bargaining unit shortly before a union representation election, including the employees' home addresses.<sup>134</sup> Part of the reason why the Board requires that employers provide an *Excelsior* list (a requirement that has been affirmed by the Supreme Court<sup>135</sup>) is the recognized difficulties of employee access. The Board noted that it was not only union representatives who had trouble reaching bargaining unit members: "[M]any employees are unknown to their fellows," whether because of the size of the employer, turnover, or factors such as "layoff status, sick leave, leave of absence, military leave, etc."<sup>136</sup> If an employer must provide employee contact information to an organizing union in order to effect workers' Section 7 right to "bargain collectively through representatives of their own choosing"<sup>137</sup> then it would certainly be consistent to hold that employers must provide workers' contact information to each other for the even more fundamental "mutual aid and protection" right from Section 7.

The Board also dismisses objections to the *Excelsior* list as less weighty than the "substantial public interest" in favor of it because the employee contact information is an important means toward enabling free union elections<sup>138</sup> and hence realizing the purpose of the NLRA. While a union organizer visiting a worker's home does implicate the worker's privacy interest, the "fundamental" interest in "a fair and free" union election outweighs the privacy interest.<sup>139</sup> Surely if the NLRA and reviewing courts support having strangers who are paid to organize unions visit workers' homes, and ordering employers to disclose employee addresses so that organizers may do so, then they should also support allowing one worker to access another via e-mail.

Finally, e-mail is the obvious method of contact for worker

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134 *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

135 *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

136 *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1241 (1966).

137 29 U.S.C. § 157.

138 156 N.L.R.B. at 1243.

139 *Id.* at 1246 n.27.

organization in light of fissured employment relationships and technological developments.<sup>140</sup> The argument that an employee “might be able to communicate with [other] employees” through “other avenues” besides the proposed mode was made and rejected in *Excelsior*,<sup>141</sup> and the Board has proposed that it is time to finally add phone numbers and e-mail addresses to *Excelsior* lists,<sup>142</sup> given the changing nature of work relationships in the 21st Century.

### Conclusion

New disclosure and coworker contact requirements may face an uphill battle in the current political and legal climate, especially given the First Amendment challenge of the *National Association*<sup>143</sup> decision. They are also not a panacea for the many problems facing workers today—measures to address illegal and unfair work practices and conditions must be as diverse as the array of problems. But this battle to give workers the knowledge to exercise their rights—the most basic tool of defense and empowerment—is nevertheless vital. It is well-established that the decline of organized labor is a large factor in the stagnation of middle-class wages and growing inequality in America.<sup>144</sup> This trend is not sustainable. History teaches us that unchecked growth of inequality can eventually lead to dire consequences.<sup>145</sup> By enabling workers’ knowledge of their rights and their access to one another, the resulting revitalization of collective activity to improve wages and working conditions could perhaps help mitigate the growth of inequality and its eventual consequences.

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140 See Wissinger, *supra* note 68, at 333.

141 156 N.L.R.B. at 1245.

142 *The National Labor Relations Board Proposes Amendments to Improve Representation Case Procedures*, NAT’L LAB. REL. BOARD (Feb. 5, 2014), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-proposes-amendments-improve-representation>.

143 *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

144 See, e.g., Heidi Shierholz & Lawrence Mishel, *A Decade of Flat Wages: The Key Barrier to Shared Prosperity and a Rising Middle Class*, ECON. POL’Y INST. (Aug. 21, 2013), <http://www.epi.org/publication/a-decade-of-flat-wages-the-key-barrier-to-shared-prosperity-and-a-rising-middle-class/>.

145 See, e.g., Dale Archer, *Could America’s Wealth Gap Lead to a Revolt?*, FORBES (Sept. 4, 2013, 11:08 AM), <http://www.forbes.com/sites/dalearcher/2013/09/04/could-americas-wealth-gap-lead-to-a-revolt/>.