No. 15-1915

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARIO SALINAS, et al.,

Plaintiffs-Appellants,

v.

COMMERCIAL INTERIORS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases--continued:

Page

Cases--continued:

Statutes:

Page

Code of Federal Regulations:

Miscellaneous:

Page

Miscellaneous--continued:

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The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants ("Plaintiffs"). The district court applied the wrong legal analysis in determining that Defendant-Appellee Commercial Interiors, Inc. ("Commercial") was not Plaintiffs' joint employer under the Fair Labor Standards Act ("FLSA" or "Act"). The district court focused on the relationship between Commercial and its subcontractor who supplied Plaintiffs to work for Commercial instead of the economic realities of the working relationship between Plaintiffs and Commercial.

THE SECRETARY'S INTEREST AND AUTHORITY TO FILE

The Secretary has a strong interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. The Secretary is particularly interested in the scope of the employment relationship under the FLSA and whether an employee has a joint employer for the work performed. Businesses are increasingly avoiding direct employment of workers by using intermediaries, such as management companies, contractors, staffing agencies, or other labor providers, to supply them with labor. The Department of Labor ("Department") regularly encounters in investigations situations where more than one business is involved in the work performed and the employee may have two employers. All businesses that benefit from an employee's work and meet the legal standard for employing that employee are responsible for FLSA compliance.

The Department is committed to pursuing joint employment in FLSA cases where appropriate. For example, the Secretary recently brought a successful enforcement action against DirecTV in which the district court ruled on summary judgment that DirecTV jointly employed the employees of a subcontractor whom it engaged to install its satellite television services. See Perez v. Lantern Light Corp., No. C12–01406 RSM, 2015 WL 3451268 (W.D. Wash. May 29, 2015).

In addition, the Department has issued guidance on the legal analysis applicable in joint employment cases. In June 2014, the Department issued guidance explaining how joint employment applies in FLSA cases arising in particular employment situations in the home health care industry. See Administrator's Interpretation No. 2014-2, Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act (Jun. 19, 2014) ("Home Care AI"), available at www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf. And in January 2016, the Department issued guidance explaining that an employer who uses an intermediary to provide it with workers may jointly employ those workers under the FLSA and the Migrant and Seasonal Agricultural Workers Protection Act ("MSPA") depending on the economic realities of the employer's relationship with the workers. See Administrator's Interpretation No. 2016-1, Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act (Jan. 20, 2016) ("Joint Employment AI"),

available at www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.[1]

The Department's consistent interpretations of the FLSA as set forth in the Joint Employment AI are entitled to Skidmore deference. See Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944) (the Department's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); Perez v. Mountaire Farms, Inc., 650 F.3d 350, 371 n.12 (4th Cir. 2011) (according Skidmore deference to a Department advisory memorandum setting forth the Secretary's positions regarding compensable time under the FLSA).

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary to file this brief.

STATEMENT OF THE ISSUE

Whether the district court erred by resolving an issue of joint employment under the FLSA by analyzing the potential joint employer's subcontracting relationship with the intermediary which provided the workers instead of the economic realities of

[1] A related employment relationship issue is whether a worker is an employee or independent contractor, and the Department recently issued guidance on the legal standard for making such determinations under the FLSA. See Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (Jul. 15, 2015) ("Misclassification AI"), available at www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

the working relationship between the potential joint employer and the workers.

STATEMENT OF THE CASE

A. Factual Background

Commercial is a construction company that does interior finishing and has a number of its own drywall employees. See JA1135.[2] J.I. General Contractors ("JI") is a company that installs drywall, frames, and ceilings. See id. Commercial engaged JI as a subcontractor on construction projects, and JI provided Commercial with workers, including Plaintiffs, to work on those projects. See id. JI primarily existed to provide workers to Commercial: JI had at least twelve contracts with Commercial and only one or two contracts with another company (which went out of business). See JA1135-1136.

JI owned no tools and provided none to the employees; instead, Commercial owned and provided all of the tools and equipment used by the employees on its projects, except for some small tools that the employees owned and brought themselves. See JA1136. Commercial provided all of the supplies and materials used by Plaintiffs to perform the drywall work, as well as "gang boxes" at the work sites so that Plaintiffs could store their tools there. See id.

[2] "JA" refers to the Joint Appendix filed by the parties.

Plaintiffs met at a 7-Eleven, and JI transported them to the worksite. See JA1137. Plaintiffs wore hardhats and vests with Commercial's logo and had identification cards describing them as Commercial's employees. See JA1136. According to Plaintiffs, they were told that they worked for Commercial and were instructed to tell others that they worked for Commercial. See id. Even JI's supervisors wore shirts bearing Commercial's logo when working on its projects. See id.

Commercial's foremen "checked" Plaintiffs' work "throughout the day" and immediately told JI's supervisors to fix the work if the work did not meet Commercial's standards. JA1136. Commercial's foremen "from time to time" provided instructions to Plaintiffs through JI's supervisors (who translated the instructions from English to Spanish). Id. Commercial's superintendent also instructed JI about how to adjust its staffing levels at the worksites. See id. Commercial's project managers had to approve JI's work before JI was paid. See id. JI did not invoice Commercial; instead, Commercial generally paid JI based on how much work had been completed. See id. JI did not keep written records of the employees' hours worked, but Commercial did keep daily and weekly time records of those hours. See JA1137.

B. District Court's Decision

Plaintiffs sued Commercial and JI alleging that the two employers violated the FLSA and Maryland law by not compensating them for all hours worked and not paying them time and a half for all overtime hours worked. See JA37-55. Plaintiffs and Commercial each filed a summary judgment motion as to whether Plaintiffs were jointly employed by Commercial under the FLSA. See JA1135. The district court (Judge J. Frederick Motz) determined that Commercial was not Plaintiffs' joint employer and granted summary judgment to Commercial. See JA1135-1141.

In its decision, the district court described Plaintiffs' case as "sympathetic" because they "are members of a minority group that may have been victimized by JI and Commercial" and because "JI (like many subcontractors) is thinly capitalized and is dependent for its business upon Commercial." JA1137. The district court stated, however, that "[a]s a general proposition, it cannot be disputed that general contractors, subcontractors, and sub-subcontractors are independent entities" and that this proposition "supports that the sub-contract relationship between Commercial and JI does not make Commercial a 'joint employer' of laborers who were employed by JI." Id.

The district court used the following factors to determine if Commercial jointly employed Plaintiffs:

> 1. Was the relationship between JI and Commercial one that traditionally has been recognized in the law?
>
> 2. Was the amount paid by Commercial to JI pursuant to the contract between them sufficient to permit the direct employer to meet its legal obligations under the FLSA while earning a reasonable profit?
>
> 3. Did the relationship between JI and Commercial appear to be a "cozy" one, i.e[.], one that is virtually exclusive and shaped by things other than objective market forces?
>
> 4. Is the alleged violation of the FLSA one of which Commercial, during the ordinary course of performance of its own duties, should have been aware?
>
> 5. Are there other indicia that the relationship between JI and Commercial was designed to abuse the employees of the direct employer?

JA1138. The district court's employment relationship analysis thus focused on whether JI was a legitimate subcontractor of Commercial. See id.

The district court found that the first, second, and fourth factors favored a conclusion that Commercial did not jointly employ Plaintiffs: Commercial's relationship with JI was "one of a subcontractor and a sub-subcontractor," which "has traditionally been recognized in the law"; "although JI neither needed or possessed substantial capital investments, there is no evidence that Commercial paid it less than was required for JI to meet its FLSA duties while earning a reasonable profit"; and "there is no evidence that Commercial knew of the primary FLSA violation alleged by plaintiffs." JA1138-1139. On the other hand, the district court found that Plaintiffs presented

evidence to support the third and fifth factors: JI contracted "almost exclusively" with Commercial and their relationship "appears to have been quite informal," and "at least some of JI's employees did not speak English." JA1139.

The district court concluded that this evidence "gives rise only to a suspicion that Commercial was abusing its relationship with JI, and suspicion is not sufficient to withstand a summary judgment motion." JA1139. In the district court's view, "[i]f contractors like Commercial are to be held liable for FLSA violations committed with subcontractors with whom they enter into a relationship, it is Congress, not the courts, that must change the rules of the game." JA1139-1140.

SUMMARY OF ARGUMENT

Under the FLSA, workers are employees of all employers on whom, as a matter of economic reality, they are economically dependent, meaning that workers may have joint employers for work performed. Here, the district court rejected the argument that Plaintiffs were jointly employed by Commercial because of Commercial's subcontracting relationship with JI, the employer who provided Plaintiffs to work for Commercial. The district court erred by focusing on that subcontracting relationship instead of analyzing the economic realities of the working relationship between Commercial and Plaintiffs. Economic realities are the hallmark of determining employment under the

FLSA. Applying an economic realities analysis to the facts of this case as guided by the Department's MSPA joint employment regulation (the FLSA and MSPA share the same broad scope of employment and joint employment), there is considerable evidence that Plaintiffs were jointly employed by Commercial.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO APPLY AN ECONOMIC REALITIES ANALYSIS TO DETERMINE WHETHER COMMERICAL WAS A JOINT EMPLOYER

1. The Legitimacy of a Subcontracting Relationship Is Not Dispositive of Joint Employment under the FLSA.

The district court's joint employment analysis failed to examine the economic realities of Plaintiffs' working relationship with Commercial. The district court instead focused its analysis on the subcontracting relationship between Commercial and JI. See JA1138-1139. The district court provided no basis in the FLSA or relevant caselaw for its analysis. Instead, it based its analysis on the proposition that an employer (Commercial) is not responsible for FLSA violations committed by an independent entity (JI) engaged by the employer as a subcontractor. See JA1137. In the district court's view, as long as the subcontract relationship is not a sham, the contractor is insulated from liability for FLSA violations committed by the subcontractor and should be so

insulated unless Congress "change[s] the rules of the game." JA1138-1140.[3]

However, the "rules of the game" provided by Congress — i.e., the FLSA — already establish a broad scope of employment. Under the FLSA, workers are employed by all employers on whom, as a matter of economic reality, they are economically dependent. Indeed, an employer who subcontracts out work (whether legitimately or not) is not immune from being found to jointly employ the subcontractor's employees under the FLSA. See Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973) (subcontractor's status as a bona fide

[3] Judge Motz ruled similarly in granting a motion to dismiss by DirecTV in an FLSA case brought by workers who were employed by DirecTV's subcontractors and who installed DirecTV's services. See Hall v. DirecTV, LLC, Nos. JFM-14-2355 & JFM-14-3261, 2015 WL 4064692 (D. Md. Jun. 30, 2015). Judge Motz concluded that the workers' allegations failed to show that DirecTV could be their joint employer. See id. at *2. Judge Motz stated that "the allegations show only that DIRECTV adopted a reasonable business model that allowed for the decentralization of decision-making authority regarding the employment of technicians who install its equipment." Id. Judge Motz added: "Of course, if [DirecTV's subcontractors] were undercapitalized and merely charades created by DIRECTV that followed every suggestion and payment decision made by DIRECTV, that would show, perhaps conclusively, DIRECTV's joint employer status." Id. According to Judge Motz, however, the workers alleged nothing that implied that the subcontractors "were undercapitalized or slavishly followed every suggestion made by DIRECTV in regard to the status and method of payment of the [workers]. Absent such allegations, it cannot be inferred that DIRECTV was the joint employer of the [workers]." Id. Judge Motz's decision in that case is on appeal before this Court (No. 15-1857) and is erroneous for the same reasons that his decision in this case is erroneous.

independent contractor "does not necessarily imply the [sub]contractor is solely responsible for his employees under the [FLSA]"; "[a]nother employer may be jointly responsible for the [sub]contractor's employees"); Mendoza v. Essential Quality Constr., Inc., 691 F. Supp.2d 680, 686 (E.D. La. 2010) ("Although ... a general contractor/subcontractor relationship does not establish joint employment, neither does the fact that such relationship exists preclude the possibility that the employees of the subcontractor are also the employees of the general contractor.").

Courts have concluded that contractors may jointly employ their subcontractors' employees under the FLSA, particularly in construction cases. See Lantern Light, 2015 WL 3451268, at *2-17 (applying an economic realities analysis and ruling that employer jointly employed its subcontractor's employees who installed its satellite television services); Chao v. Westside Drywall, Inc., 709 F. Supp.2d 1037, 1060-63 (D. Or. 2010) (applying an economic realities analysis and denying employer's summary judgment motion because there was sufficient evidence for a reasonable jury to find that the employer jointly employed its subcontractor's construction workers); Lemus v. Timberland Apartments, L.L.C., No. 3:10-cv-01071-PK, 2011 WL 7069078, at *5-19 (D. Or. Dec. 21, 2011) (Mag. Recommendation) (applying an economic realities analysis and ruling that employer jointly

employed its subcontractor's construction workers), adopted by 2012 WL 174787 (D. Or. Jan. 20, 2012); see also Griffin & Brand, 471 F.2d at 237-38 (applying an economic realities analysis and ruling that farm operator jointly employed harvest workers whom it engaged through crew leaders); Deras v. Verizon Maryland, Inc., No. DKC 09–0791, 2010 WL 3038812, at *4-8 (D. Md. Jul. 30, 2010) (denying Verizon's motion to dismiss and finding that it could jointly employ its subcontractor's laborers under the FLSA).

There are, of course, many contractor-subcontractor relationships where the contractor is not a joint employer of the subcontractor's employees, and the Secretary is not arguing that an employer who subcontracts out work is automatically a joint employer of its subcontractor's employees. Rather, an economic realities analysis is necessary in each case. See Lemus, 2011 WL 7069078, at *19 ("My finding today rests, of course, on the unique facts presented and does not imply that all developer/general contractors are joint employers of their subcontractors' employees."). The district court failed to apply that analysis here.

2. The Broad Scope of Employment and Joint Employment under the FLSA.

The FLSA's broad definition of employment and the relevant regulations and caselaw support a broad scope of joint

employment. The FLSA defines "employee" as "any individual employed by an employer," 29 U.S.C. 203(e)(1), and "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d). The FLSA's definition of "employ" "includes to suffer or permit to work." 29 U.S.C. 203(g). The Supreme Court has noted these definitions' breadth:

> A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the [FLSA] unless specifically excluded.

U.S. v. Rosenwasser, 323 U.S. 360, 362-63 (1945). The "suffer or permit" definition of employment is "'the broadest definition that has ever been included in any one act.'" Id. at 363 n.3 (quoting 81 Cong. Rec. 7657 (1938) (statement of Sen. Black)). This Court has recognized that these definitions "are very broadly cast." Shultz v. Falk, 439 F.2d 340, 344 (4th Cir. 1971).

The FLSA's "suffer or permit to work" standard for defining employment necessarily includes as employers persons or entities who use intermediaries to provide them with labor. Prior to the FLSA's enactment, "suffer or permit" or similar phrasing was commonly used in state child labor laws and was "designed to

reach businesses that used middlemen to illegally hire and supervise children." Antenor v. D & S Farms, 88 F.3d 925, 929 n.5 (11th Cir. 1996). A key rationale underlying the "suffer or permit to work" standard was that an employer should be liable for the child labor if it had the opportunity to detect work being performed illegally and the ability to prevent it from occurring. See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 29-31 (N.Y. 1918) (milk delivery company employed the child hired by its delivery driver because it knew or could have known about the child worker and was thus liable for the child labor violation). The "suffer or permit to work" standard was designed to expand child labor laws' coverage beyond the person who directly hired the child laborer and bring under the laws' coverage those employers who engaged "middlemen" that hired children.

The FLSA joint employment regulation states that a single worker may be "an employee to two or more employers at the same time." 29 C.F.R. 791.2(a); see Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) ("The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act."). According to the FLSA regulation, if "the employee performs work which simultaneously benefits two or more employers," joint employment generally exists where: (1) "there is an arrangement between the employers

to share the employee's services" or "to interchange employees"; (2) one employer acts "directly or indirectly in the interest of the other employer ... in relation to the employee"; or (3) the employers are associated "with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. 791.2(b).

This Court has applied the FLSA regulation to find joint employment. For example, this Court concluded that security guards were jointly employed by a security firm and the individual that the workers protected because the firm and the individual were associated with respect to the guards' employment and shared common control over them. See Schultz v. Capital Int'l Sec., 466 F.3d 298, 306 (4th Cir. 2006) ("[T]he entire employment arrangement fits squarely within the third example of joint employment in the regulation."); cf. Falk, 439 F.2d at 344-45 (a building management business was a joint employer, with the buildings' owners, of the maintenance workers employed at the buildings).

3. An Economic Realities Analysis Applies to Determine Whether an Employer Jointly Employs Workers Provided to It by an Intermediary.

Consistent with the FLSA's broad scope of employment, and as discussed in the Joint Employment AI and as relevant to this

case, joint employment may exist where employees are employed by one employer (a staffing agency, subcontractor, labor provider, or other intermediary employer, for example), and that employer provides its employees to work for another employer. The intermediary employer is an employer of the employees and is also acting in the interest of the other employer by providing it with labor. The other employer, who typically contracts with the intermediary employer to receive the benefit of the employees' labor, is the potential joint employer; the issue is whether the employee is jointly employed by that other employer. This is sometimes called vertical joint employment.[4] See Joint Employment AI, 5-6, 9-10; 29 C.F.R. 791.2(b) (providing that joint employment may exist where an employee performs work which simultaneously benefits two employers and one employer acts "directly or indirectly in the interest of the other employer ... in relation to the employee"); see also A-One Med. Servs.,

[4] There is also horizontal joint employment, which exists where an employee has employment relationships with two separate employers and the employers are sufficiently associated with, or related to, each other that they jointly employ the employee. See Joint Employment AI, 4-9; Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 917 (9th Cir. 2003) (distinguishing between horizontal and vertical joint employment). Examples of horizontal joint employment include an employee who works for separate restaurants that share economic ties and have the same managers controlling both restaurants, see Chao v. Barbeque Ventures, LLC, No. 8:06CV676, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007), or a nurse who works for separate health care providers that share staff and have common management, see A-One Med. Servs., 346 F.3d at 918.

346 F.3d at 917 (describing vertical joint employment as possible in circumstances where "a company has contracted for workers who are directly employed by an intermediary company"); Lantern Light, 2015 WL 3451268, at *3 (where company has contracted for workers who are directly employed by an intermediary, court applies vertical joint employment analysis to relationship between company and workers); Westside Drywall, 709 F. Supp.2d at 1062 (describing vertical joint employment as "where a company has contracted for workers who are directly employed by an intermediary company") (citing A-One Med. Servs., 346 F.3d at 917); Berrocal v. Moody Petrol., Inc., No. 07-22549-CIV, 2010 WL 1372410, at *11 n.16 (S.D. Fla. Mar. 31, 2010) (vertical joint employment may exist when "an employer hires laborers through a third party labor contractor").[5]

Determining whether an employee of an intermediary employer is jointly employed by the other employer necessarily entails an employment relationship analysis. And under the FLSA, the existence of an employment relationship is determined by

[5] An employer recently agreed to pay $2.1 million in back wages to workers to resolve the Department's finding following an investigation that the employer jointly employed the workers under the FLSA. The Department found that the employer was a joint employer of the "temporary workers" employed by two staffing agencies and provided by the agencies to work on the employer's production line – a typical vertical joint employment scenario. See Department News Release: J&J Snack Foods Pays More Than $2.1M in Back Wages, Damages to 677 Temporary Workers in New Jersey, Pennsylvania (Oct. 27, 2015), available at www.dol.gov/opa/media/press/whd/WHD20151976.htm.

analyzing the economic realities of the working relationship. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985) (test of employment under the FLSA is economic reality); Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33 (1961) (economic realities of the worker's relationship with the employer are the test of employment); Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-730 (1947); see also Joint Employment AI, 10-11. "In determining whether a worker is an employee covered by the FLSA, a court considers the 'economic realities' of the relationship between the worker and the putative employer." Schultz, 466 F.3d at 304.

Consistent with an economic realities analysis, courts in vertical joint employment cases must look well beyond the potential joint employer's control over the intermediary's employees. The FLSA rejected the common law control test for determining employment in favor of the broader economic realities analysis. See Falk, 439 F.2d at 344 (courts find employment under the FLSA "far more readily than would be dictated by common law doctrines"); Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947) (FLSA's definitions are "comprehensive enough to require its application" to many working relationships which, under the common law control standard, may not be employer-employee relationships); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)

(FLSA's "suffer or permit" standard for employment "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."). As the Second Circuit stated, "the broad language of the FLSA, as interpreted by the Supreme Court in Rutherford, demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA." Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003). Addressing only the potential joint employer's control "is unduly narrow" and "cannot be reconciled with the 'suffer or permit' language in the [FLSA], which necessarily reaches beyond traditional agency law." Id.[6] Although some courts have applied an analysis that addresses only, or primarily, the potential joint employer's control, see Baystate Alt. Staffing, 163 F.3d at 675; In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 468-69 (3d

[6] The FLSA's joint employment analysis is thus different than the analysis under, for example, the National Labor Relations Act (29 U.S.C. 151 et seq.) and the Occupational Safety and Health Act (29 U.S.C. 651 et seq.).

Cir. 2012), this approach is not consistent with the FLSA's broad scope of employment.[7]

Thus, in potential vertical joint employment situations, the employer receiving the benefit of the work of the intermediary's employees is a joint employer under the FLSA if, as a matter of economic reality, the employees are economically dependent on it. See Joint Employment AI, 5-6, 9-11. When determining whether workers employed by a subcontractor who provides the workers to work for a contractor are jointly employed by the contractor, the relationship between the contractor and the subcontractor does not determine whether the contractor is a joint employer.[8] Rather, the economic realities of the contractor's relationship with the workers determines whether it is a joint employer.

[7] Enterprise Rent-A-Car involved whether a parent company jointly employed its subsidiaries' employees. See 683 F.3d at 464. The Third Circuit ruled that joint employment in that case was determined by whether the parent company exercised significant control. See id. at 467-68. The Third Circuit nonetheless recognized that the control factors that it applied "*do not constitute an exhaustive list* of all potential relevant facts" and should not be blindly applied; rather, a joint employment determination must consider the employment situation in totality, including the economic realities of the working relationship. Id. at 469 (emphasis in original).

[8] Of course, if the subcontractor itself (or him or herself) is an employee of the contractor, then the subcontractor's employees are necessarily employees of the contractor. In such cases, there really is no subcontractor, and no joint employment analysis is necessary. This situation may exist in construction, for example, where the "subcontractor" may be merely an individual crew leader who brings workers to the construction site. See Joint Employment AI, 10.

In this case, Plaintiffs were employees of JI and were assigned to work for Commercial; thus, Commercial was Plaintiffs' joint employer if Plaintiffs, as a matter of economic reality, were economically dependent on Commercial. The district court's failure to apply this economic realities analysis when determining whether Commercial was Plaintiffs' joint employer under the FLSA was erroneous, and its decision should be reversed and remanded for application of the correct legal standard as discussed below.

II. THE ECONOMIC REALITIES FACTORS IN THE DEPARTMENT'S MSPA JOINT EMPLOYMENT REGULATION SHOULD GUIDE THE ANALYSIS IN VERTICAL JOINT EMPLOYMENT CASES

The FLSA joint employment regulation contemplates vertical joint employment by providing that joint employment generally exists where an employee's work "simultaneously benefits two or more employers" and "one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee." 29 C.F.R. 791.2(b). But, the regulation does not provide specific economic realities factors to apply. As explained in the Joint Employment AI, the Department's MSPA joint employment regulation describes seven economic realities factors in the context of a farm labor contractor acting as an intermediary employer for (i.e., in the interest of) an agricultural grower. See 29 C.F.R. 500.20(h)(5)(iv). These factors are probative of whether the

employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work. Accordingly, the economic realities factors identified in the MSPA joint employment regulation are particularly relevant to, and should guide the analysis in, vertical joint employment cases arising under the FLSA. See Joint Employment AI, 5-6, 10-12. Additional or different factors may be part of the analysis as long as they are consistent with the FLSA's broad scope of employment.

1. The MSPA joint employment regulation's economic realities factors are appropriate in guiding the resolution of vertical joint employment cases arising under the FLSA because MSPA defines the scope of the employment relationship in the exact same broad manner as the FLSA. Indeed, MSPA incorporates the FLSA's definition of "employ." See 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)]."); 29 C.F.R. 500.20(h)(1) (as so defined, "employ" under MSPA includes to suffer or permit to work). "Both statutes utilize the same definition of 'employ,' so if the [employers] employed the [workers] under one statute, they necessarily employed them under the other." Antenor, 88 F.3d at 929. The terms "employer" and "employee" under MSPA are also given the same meaning as they have under the FLSA. See 29 C.F.R. 500.20(h)(2), (3) (each term "is given its meaning as

found in the [FLSA]"). Just as under the FLSA, a worker is an employee under MSPA rather than an independent contractor if the "economic reality" of the worker's relationship with the employer shows "economic dependence" on that employer. 29 C.F.R. 500.20(h)(4); see Misclassification AI, 2 n.3 (the analysis to determine whether a worker is an employee under the FLSA or an independent contractor should also be applied in determining whether a worker is an employee or independent contractor in MSPA cases).

The Department's MSPA joint employment regulation specifically provides that MSPA's "definition of the term *employ* includes the *joint employment* principles applicable under the [FLSA]." 29 C.F.R. 500.20(h)(5) (emphases in original).[9] MSPA incorporated the FLSA's definition of the term "employ" "with the deliberate intent of adopting the FLSA *joint employer* doctrine as the 'central foundation' of MSPA and 'the best means by which to insure that the purposes of this MSPA would be fulfilled.'" 29 C.F.R. 500.20(h)(5)(ii) (emphasis in original) (quoting MSPA's legislative history). The MSPA joint employment regulation addresses a typical vertical joint employment scenario: the agricultural employer engages a farm labor contractor or other crew leader to provide workers for the

[9] The Department amended the MSPA joint employment regulation in 1997. See 62 Fed. Reg. 11,734 (Mar. 12, 1997).

agricultural employer's farm, and the issue is whether the agricultural employer jointly employs the workers. The regulation provides that, in such cases, "the ultimate question to be determined is the economic reality——whether the worker is so economically dependent upon the agricultural [employer] as to be considered its employee." 29 C.F.R. 500.20(h)(5)(iii). The regulation further provides that "Congress intended that the joint employer test [under MSPA] be the formulation" set forth in Griffin & Brand, an FLSA case where the court applied an economic realities analysis to find joint employment. 29 C.F.R. 500.20(h)(5)(ii) (emphasis omitted) (citing MSPA's legislative history); see Torres-Lopez v. May, 111 F.3d 633, 639 (9th Cir. 1997) ("This court has recognized that the concept of joint employment should be defined expansively under the FLSA—and therefore under [MSPA] as well."). In sum, "[j]oint employment under the [FLSA] is joint employment under the MSPA." 29 C.F.R. 500.20(h)(5)(i) (emphasis omitted); see Antenor, 88 F.3d at 929-933 (applying one economic realities analysis for determining joint employment under the FLSA and MSPA); Torres-Lopez, 111 F.3d at 639-644 (same).

The Secretary is not arguing that the MSPA joint employment regulation itself applies in FLSA cases; however, the MSPA joint employment regulation and its economic realities factors are useful guidance in FLSA vertical joint employment cases because

of the shared definition of employment and the coextensive scope of joint employment between the FLSA and MSPA.[10] Using the MSPA regulation's joint employment factors in an FLSA case is consistent with both statutes and their respective regulations. It is also consistent with the Department's guidance. See Joint Employment AI, 5-6, 10-12; Home Care AI, 3 (citing 29 C.F.R. 500.20(h) and stating that MSPA regulation's economic realities factors should be considered when determining joint employment under the FLSA); Wage and Hour Division Opinion Letter (May 11, 2001) (citing 29 C.F.R. 500.20(h) and identifying MSPA regulation's economic realities factors as relevant factors when determining joint employment under the FLSA), available at 2001 WL 1558966.

2. The economic realities factors identified in the MSPA joint employment regulation are:

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

A. Whether the possible joint employer has the power, directly or indirectly, to control or supervise the workers or the work performed;

B. Whether the possible joint employer has the power, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the workers;

C. The degree of permanency and duration of the workers' relationship with the possible joint employer in the context of the work at issue;

D. The extent to which the workers' services are repetitive, rote tasks requiring skills which are acquired with relatively little training;

E. Whether the work is an integral part of the possible joint employer's overall business operations;

F. Whether the work is performed on premises owned or controlled by the possible joint employer; and

G. Whether the possible joint employer undertakes responsibilities in relation to the workers which are commonly performed by employers.

See 29 C.F.R. 500.20(h)(5)(iv).[11]

These factors "are not intended to be exhaustive." 29 C.F.R. 500.20(h)(5)(iv). Factors in addition to, or different from, the factors identified in the MSPA joint employment

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

regulation may be part of the analysis as long as they are consistent with the FLSA's broad scope of employment. See Joint Employment AI, 12-13. For example, district courts in the Ninth Circuit resolving FLSA vertical joint employment cases apply factors from the following two decisions: Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (four-factor test primarily assessing potential joint employer's control of employment conditions); and Torres-Lopez, 111 F.3d at 640-41 (eight economic realities factors). See, e.g., Lantern Light, 2015 WL 3451268, at *2-17 (applying both the Bonnette and Torres-Lopez factors); Westside Drywall, 709 F. Supp.2d at 1061-62 (same).

The Second Circuit applies a six-factor economic realities analysis: (1) use of the potential joint employer's premises and equipment for the work; (2) whether the intermediary employer has a business that can or does shift from one potential joint employer to another; (3) whether the employee performs a discrete line-job that is integral to the potential joint employer's production process; (4) whether the potential joint employer could pass responsibility for the work from one intermediary to another without material changes for the employees; (5) the potential joint employer's supervision of the employee's work; and (6) whether the employee works exclusively or predominantly for the potential joint employer. See Zheng,

355 F.3d at 71-72. In Schultz, this Court recognized that in a joint employment case with different facts (i.e., a vertical joint employment situation as opposed to the horizontal joint employment situation present in that case) "it may be useful for a court to consider factors such as those listed in [Bonnette] and [Zheng]." 466 F.3d at 306 n.2.[12]

III. THERE IS CONSIDERABLE EVIDENCE THAT COMMERCIAL WAS PLAINTIFFS' JOINT EMPLOYER AS A MATTER OF ECONOMIC REALITY

Applying an economic realities analysis guided by the MSPA joint employment regulation reveals that there is considerable evidence in support of a determination that Commercial was Plaintiffs' joint employer.

Directing, Controlling, or Supervising the Work Performed. Commercial's foremen "checked" Plaintiffs' work "throughout the day" and immediately told JI's supervisors to fix the work if it did not meet Commercial's standards. JA1136. Commercial's foremen "from time to time" provided instructions to Plaintiffs through JI's supervisors (who translated for Plaintiffs). Id. Commercial approved JI's work before paying for it. See id. Citing record evidence, Plaintiffs argued on summary judgment that Commercial's supervision and monitoring of their work was extensive. See ECF No. 87-1, Plaintiffs' Memorandum in Support

[12] Citing Schultz, the district court in Quinteros v. Sparkle Cleaning, Inc., 532 F. Supp.2d 762, 774-76 (D. Md. 2008), applied an economic realities analysis to a potential vertical joint employment situation in an FLSA case.

of Their Cross-Motion for Partial Summary Judgment ("Plaintiffs' Memorandum"), 9-12, 32-33.

Controlling Employment Conditions. Commercial instructed JI about how to adjust its staffing levels at the worksites. See JA1136. According to Plaintiffs, Commercial significantly determined Plaintiffs' daily schedules by setting the times when work would start, requiring Plaintiffs to report to work before the start times, requiring Plaintiffs to work on Saturdays when work could not be performed on weekdays, and sometimes directly instructing Plaintiffs to work overtime. See JA269-273, JA302-304, JA312, JA495-500. When JI did not complete a project on the assigned schedule, Commercial paid JI for the extra work on an hourly basis, and Commercial instructed JI how to staff the extra work, how many hours needed to be worked, and when to pay overtime. See JA249-255, JA408-410. Commercial generally paid JI based on how much work had been completed rather than having JI provide invoices. See JA1136. Commercial told JI what to pay Plaintiffs on jobs subject to prevailing wage laws. See JA218-222, JA416-420, JA466-467.

Permanency and Duration of Relationship. JI had at least twelve contracts with Commercial and only one or two contracts with another company (which went out of business). See JA1135-1136. To the extent that JI's business did not shift from one potential joint employer to another and Plaintiffs worked

predominantly for Commercial, those facts would indicate that Commercial was their joint employer. See Zheng, 355 F.3d at 71-72.

Repetitive and Rote Work. The district court did not examine whether Plaintiffs' work for Commercial was repetitive or rote. Courts in joint employment cases, however, have found drywall and similar work to be relatively unskilled. See Westside Drywall, 709 F. Supp.2d at 1065 (drywall and related work did not require significant degree of skill or training); Lemus, 2011 WL 7069078, at *18 (framing work is unskilled).

Integral to Potential Joint Employer's Business. Plaintiffs' work was an integral part of Commercial's business. Commercial "is a construction company that does interior finishing" and drywall work, and Plaintiffs were drywall workers. JA1135-1136.

Work Performed on Premises Owned or Controlled by Potential Joint Employer. Plaintiffs worked on the premises of Commercial's clients (see JA754, JA773-774) and, in that sense, worked on premises over which Commercial exercised some control during the period of its work. Plaintiffs wore hardhats and vests with Commercial's logo and had identification cards identifying them as its employees. See JA1136. According to Plaintiffs, identification cards with Commercial's logo were

necessary to gain access to some work sites. See Plaintiffs' Memorandum, 30-31.

Performing Functions Commonly Performed by Employers. Commercial kept daily and weekly time records of Plaintiffs' hours worked. See JA1137. According to Plaintiffs, Commercial directly hired Plaintiffs and put them on its payroll when JI was having difficulty enrolling in an insurance program. See JA227-228. Commercial also owned and provided most of the tools and equipment used by Plaintiffs, provided "gang boxes" at the work sites for tool storage, and provided the supplies and materials necessary to perform the drywall work. See JA1136.

On remand, the district court should consider the above evidence and other evidence relevant to the economic realities of Plaintiffs' working relationship with Commercial to determine whether Commercial was their joint employer.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's joint employment decision and remand the case for application of an economic realities analysis.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7), 29(d), and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants complies with:

(1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it was prepared in a monospaced typeface (Courier New 12-point font) containing no more than 10.5 characters per inch; and

(2) the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because it contains 6,991 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants was served this 11th day of February, 2016, via this Court's ECF system and by pre-paid overnight delivery, on each of the following:

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