



**In the Matter of:**

**ADMINISTRATOR, WAGE AND  
HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR,**

**ARB CASE NO. 2017-0046**

**ALJ CASE NO. 2015-MSP-00001**

**PROSECUTING PARTY<sup>1</sup>,      DATE: July 30, 2020**

**v.**

**WYRICK & SONS PINE STRAW,**

**RESPONDENT.**

**Appearances:**

***For the Administrator, Wage and Hour Division:***

**Nicholas C. Geale, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.;  
and Quinn Philbin, Esq.; *U.S. Department of Labor, Office of the  
Solicitor; Washington, District of Columbia***

***For the Respondent:***

**Ronald A. Mowrey, Esq. and Mark L. Mason, Esq.; *Mowrey Law Firm,  
P.A.; Tallahassee, Florida***

**Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge,*  
Heather C. Leslie and James A. Haynes, *Administrative Appeals Judges***

**DECISION AND ORDER**

PER CURIAM. This case arises under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA or the Act), 29 U.S.C. §§ 1801–1872, and its

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<sup>1</sup> The Decision and Order issued by the Administrative Law Judge did not refer to the Administrator of the Wage and Hour Division of the U.S. Department of Labor as a party in the case caption. The Administrator serves as the prosecuting party in this case.

implementing regulations at 29 C.F.R. Part 500. The Wage and Hour Division of the U.S. Department of Labor (WHD) charged Respondent Wyrick & Sons Pine Straw (Wyrick) with five violations of the MSPA. The United States Department of Labor Administrative Law Judge (ALJ) Patrick M. Rosenow issued a Decision and Order (D. & O.) on April 25, 2017 upholding the violations. On Wyrick's Petition for Issuance of a Notice of Intent to Modify and/or Vacate a Decision and Order, we affirm in part, reverse in part, and remand for additional proceedings.

### **BACKGROUND AND PROCEEDINGS BELOW**

Although the parties disagree as to the legal conclusions that should be drawn in this case, the facts are largely not in dispute. Wyrick commercially sells pine straw, which is the fallen needles of pine trees. D. & O. at 2. Pine straw is collected and sold as a mulch alternative for landscaping and groundcover. Hearing Transcript (TR) at 33, 255-57.

Wyrick did not own the land from which it harvested pine straw. Instead, Wyrick entered into oral and written agreements with landowners which granted Wyrick permission to access the land to conduct the harvest. D. & O. at 2; Administrator Hearing Exhibit (AX) 4. Before harvesting, Wyrick's employees customarily entered the pine fields to apply herbicides to the land. D. & O. at 2; TR at 246-49. Wyrick's employees also customarily mowed and cleared the area where harvesters would be collecting the pine straw. *Id.* This preparation and pre-treatment could sometimes occur years or months before the actual harvest. TR at 344, 382-83.

Although Wyrick performed the field preparation and pre-treatment work itself, Wyrick turned to contractors to supply the workforce for the harvest. D. & O. at 3. Relevant to this appeal, Wyrick contracted with two individuals—the Crew Chiefs—to recruit, hire, and supply laborers. *Id.* Under the supervision of the Crew Chiefs, the laborers used pitchforks to rake pine needles into piles, used box balers to manually compact the needles, tied needles with twine into bales, and loaded the bales onto trailers. *Id.* The Crew Chiefs tallied the number of bales harvested each week, and Wyrick paid them a fixed rate of \$0.90 per bale. D. & O. at 3; AX 1. Wyrick's employees generally were not present in the fields supervising the harvest, leaving the Crew Chiefs to manage that task independently. *See* TR at 219, 344, 375-76, 380; RX 23.

WHD, which is tasked with enforcing the MSPA, began an investigation of Wyrick in March 2012 and determined that it was not in compliance with the Act. AX 3, 12; TR at 30. WHD made the following determinations:

- (1) Wyrick utilized the services of two unregistered farm labor contractors (FLC)—the Crew Chiefs—in violation of 29 U.S.C. § 1842 and 29 C.F.R. § 500.71;
- (2) Wyrick failed to keep records of each worker, in violation of 29 U.S.C. §§ 1821(d), 1831(c), and 29 C.F.R. § 500.80(a);
- (3) Wyrick failed to provide or post disclosures of employment conditions to workers, in violation of 29 U.S.C. §§ 1821(a), 1831(a), and 29 C.F.R. §§ 500.75(b), 500.76(b);
- (4) Wyrick failed to provide each worker with a wage statement, in violation of 29 U.S.C. §§ 1821(d)(2), 1831(c)(2), and 29 C.F.R. § 500.80(d); and
- (5) Wyrick failed to display a MSPA poster in the work fields, in violation of 29 U.S.C. §§ 1821(b), 1831(b), and 29 C.F.R. §§ 500.75(c), 500.76(d)(1).

D. & O. at 4; AX 12. WHD assessed Wyrick a civil penalty totaling \$2,525. *Id.*

Wyrick challenged WHD's determination and requested a hearing with the U.S. Department of Labor Office of Administrative Law Judges. Although Wyrick conceded that it had not satisfied the foregoing requirements of the MSPA, it argued that it was not subject to the Act. D. & O. at 3-4.

ALJ Rosenow was assigned to the matter and conducted a hearing on June 28 and 29, 2016. The ALJ issued the D. & O. on April 25, 2017, agreeing with WHD that Wyrick was subject to the Act, but reducing the civil penalty to \$1,825. Wyrick appealed the matter to the Board.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Administrative Review Board (ARB or Board) has jurisdiction over this appeal pursuant to the MSPA and its implementing regulations, 29 C.F.R. § 500.263, as well as the Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). Under

the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions de novo. *See* 5 U.S.C. § 557(b); *Gonzalez v. Adm'n*, ARB No. 2004-0178, ALJ No. 2002-MSP-00005 R & P, slip op. at 2 (ARB Mar. 29, 2007).

## DISCUSSION

As its title suggests, the MSPA provides certain employment protections designed to ensure the safety and fair treatment of migrant and seasonal agricultural workers. As noted above, Wyrick concedes that it did not abide by the requirements of the MSPA with respect to the laborers it used to harvest pine straw, as cited by WHD—the Crew Chiefs were not registered as FLCs, and Wyrick did not maintain employment records, issue wage statements, or make required employment disclosures to the laborers. D. & O. at 3.

But, for Wyrick to be liable for any of the cited violations, the laborers must have been “seasonal agricultural workers,”<sup>2</sup> which is defined, in relevant part, as individuals “employed in agricultural employment of a seasonal or other temporary nature . . .” 29 U.S.C. § 1802(10)(A); 29 C.F.R. § 500.20(r). Wyrick argues that the laborers were not engaged in “agricultural employment,” because pine straw is not an agricultural or horticultural commodity. Wyrick also argues pine straw harvesting is performed year-round, and, thus, the laborers employment was not of a “seasonal or other temporary nature.”

In addition, for Wyrick to be liable for the recordkeeping, wage, and disclosure requirements of the MSPA, Wyrick must have “employed” the laborers. *See* 29 U.S.C. § 1831(a)-(c), 29 C.F.R. §§ 500.76(b), (d)(1), 500.80(a), (d).<sup>3</sup> Wyrick contends that the laborers were employed by the Crew Chiefs, and not by Wyrick.

We consider each argument in turn.

### **1. The Laborers Were Engaged in Agricultural Employment Because Pine Straw is an Agricultural Commodity**

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<sup>2</sup> Although the MSPA protects both migrant and seasonal agricultural workers, WHD has not argued that the laborers qualified as migrant agricultural workers under the Act.

<sup>3</sup> In contrast to the recordkeeping, wage, and disclosure requirements, liability for utilizing unregistered FLCs does not depend on whether Wyrick “employed” the laborers. *See* 29 U.S.C. § 1842; 29 C.F.R. § 500.71.

The MSPA provides that agricultural employment means:

employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any **agricultural or horticultural commodity** in its unmanufactured state.

29 U.S.C. § 1802(3) (emphasis added); 29 C.F.R. § 500.20(e). The question presented to the Board is whether the pine straw harvested by the laborers in this case qualifies as an “agricultural or horticultural commodity.”

Although the MSPA and its implementing regulations do not define the term, the implementing regulations of the Fair Labor Standards Act (FLSA) define “agricultural or horticultural commodities” as “commodities resulting from the application of agricultural or horticultural techniques.” 29 C.F.R. § 780.112. More specifically, “products of the soil” are considered agricultural or horticultural commodities when they are “planted and cultivated by man.” *Id.* The regulations contrast agricultural or horticultural commodities with wild commodities, which are produced by the exploitation of natural resources or by uncultivated natural growth, such as mosses, wild rice, burls, and laurel plants. 29 C.F.R. § 780.114. But, commodities that typically grow wild may nevertheless become agricultural or horticultural commodities if they are “actually cultivated.” *Id.*

The ALJ ruled that pine straw is an agricultural or horticultural commodity, and the laborers were engaged in agricultural employment, based on the Eleventh Circuit’s holding in *Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003). D. & O. at 21. In that case, harvesters pursued a private cause of action against their employer, a wholesaler of pine straw, under the MSPA. *Morante-Navarro*, 350 F.3d at 1165. After considering the history and purpose of the MSPA as well as the definitions contained in the FLSA regulations, the Eleventh Circuit determined pine straw was an agricultural commodity because the workers employed agricultural techniques to cultivate it. *Id.* at 1167-70. Specifically, before harvesting could take place, the fields had to be mechanically and manually cleared of ground debris and vegetation. *Id.* at 1165. Workers used mechanical “bush hogs” to mow and clear the underlying growth, and manually cleared loose branches and pine cones. *Id.* The Eleventh Circuit determined this site preparation work and the

techniques employed by the workers to allow the harvest to take place constituted “cultivation.” *Id.* at 1170.

We agree with the ALJ and the Administrator that the circumstances presented in our case are nearly identical in all material respects to *Morante-Navarro*, and we are persuaded by the Eleventh Circuit’s analysis and decision that the pine straw here is an agricultural commodity. In both cases, the land had to be cleared and prepared through the use of various agricultural techniques before the pine straw could be harvested. In fact, the techniques employed by Wyrick here were more involved than those employed in *Morante-Navarro*. Whereas in both cases workers manually and/or mechanically prepared the land, here Wyrick took the additional step of preparing and pre-treating the pine fields by applying herbicides.

Wyrick’s argument that the techniques employed here and in *Morante-Navarro* did not amount to “cultivation” are unavailing. Months or years in advance of a harvest, Wyrick cleared, pre-treated, and prepared the land. These pre-harvesting activities required planning, foresight, and the measured application of agricultural techniques for the purpose of rendering the pine straw harvestable and marketable. Although Wyrick did not itself grow the pine trees, its efforts nonetheless constituted cultivation of the pine straw product.

Accordingly, we affirm the ALJ’s ruling that the laborers here were agricultural workers under the MSPA, insofar as they harvested pine straw, an agricultural commodity.

## **2. We Remand on the Issue of Whether the Laborers Were Employed on a Seasonal Basis**

For the laborers to be afforded the protections of the MSPA, their employment must have been of a “seasonal nature.” *See* 29 U.S.C. § 1802(10)(A); 29 C.F.R. § 500.20(r). Laborers are employed on a “seasonal” basis where their employment “pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.” 29 C.F.R. § 500.20(s)(1).

The evidence presented at the hearing suggested that at least some harvesting could take place year-round, although there were fluctuations in the volume of harvesting at various points in the year due to weather or market conditions. Rather than weighing the evidence to determine whether the variations

rendered the harvesting “seasonal” as defined by regulation, the ALJ, relying on another Eleventh Circuit case, *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500 (11th Cir. 1993), ruled that the laborers were employed on a seasonal basis because they were performing “field work.” D. & O. at 22. This ruling was in error.

In *Caro-Galvan*, the plaintiffs harvested fern crops and performed other field work for the defendant-farm. *Caro-Galvan*, 993 F.2d at 1502. Although ferns were grown and harvested year-round, most harvesting occurred between January and May due to a combination of conducive weather conditions and market demand. *Id.* During the January to May prime season, the workers were able to harvest enough ferns to earn minimum wage. *Id.* But, the harvest was so light during the June to December off-season that the workers could not earn minimum wage exclusively from harvesting ferns, and had to turn to other types of work on the farm to supplement their income. *Id.*

The fact that the fern harvesting diminished so severely during the off-season that the workers were not even able to earn minimum wage from harvesting alone led the Eleventh Circuit to conclude that the workers were “seasonal” under the MSPA. *Id.* at 1508. Although the workers remained employed with the farm year-round, the regulations specifically contemplated that “seasonal” workers may shift from one type of seasonal work to another. 29 C.F.R. § 500.20(s)(1).

Of particular significance to the ALJ’s ruling in this case, the Eleventh Circuit also commented in *Caro-Galvan* that “[if] the worker performs ‘field work,’ he or she is employed on a seasonal or temporary basis.” *Id.* The Eleventh Circuit derived this rule from 29 C.F.R. § 500.20(s)(4), which provides that a worker is **not seasonal** when he or she is employed on “essentially a year round basis to perform a variety of tasks for his employer and **is not primarily employed to do field work**” (emphasis added).<sup>4</sup> Attempting to apply a contrapositive, the Eleventh Circuit concluded that because a worker is not seasonal if he is not performing field work, then a worker performing field work is employed on a seasonal basis. See *Caro-Galvan*, 993 F.2d at 1508.

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<sup>4</sup> § 500.20(s)(4) reads as follows:

On a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

Despite believing that “an interpretation which expands the word seasonal to include year-round uninterrupted field work reflects a marked departure from clear statutory language,” the ALJ felt he was compelled to follow the *Caro-Galvan* pronouncement that all field work is seasonal work. D. & O. at 22. The ALJ’s reservation about applying this rule was appropriate. We find that the Eleventh Circuit’s pronouncement that all field work is seasonal work is contrary to the plain language of the MSPA and its implementing regulations and was dicta which the ALJ should not have followed.

We start, as we must, with the plain language of the MSPA. Congress defined a “seasonal agricultural worker,” in pertinent part, as one “employed in agricultural employment **of a seasonal or other temporary nature** . . . when employed on a farm or ranch **performing field work** related to planting, cultivating, or harvesting operations . . .” 29 U.S.C. § 1802(10)(A) (emphasis added). Thus, “seasonal” work and “field work” were plainly envisioned by Congress as separate and distinct requirements, both of which must be satisfied for the worker to qualify for protection under the Act.

Accordingly, the MSPA’s implementing regulations also separately define the terms “seasonal” and “field work.” As set forth above, “seasonal” work is that which is “ordinarily” “of the kind exclusively performed at certain seasons or periods of the year . . .” 29 C.F.R. § 500.20(s)(1). Field work is defined as operations on a farm or ranch which “are normally required to plant, harvest or produce agricultural or horticultural commodities . . .” 29 C.F.R. § 500.20(r)(2)(ii). Notably, “field work” is defined without temporal or seasonal limitations, and, therefore, could encompass a greater scope or variety of work than work performed only on a seasonal basis. Stated another way, field work *may* be seasonal, but only if it also satisfies the temporal limitations imposed by the regulatory definition of “seasonal.” *See Bautista Hernandez v. Tadala’s Nursery, Inc.*, No. 12-61062-CIV-SELTZER, 2013 WL 12043485, \*5 (S.D. Fl. Oct. 21, 2013).

Moreover, had Congress intended for all field work to be covered by the MSPA, there would have been no purpose in limiting the MSPA’s coverage to workers employed on a “seasonal” basis. The “seasonal” limitation could have been excluded from the statute, leaving “field work,” alone, as the operative concept for coverage for workers like those at issue here. *See Bautista Hernandez*, 2013 WL 12043485 at \*5 (“Indeed, had Congress intended that all field workers be deemed seasonal workers, it is reasonable to conclude that it not only would have foregone any temporal limitations, but also would have substituted the term ‘field worker’ for

‘seasonal agricultural worker.’”); *Ramirez v. DeCoster*, 194 F.R.D. 348, 357 (D. Me. 2000) (“Here, Congress has used plain language that simply will not encompass these workers, because their work is neither seasonal nor temporary. Congress could have left those limiting criteria out of the Act and extended its protection to any employee who engaged in agricultural-related labor and who left his home to be so engaged, but Congress chose not to.”). But, that is not how Congress wrote the MSPA, nor how the Department of Labor wrote the implementing regulations.

We recognize that our holding is contrary to the Department of Labor’s preamble to the regulatory definition of “seasonal,” which agrees with the Eleventh Circuit that all field work is, by definition, seasonal work. *See* Migrant and Seasonal Agricultural Worker Protection Regulations, 48 Fed. Reg. 36,736, 36,737 (Aug. 12, 1983). Although the preamble can inform the interpretation of the regulation, the preamble is not binding. When a preamble conflicts with the plain language of the regulation, the regulation controls. *Peabody Twentymile Mining, LLC v. Sec’y of Labor*, 931 F.3d 992, 998 (10th Cir. 2019); *Boose v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 587 F.3d 997, 1005 (9th Cir. 2009); *Barrick Goldstrike Mines, Inc. v. Whitman*, 260 F. Supp. 2d 28, 36 (D.D.C. 2003).

In addition, although the ALJ determined he was compelled to follow *Caro-Galvan*’s statement that all field work is seasonal work because this case arises within the jurisdiction of the Eleventh Circuit, we regard the Eleventh Circuit’s proclamation as non-binding dictum. The central holding of *Caro-Galvan* was that the workers were seasonal because the fern harvesting diminished so severely in the off-season that they could not earn minimum wage and were compelled to move to other tasks. Under those facts, the Eleventh Circuit ruled (and rightly so) that the work met the regulatory definition of seasonal.

The Eleventh Circuit’s additional proclamation that all field work is seasonal work extended further than the facts of the case, and was not necessary to the decision given the facts and circumstances presented there. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010). As stated by the Southern District of Florida in *Bautista Hernandez*<sup>5</sup>, which also grappled with *Caro-Galvan*’s ruling, the statement that all field work is seasonal work could have been omitted from the decision without impairing the court’s analytical foundation regarding the seasonal fluctuation of fern harvesting. *Bautista Hernandez*, 2013 WL 12043485, at \*5; *cf. Ramirez*, 194 F.R.D. at 357 (reconciling *Caro-Galvan* with the statute by finding

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<sup>5</sup> The analysis in *Bautista Hernandez* is particularly compelling because the Southern District of Florida falls under the jurisdiction of the Eleventh Circuit.

that its central holding—that the fern growing was seasonal because of the significant fluctuation in work—could be read consistently with the plain language of the MSPA).

For these reasons, we hold that the ALJ erred in ruling that the laborers here were employed on a seasonal basis merely because they performed field work. We remand the matter to the ALJ to make findings as to whether the laborers were employed on a seasonal basis, without being restrained by the notion that all field workers are employed on a seasonal basis under the Act.

In making this determination, the ALJ must be guided by the express language of the regulatory definition of “seasonal.” That is, the ALJ must decide if the harvesting of the pine straw by the laborers, ordinarily, is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. *See* 29 C.F.R. § 500.20(s)(1). The ALJ may consider, among other things, the frequency, duration, and severity of any fluctuations that occurred in the harvesting of pine straw, the transience of or level of turnover in the workforce triggered by the nature of the harvest, whether the laborers were compelled to find other work due to fluctuations in the harvest, the ability or feasibility of harvesting pine straw in different seasons or periods of the year, and changes in market demand for pine straw in different seasons or periods of the year.

As the central holding of *Caro-Galvan* makes clear, it is possible that the laborers were employed on a seasonal basis despite the fact that some minimal level of harvesting could occur year-round. But, the definition of “seasonal” clearly requires more than mild fluctuations or variations in the level of work available. We remand to the ALJ to make this determination based on the evidence presented.

### **3. Wyrick Did Not Jointly Employ the Laborers**

The final issue presented for review is whether Wyrick “employed” the pine straw laborers. Wyrick had no obligation to keep records, provide disclosures, display posters, or provide wage statements to the laborers under the MSPA if it did not “employ” them. *See* 29 U.S.C. § 1831(a)-(c); 29 C.F.R. §§ 500.76(b), (d)(1), 500.80(a), (d).

Although Wyrick retained the laborers' services indirectly through the Crew Chiefs<sup>6</sup>, Wyrick could nonetheless be liable as the laborers' joint employer under the Act. *See* 29 C.F.R. § 500.20(h)(5). Wyrick will be considered the laborers' joint employer if, as a matter of economic reality, the laborers were dependent upon Wyrick. *See* 29 C.F.R. § 500.20(h)(5)(iii); *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996). The implementing regulations provide several factors that may be considered in determining whether or not a joint employment relationship exists:

- (1) Whether the putative employer has the power, either alone or through control of the contractor, to direct, control, or supervise the workers or the work performed;
- (2) Whether the putative employer has the power, either alone or in addition to the contractor, directly or indirectly, to hire or fire, modify the employment conditions, or determine the rates or the methods of payment for the workers;
- (3) The degree of permanency and duration of the relationship of the putative employer and the workers;
- (4) Whether the services rendered by the workers are repetitive, rote tasks requiring skills which are acquired with relatively little training;
- (5) Whether the activities performed by the workers are an integral part of the overall business operation of the putative employer;
- (6) Whether the work is performed on the putative employer's premises; and
- (7) Whether the putative employer undertakes responsibilities in relation to the workers which are commonly performed by employers.

29 C.F.R. § 500.20(h)(5)(iv)(A)-(G); *see also* *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208-14 (11th Cir. 2003) (applying the regulatory factors). These factors are not exclusive, and no single factor is determinative. 29 C.F.R. § 500.20(h)(5)(iv); *Antenor*, 88 F.3d at 932. Significantly, the factors must be weighed qualitatively, not quantitatively based on a strict mathematical formula. *Antenor*, 88 F.3d at 933.

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<sup>6</sup> *See* Administrator's Opening Post-Hearing Brief at 22 (stating the "undisputed material facts show that Respondent hired laborers through [the Crew Chiefs] . . .").

The ALJ determined that Wyrick jointly employed the laborers supplied by the Crew Chiefs. Although the ALJ considered some of the foregoing factors, he ignored others, in whole or in part. Weighing the regulatory factors and guiding principles based on all of the facts and circumstances of this case, we conclude that the laborers were not so economically dependent on Wyrick as to render Wyrick their joint employer.

*A. Control and Supervision*

We find that Wyrick did not control the laborers performing its harvest. Control, in the context of the MSPA, typically exists where the putative employer takes an active role in the oversight of the work, making such decisions as whom and how many employees to hire, whom to assign to specific tasks, when work should begin or end each day, when a particular field will be harvested or planted, and whether a worker should be disciplined or retained. *Martinez-Mendoza*, 340 F.3d at 1209-10 (citing *Charles v. Burton*, 169 F.3d 1322, 1329-30 (11th Cir. 1999)). As articulated by the Eastern District of California, we ask:

[D]oes [the putative employer] provide oversight and direction on how to carry out the job or simply point the workers (or FLC) in the direction of the field and instruct on the job generally? Does it control the dates, times, and locations for work to be accomplished or does it simply instruct the FLC on the agricultural specifications of the job?

*Perez v. Valley Garlic, Inc.*, No. 1:16-CV-01156, 2017 WL 772147, \*6 (E.D. Cal. Feb. 27, 2017).

There is no evidence that Wyrick had any involvement in who or how many workers to hire, which laborers were assigned to specific tasks, how work schedules were determined, or when work should begin or end each day. To the contrary, Wyrick's representative provided unrebutted<sup>7</sup> testimony that he did not know how many workers the Crew Chiefs employed to harvest the straw, did not tell them

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<sup>7</sup> No Crew Chiefs or laborers testified at the hearing or provided depositions. The only information we have from the laborers comes from five brief statements taken at the start of WHD's investigation. *See* AX 18, 19. It is clear from those statements that the investigators were primarily concerned at that time with assessing whether the duties required by the MSPA were being satisfied, and not whether the MSPA was applicable to these laborers or to Wyrick. Most of Wyrick's testimony relevant to the joint employer analysis, therefore, was unrebutted.

what hours they were expected to work, and did not set any minimum or maximum number of bales that Wyrick expected them to harvest. TR at 342-43, 350. His testimony is consistent with the independent contractor agreements between Wyrick and the Crew Chiefs, which stated the contractors were to perform a specified service, and had “sole control over the means in which the specified service is completed.” Respondent’s Hearing Exhibit (RX) 23.

Thus, Wyrick was concerned with the end product, and left it to the Crew Chiefs to control the means of production. These facts contrast sharply with the types of control courts have found indicative of joint employment in other cases. *Compare Antenor*, 88 F.3d at 934 (control where defendant told FLC how many workers it required each day, when picking could commence each day, and when work should be delayed or stopped), *and Luna v. Del Monte Fresh Produce (Se.), Inc.*, No. 1:06-cv-2000-JEC, 2008 WL 754452, \*4 (N.D. Ga. Mar. 19, 2008) (control where defendant determined how many workers were needed, which fields to work, how many workers to assign to specific tasks, and the days on which specific work would begin), *with Martinez-Mendoza*, 340 F.3d at 1210-11 (no control where defendant did not assign laborers or tasks, design the laborers’ work schedule, or implement discipline), *and Aimable v. Long & Scott Farms*, 20 F.3d 434, 440-41 (11th Cir. 1994) (no control where it was FLC’s responsibility to determine, recruit, and compensate the necessary number of workers).

The Administrator argues Wyrick indirectly controlled the laborers by setting an “expectation” that the Crew Chiefs and laborers had to meet—raking, baling, and loading pine straw—and by determining the fields that the laborers would harvest.<sup>8</sup> Deputy Administrator’s Response Brief (Admin. Br.) at 20. But, in amending the MSPA’s regulations, the WHD made clear that defining standards or requirements for a contractor to meet does not establish control over the contractor’s workers. Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. 11,734, 11,739-40 (Mar. 12, 1997). Courts have held such “agricultural decisions”—like setting standards, specifications, or expectations for the harvest, or choosing which fields to pick on which days—do not create the type of control contemplated by the MSPA. *See Martinez-Mendoza*, 340 F.3d at 1210-11; *Aimable*, 20 F.3d at 440-41. Although making certain agricultural decisions “might indirectly affect how many workers need to be hired, they still do not show ‘control[.]’” *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 898 F.3d 1110, 1126 (11th Cir. 2018).

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<sup>8</sup> Although Wyrick determined when fields were ready to harvest, even then Wyrick generally gave the Crew Chiefs their choice of fields. The Crew Chiefs could pass on fields which they were not interested in harvesting. TR at 251-53, 278.

We also find that Wyrick did not supervise the laborers. “[I]t is well settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor.” *Antenor*, 88 F.3d at 935 (quoting *Aimable*, 20 F.3d at 441). “On the other hand, infrequent assertions of minimal oversight do not constitute the requisite degree of supervision.” *Martinez-Mendoza*, 340 F.3d at 1211 (citing *Charles*, 169 F.3d at 1330).

The Administrator presented no evidence or testimony from the laborers, or others, suggesting that they ever received any orders, direction, or instruction from Wyrick. In fact, a WHD investigator confirmed that no laborer ever stated anyone from Wyrick ever came to the field and supervised or directed them to do anything. TR at 219. Wyrick’s representative also testified that he never went to the fields to direct or supervise the harvest. TR at 344. Although Wyrick’s representatives did come to the fields to pick up loaded trailers, occasional presence does not serve as a proxy for supervision. *See Martinez-Mendoza*, 340 F.3d at 1211; *Aimable*, 20 F.3d at 441.

Once again, the evidence presented here contrasts sharply with cases in which the putative employer was found to have supervised the workers. *Cf. Antenor*, 88 F.3d at 934 (supervision where defendant directly oversaw and intervened in the laborers’ work); *Torres-Lopez v. May*, 111 F.3d 633, 642-43 (9th Cir. 1997) (supervision where defendant had right to inspect work as it was being performed and maintained constant presence in the field); *Sejour v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1216, 1228-29 (N.D. Fl. 2014) (supervision where defendant visited field several times a day to check progress, often picked with the workers, and instructed crew on how to pick); *Luna*, 2008 WL 754452, at \*4 (supervision where defendant spent up to three hours every day observing the progress of work and confronted workers directly if problems were observed).

The Administrator argues that Wyrick indirectly supervised the laborers by making deductions in pay for bad or rejected bales. Admin. Br. at 20. It is true that in the event a bale presented for sale was rejected by a customer, Wyrick made a retroactive deduction to the amounts paid to the Crew Chiefs. But, even then, Wyrick typically only notified Crew Chiefs of the defect in the bale, which usually resolved the problem. TR at 274-75, 364-66. This type of indirect quality control, on its own, does not amount to supervision of the workforce. *See Arrendondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1077-78 (E.D. Cal. 2013).

B. Ability to Hire or Fire, Modify Employment Conditions, and Determine Rates and Methods of Pay

The next factor asks whether the putative employer can hire or fire the workers, make business decisions that impact the worker's employment conditions, such as determining the number of hours to be worked each day, or dictate the method and rates of pay. 29 C.F.R. § 500.20(h)(5)(iv)(B).

There is no evidence suggesting Wyrick had a hand in hiring or firing the laborers. Wyrick's representative testified, without rebuttal, that Wyrick did not hire or fire any of the laborers, and, furthermore, had no idea who or how many laborers the Crew Chiefs employed. TR at 346, 350. The Crew Chiefs contracted to provide the labor to Wyrick, and laborers who provided statements to WHD investigators stated they were hired by the Crew Chiefs. *See* D. & O. at 3; AX 18, 19.

In addition, there is no evidence that Wyrick modified or controlled the laborers' employment conditions. There is no evidence Wyrick set their working hours, assigned laborers to specific tasks or fields, or dictated any other terms and conditions of the laborers' employment. *See* TR at 342-43, 350.

It is also undisputed that Wyrick did not pay the laborers directly. Instead, Wyrick paid the Crew Chiefs per bale (\$0.90), and the Crew Chiefs paid their own laborers. D. & O. at 3, TR at 344; AX 1. Even so, the Administrator argues that Wyrick at least indirectly controlled the laborers' rates and method of pay by setting suggested piece rate prices for each of the tasks performed by the laborers. Admin. Br. at 19.

It is true that Wyrick identified a piece rate of \$0.70 for baling and \$0.10 for loading each bale on the Crew Chiefs' pay statements. AX 1. And, as the Administrator emphasized, the laborers were, in fact, paid those rates. AX 18, 19. However, Wyrick's representative testified that the rates on the pay statements were mere suggestions which tracked local industry standards, and that it was up to the Crew Chiefs to determine how much the laborers were actually paid. TR at 272-73, 344. He also testified that despite suggesting pay rates, he did not know how much the Crew Chiefs actually paid the laborers. TR at 344. Although the actual pay rates did track Wyrick's suggestions, the Administrator presented no other evidence that the Crew Chiefs were beholden to, or even swayed by, the rates indicated on the pay statements, or evidence that Wyrick prohibited or dissuaded

the Crew Chiefs from setting their own pay rates for the laborers. We are not persuaded that Wyrick controlled the laborers rates or methods of pay merely because the laborers' actual pay tracked Wyrick's recommendations.

*C. Permanency and Duration of Relationship*

Recognizing that most agricultural work is seasonal or temporary, courts have generally found a sufficiently permanent relationship for purposes of the joint employment analysis where contractors and their workers return to work for the putative employer year-after-year, or where the contractors supply their workers primarily to one putative employer during a specific harvest or planting period. *See Charles*, 169 F.3d at 1332 (collecting cases). "Where an FLC and its workers are engaged for the duration of the operation and are obligated to work exclusively for the employer at its discretion, this factor would suggest economic dependence." *Martinez-Mendoza*, 340 F.3d at 1212 (citing Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. at 11,740).

The ALJ found that the laborers "consistently accepted the crew chiefs' invitations to gather pine straw for Wyrick," thus indicating a somewhat permanent relationship. D. & O. at 24. The ALJ provided no specific citation for this assertion, and we find the evidence does not support the ALJ's conclusion. Although invoices reflected that two individuals—identified only as "Tio" and "Alex"—consistently worked for Wyrick as loaders, the Administrator points to no other evidence in the record regarding who the other laborers were or how long any other laborers remained engaged with Wyrick. *See* AX 1. Wyrick's representative also testified that the company did not prohibit the Crew Chiefs from working other land, and nothing in the written agreement between the Crew Chiefs and Wyrick indicates exclusivity in their relationship. TR at 346; RX 23.

Furthermore, the statements obtained from the laborers suggest a high level of turnover and a lack of permanency in the harvesting workforce. Of the five laborers who provided statements, three had worked for Wyrick for three months or less, and the longest tenured laborer had only worked for Wyrick for eight months. AX 18, 19. Additionally, one laborer stated that the laborers "come and go as they want," and another indicated that he was previously part of a larger crew, but there were only two people left by the time of the investigation. AX 18 (Statements of Nancy Alfaro and Manuel Lopez). As a result, we find that the evidence does not establish a permanent relationship between Wyrick and the workforce.

*D. Degree of Skill Required*

“The lower the worker’s skill level, the lower the value and marketability of his/her services and the greater the likelihood of his/her economic dependence on the person utilizing those services.” *Charles*, 169 F.3d at 1332 n.14 (quoting Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. at 11,740-41). The parties stipulated that no training or education was required for the laborers to perform the harvest, except a short amount of time to learn to use the manual baler. D. & O. at 3. Therefore, we agree with the ALJ and the Administrator that raking and baling pine straw required little skill.

*E. Integral to Business Operations*

“[A] worker who performs a routine task that is a normal and integral phase of the [putative employer’s] production is likely to be dependent on the grower’s overall production process.” *Martinez-Mendoza*, 340 F.3d at 1213 (quoting *Antenor*, 88 F.3d at 937). A task or activity is considered “integral” to an employer’s business when that employer “would be virtually certain to assure that the function is performed, and would obtain the services of whatever workers are needed for this function.” *Id.* (quoting Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. at 11,741). Wyrick is a pine straw wholesaler, and the laborers harvested pine straw for Wyrick to sell. We agree with the ALJ and the Administrator that the raking and baling performed by the laborers was therefore integral to Wyrick’s business.

*F. Performed on Wyrick’s Premises*

The putative employer’s ownership of or control over the land upon which the laborers toiled is “probative of joint employment because without the land, the worker might not have work, and because a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors.” *Martinez-Mendoza*, 380 F.3d at 1214 (quoting *Charles*, 169 F.3d at 1333). Although Wyrick did not own the pine fields upon which the laborers worked, Wyrick nevertheless was responsible for the agreements with the landowners that permitted the laborers to enter the fields and harvest the pine straw. D. & O. at 2-3; TR at 235. The Crew Chiefs did not have relationships with the landowners and the laborers only had access to the land through their association with Wyrick. *Id.* The ALJ found, as a practical matter, that Wyrick controlled the land for purposes of the joint employment analysis. D. & O. at 24. We agree.

Wyrick challenges the ALJ's specific assertion that Wyrick possessed "to some degree a possessory interest in the land." Respondent's Initial Brief (Resp. Br.) at 25-26; D. & O. at 24. Wyrick asserts that it neither owned nor leased the land, as required for a "possessory interest." Although Wyrick may be right that Wyrick's agreements with landowners did not confer a technical and legal possessory interest, the fact remains that the laborers were only on the land by virtue of Wyrick's agreements with the landowners. We agree with the ALJ's principal conclusion that the *practical* nature of the relationship is clear, regardless of the technical legal status between Wyrick and the landowners. The laborers' and Crew Chiefs' ability to work the land was wholly dependent on, and derivative of, Wyrick's agreements with the landowners, thus giving Wyrick some level of control over the land for purposes of the laborers and work at issue in this action. *See Perez*, 2017 WL 772147, at \*9.

*G. Responsibilities Commonly Performed by Employers*

"[W]orkers who use the services, materials or functions [provided by a putative employer] are in a very tangible way economically dependent on the entity performing these functions." *Charles*, 169 F.3d at 1333 n.15 (quoting Migrant and Seasonal Workers Protection Act, 62 Fed. Reg. at 11,741-42). Examples of tasks that are ordinarily performed by employers include: preparing or making payroll records, preparing or issuing paychecks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing, or transportation, and providing tools, equipment, or materials required for the job. 29 C.F.R. § 500.20(h)(5)(iv)(G); *Martinez-Mendoza*, 340 F.3d at 1214.

The ALJ regarded the fact that Wyrick provided the laborers with the tools necessary for harvesting the pine straw (pitchforks, strings, balers, tractors, and trailers) as an indicium of joint employment. D. & O. at 24. But, Wyrick engaged in no other tasks typical of an employer with respect to the laborers. There is no evidence that Wyrick managed payroll, issued paychecks, paid or deducted for taxes, provided worker's compensation insurance, provided housing or transportation, or provided field sanitation facilities or water. Although Wyrick provided tools and equipment, these facts alone provides minimum indicia of employment or economic dependency in light of the many other tasks in which Wyrick did not engage that would be typical of an employer. *See Charles*, 169 F.3d at 1333; *Perez*, 2017 WL 772147, at \*9.

*H. The Factors Demonstrate the Laborers Were Not Economically Dependent on Wyrick*

Weighing the relevant factors, we find that Wyrick did not jointly employ the laborers. Although the laborers provided unskilled work that was integral to Wyrick's business on land secured by Wyrick, Wyrick did not supervise or control the laborers, set their working conditions or terms and conditions of employment, hire or fire them, or set their pay rates. The evidence also suggests that the workforce was largely transient and temporary and, therefore, not dependent on Wyrick. And, other than providing the few tools that were necessary to do the work, Wyrick assumed none of the other responsibilities typical of an employer. Wyrick hired the Crew Chiefs to recruit, hire, supply, supervise, and pay the work force, and remained primarily concerned only with the final product that was produced. Weighing all of the factors qualitatively, we find that the laborers were not economically dependent on Wyrick under these circumstances. Therefore, we reverse the ALJ's ruling that Wyrick jointly employed the laborers.

**CONCLUSION**

Because Wyrick did not employ the laborers, it was not required to provide them with wage statements, maintain their employment records, provide or post disclosures of employment conditions, or display MSPA posters in the work fields pursuant to 29 U.S.C. § 1831(a)-(c) and 29 C.F.R. §§ 500.76(b), (d)(1), 500.80(a), (d), as cited by WHD. We **REVERSE** the ALJ's assessment of penalties with respect to those violations.

Regarding the remaining violation, for utilizing the services of unregistered FLCs in violation of 29 U.S.C. § 1842 and 29 C.F.R. § 500.71, we **AFFIRM** the ALJ's ruling that the laborers were engaged in agricultural employment, but **REMAND** for further proceedings consistent with this Order on the issue of whether the laborers were employed on a seasonal basis.

**SO ORDERED.**