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Bryan Arbeit

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## ARTICLES

# A FRANCHISOR'S FLSA LIABILITY FOR ITS FRANCHISEE'S WORKERS: WHY OPERATIONAL CONTROL OVER EMPLOYMENT CONDITIONS SHOULD MAKE A FRANCHISOR A JOINT EMPLOYER

*Bryan Arbeit\**

## INTRODUCTION

The franchising model has been described as “a ubiquitous, lucrative, and thriving business model.”<sup>1</sup> The U.S. Census Bureau reported that of the 295 industries for which franchising data was collected in 2007, franchise businesses accounted for 7.9 million workers out of a total workforce of 59 million.<sup>2</sup> Despite the substantial number of franchisee workers in the U.S. economy,<sup>3</sup> determining when a franchisor is jointly liable with a franchisee for violations of the Fair Labor Standards Act (“FLSA”) is far from an exact science.

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\* Bryan Arbeit is an associate at Wigdor LLP with significant experience in the areas of employment and civil rights litigation. Bryan graduated in 2011 from Hofstra University School of Law. At graduation, Bryan was awarded the Maurice A. Deane award for having the highest GPA of the graduating class, the Gina Escarce Memorial Award for his contribution to student learning, and Citations of Excellence in Labor and Employment and Torts Courses. The author would like to thank his family, friends, colleagues, and a special someone for all their support and encouragement.

1. *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725 (Cal. 2014).

2. *Census Bureau's First Release of Comprehensive Franchise Data Shows Franchises Make Up More than 10 Percent of Employer Businesses*, U.S. CENSUS BUREAU (Sept. 14, 2010), [https://www.census.gov/newsroom/releases/archives/economic\\_census/cb10-141.html](https://www.census.gov/newsroom/releases/archives/economic_census/cb10-141.html) (reporting that “franchise businesses accounted for nearly \$1.3 trillion of the \$7.7 trillion in total sales for these industries, [and] \$153.7 billion out of the \$1.6 trillion in total payroll . . .”).

3. *See id.* (demonstrating that more than 10% of employer businesses are franchises).

In determining FLSA liability generally, district courts in the United States Court of Appeals for the Second Circuit (“Second Circuit”) employ a number of factors from tests created by the Second Circuit in response to different factual circumstances.<sup>4</sup> The Second Circuit, however, has not yet examined an employment relationship between a franchisor and its franchisee’s workers.<sup>5</sup> This Article advocates for courts and practitioners to consider the operational control of a franchisor over the employment conditions of franchisee workers as the primary factor to determine an employment relationship between a franchisor and its franchisee’s workers. Specifically, when the franchisor can control the employment conditions of a franchisee worker—through requiring uniformity of operations in the franchised locations—then a franchisee worker should be considered an employee of the franchisor under the FLSA’s broad definition of an employee.

Part I discusses the statutory text of the FLSA and how the term “employee” under the FLSA is broadly defined to include those who employers “suffer or permit work,” while other remedial statutes fail to provide such extensive coverage. Part II of this Article discusses the leading joint employment cases from the Supreme Court of the United States (“Supreme Court”) and the Second Circuit. Part III discusses the franchise model’s strong emphasis on uniformity of operations. Part IV discusses why operational control over a worker’s employment conditions should be the primary factor in determining an employment relationship between a franchisor and its franchisee’s workers. Part IV also demonstrates how franchisor FLSA joint employer liability can incentivize franchisors to enforce compliance with the FLSA while at the same time protecting against liability by requiring franchisees to sign indemnification agreements and purchase employment practices liability insurance.

## I. THE FLSA AND THE BROAD DEFINITION OF EMPLOYEE

Subject to some exceptions, the FLSA defines “employee” to mean “any individual employed by an employer.”<sup>6</sup> The FLSA in turn defines

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4. See *infra* Part II-IV. The Second Circuit has noted the “fact-intensive character of the joint employment inquiry. . . .” *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76, n.13 (2d Cir. 2003).

5. See *Cordova v. SCCF, Inc.*, No. 13CIV5665–LTS–HP, 2014 WL 3512838, at \*4 (S.D.N.Y. July 16, 2014) (“The Second Circuit has not yet considered whether a franchisor can qualify as a joint employer. . .”).

6. Fair Labor Standards Act, 29 U.S.C. § 203(e) (2012). The FLSA obligates (subject to exemptions) that “[e]very employer shall pay to each of his employees” the minimum wage

“employ” as including “to suffer or permit to work.”<sup>7</sup> Taken together, an “employee” under the FLSA is any individual who an employer suffers or permits to work.<sup>8</sup> Additionally, the definition of employer broadly “includes any person<sup>9</sup> acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>10</sup>

In *Walling v. Portland Terminal Co.*, the Supreme Court explained that the FLSA “contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to [the FLSA], were not deemed to fall within an employer-employee category.”<sup>11</sup> The legislative history of the FLSA supports the assertion that “the term ‘employee’ had been given ‘the broadest definition that has ever been included in any one act.’”<sup>12</sup> The Supreme Court has stated a “broader or more comprehensive coverage of employees . . . would be difficult to frame.”<sup>13</sup>

The definition of employee under the FLSA is remarkably broad in

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specified in the statute. *Id.* § 206(a). The FLSA also mandates (also subject exemptions) that “no employer shall employ any of his employees” for more than forty hours unless that employee is paid time and a half for the hours worked over forty. *Id.* § 207(a). “Any employer who violates the [minimum wage and overtime] provisions of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” *Id.* § 216(b). While the statutory text of the FLSA makes an employer only liable to *his* employees, the definition of employee is exceedingly broad under the FLSA. *See id.* § 203(e), 206(a).

7. *Id.* § 203(g).

8. *See* 29 U.S.C. § 203(e), (g).

9. A “person” is broadly defined as “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.” *Id.* § 203(a).

10. *Id.* § 203(d).

11. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947). Bruce Goldstein et al., explain:

[T]he language of the definition is expansive because the meanings of the words, “to permit” and “to suffer,” are very broad. “Suffer,” according to the distillation in *Corpus Juris Secundum*, “may convey the negative idea of passivity, indifference, or abstaining from preventive action, as distinguished from a demonstrative, active course or from an affirmative act. . . . It has been said that to suffer an act usually implies the power to prohibit, prevent, or hinder it, and that to suffer an act to be done by a person who can prevent it is to permit or consent to it, to approve of it, and not to hinder it.

Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1103 (1999) (emphasis added).

12. *See* *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (“The use of the words ‘each’ and ‘any’ to modify ‘employee’ which in turn is defined to include ‘any’ employed individuals, leaves no doubt as to the congressional intention to include all employees within the scope of the Act unless specifically excluded.”) *Id.* at 363, n.3.

13. *Id.* at 362.

comparison to other remedial statutes.<sup>14</sup> In comparing the FLSA to the Employee Retirement Security Income Act (“ERISA”), the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, explained:

The definition of “employee” in the FLSA evidently derives from the child labor statutes,<sup>15</sup> and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” This latter definition, whose striking breadth we have previously noted, stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA’s concept of “employee.”<sup>16</sup>

For statutes like ERISA and Title VII, which do not define “employ” as “suffer and permit” like the FLSA,<sup>17</sup> the Supreme Court has restricted the scope of employees under these statutes to common-law agency.<sup>18</sup> In situations where the Supreme Court has interpreted statutes such as the National Labor Relations Act<sup>19</sup> and Social Security Act more

14. See, e.g., MO. REV. STAT. § 290.500(3) (2007); Labor Peace Act of 1943, COLO. REV. STAT. § 8-3-104(11) (1997).

15. The term “suffer or permit” was incorporated from state child labor laws that existed at the time the FLSA was enacted. Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L.J. 393, 401 (2002); see also Goldstein et al., *supra* note 11, at 1136-38 (explaining that in the child labor law setting there was a goal “to impose a duty on firms to police their workplaces and premises”).

16. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (4th Cir. 1992) (citations omitted).

17. See, e.g., Title VII, 42 U.S.C. § 2000e(f) (2012) (defining “employee” to mean “an individual employed by an employer” but not defining “employ”).

18. See *Darden*, 503 U.S. at 323 (explaining that there is a presumption that Congress means an agency law definition for “employee” unless it clearly indicates otherwise).

19. It should be noted that the NLRA is textually different than the FLSA, and may make an employer potentially liable to both *his* own and *any* employee. To illustrate, the NLRA makes it an unfair labor practice for an employer “to discharge or otherwise discriminate against *an* employee because he has filed charges or given testimony under this sub-chapter” or “to interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1), (4) (2012) (emphasis added). Meanwhile, the NLRA makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of *his* employees.” *Id.* § 158(a)(5) (emphasis added). The more restricted possessive “his” for one unfair labor practice should be interpreted to mean that other unfair labor practices do not require the employees to be considered employed by the particular employer in order to constitute a violation under the act. In the franchising context this distinction is significant. See *NLRB Office of the*

broadly than intended, Congress subsequently amended those statutes “to demonstrate that the usual common-law principles were the keys to [those statutes’] meaning.”<sup>20</sup> As one scholar notes, “the broadness of the FLSA’s scope eclipses even that of other ‘remedial’ legislation, such as the various civil rights acts.”<sup>21</sup>

One scholar explains that the “suffer or permit to work” definition results in the “broadest category of coverage precisely because it not only subsumes workers who are controlled by and/or economically dependent on employers, but because it also embraces those whose work a business owner can prevent even though he does not physically control their work and they are not economically dependent on him.”<sup>22</sup> Given the remarkably broad scope of employees covered by the FLSA, an

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*General Counsel Issues Consolidated Complaints Against McDonald’s Franchisees and their Franchisor McDonald’s, USA, LLC as Joint Employers*, NATIONAL LABOR RELATIONS BOARD (Dec. 19, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against>. Recently, the National Labor Relations Board Office of the General Counsel issued complaints against McDonald’s franchisees and their franchisor, McDonald’s USA, LLC, as joint employers. *Id.* The complaints allege the rights of workers were violated by the franchisor and franchisees “by, among other things, making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment during the past two years.” *Id.* While the National Labor Relations Board seeks to hold the franchisor liable as a “joint employer,” the statutory text of the NLRA does not appear to require the franchisee workers to actually work for the franchisor since the statute makes it more broadly an unfair labor practice for an employer “to interfere with, retrain, or coerce employees” rather than “his employees.” See 29 U.S.C. § 158 (a)(1); *NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald’s Franchisees and their Franchisor McDonald’s, USA, LLC as Joint Employers*, *supra*.

20. *Darden*, 503 U.S. at 324-25.

21. Burch, *supra* note 15, at 402; see also Goldstein et al., *supra* note 11, at 1104 (“The Supreme Court has acknowledged this definition’s ‘striking breadth,’ calling it ‘comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.’” (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947))).

22. Goldstein et al., *supra* note 11, at 1122; see also *Darden*, 503 U.S. at 326 (noting that the “suffer or permit to work” formulation “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles”); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (explaining that, under the economic reality test, “employees” are not limited to those who are subject to the physical control of an employer). Goldstein et al. have explained that:

[T]here was an explicit direction that the definition should be designed “to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.” A broad definition of “employee,” including “any individual suffered or permitted to work by an employer,” subsequently took the place of this provision.

Goldstein et al., *supra* note 11, at 1100 (citation omitted).

employment relationship between a franchisor and its franchisee's workers should exist where a franchisor has control over the worker's employment conditions (and profits from the work).

## II. LEADING JOINT EMPLOYMENT CASES

This Section discusses the leading joint employment cases from the U.S. Supreme Court and the Second Circuit.<sup>23</sup> Courts recognize that "[t]he determination of the employment relationship does not depend on such isolated factors' as where work is done or how compensation is divided 'but rather upon the circumstances of the whole activity.'"<sup>24</sup> This concept has been generally termed the "economic realities" test.<sup>25</sup> The Supreme Court and Second Circuit in the limited cases analyzing a joint employment relationship under the FLSA "identif[y] different sets of relevant factors based on the factual challenges posed by particular cases."<sup>26</sup>

### A. Supreme Court Joint Employment Cases

Courts have described *Rutherford Food Corp. v. McComb* to be the leading Supreme Court case dealing with joint employment.<sup>27</sup> The Second Circuit used factors from *Rutherford* when the Court ruled on a

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23. Federal Regulations provide that entities will be considered joint employers:

Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b)(3) (1938). A "single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA]." *Id.* § 791.2(a). "A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case." *Id.*

24. *Irizarry v. Catsimatidis*, 722 F.3d 99, 104 (2d Cir. 2013) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)) ("The Second Circuit 'has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the *totality of the circumstances* . . .'" (emphasis added)).

25. *See id.* at 104 ("The 'economic reality' test applies equally to whether workers are employees and to whether managers or owners are employers."); *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 145 n.8 (2d Cir. 2008) ("Because the economic realities test depends on the totality of the circumstances arising in a particular employer-employee context, our decision today is limited to the facts of this case.").

26. *Irizarry*, 722 F.3d at 104 (quoting *Barfield*, 537 F.3d at 141-42).

27. *See, e.g., Liu v. Donna Karan Int'l, Inc.*, No. 00 Civ. 4221, 2000 U.S. Dist. LEXIS 18847, at \*8 (S.D.N.Y. Dec. 22, 2000); *Lopez v. Silverman*, 14 F. Supp. 2d 405, 415 (S.D.N.Y. 1998).

joint employment case.<sup>28</sup> *Rutherford* was also decided shortly after the enactment of the FLSA, setting the precedent for future cases.<sup>29</sup>

In *Rutherford*, a slaughterhouse contracted with an experienced meat boner to assemble a group of boners to perform the boning work at the slaughterhouse.<sup>30</sup> The contracted boner would be paid an amount based on the weight boned and “would have complete control over the other boners, who would be his employees.”<sup>31</sup> The slaughterhouse would provide a room in the plant for the work and slaughterhouse employees and equipment would be used to move the meat in and out of the room.<sup>32</sup> From 1942 to 1944, several boners contracted with the slaughterhouse, each one being an employee of the former contracted boner.<sup>33</sup> The District Court found “that since the boning work had started in 1942, the money paid by [slaughterhouse] had been shared equally among all the boners, except for a short time after [one boner] took over the work when he paid some of the boners by the hour.”<sup>34</sup> It was stipulated that the boners owned their own tools, which consisted of a hook, a knife, a sharpener, and a leather belt.<sup>35</sup> The boners were not members of the slaughterhouse union even though written contracts provided they should join.<sup>36</sup>

The Supreme Court examined the nature of the boners’ business in relation to the slaughterhouse.<sup>37</sup> The Supreme Court explained that boning was part of a “series of interdependent steps” in the slaughterhouse operations.<sup>38</sup> After the cattle were slaughtered and prepared by slaughterhouse employees for boning, the boners would cut off the meat into the barrels for slaughterhouse employees to prepare for shipment.<sup>39</sup> The slaughterhouse “never attempted to control the hours of the boners,” but they were required to meet the demand of the slaughterhouse and “the president and manager of [the slaughterhouse would go] through the boning area many times a day and ‘[was] after the

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28. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003).

29. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). *Rutherford* was decided in 1947, and the FLSA was enacted in 1938. *Id.* at 722-23.

30. *Id.* at 724.

31. *Id.* at 724-25.

32. *Id.* at 725.

33. See *id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See *id.* at 725-26, 730.

38. *Id.* at 725.

39. *Id.* at 726.



boners frequently about their failure to cut all of the meat off the bones.”<sup>40</sup>

The Supreme Court concluded that the meat boners were employees of the slaughterhouse and not independent contractors.<sup>41</sup> The District Court had focused on the right to contract and found that the boners sharing money equally was common and most of the boners had at various times worked at other plants under independent contractors.<sup>42</sup> The Supreme Court rejected the District Court’s reasoning and held that “the determination of the [employment] relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.”<sup>43</sup> “Viewed in this way,” the Court considered that the boners were part of a production line, responsibility under the boning contracts passed from one boner to another without material change, the premises and equipment of the slaughterhouse was used for the work, the boning group had:

no business organization that could or did shift as a unit from one slaughterhouse to another, . . . [t]he managing official of the plant kept close touch on the operation, . . . [and profitability was] more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.<sup>44</sup>

Based “[u]pon the whole,” the Supreme Court concluded the boners were employees of the slaughterhouse, including those employed by the managing boner.<sup>45</sup>

The second leading case in the joint employment context is *Falk v. Brennan*.<sup>46</sup> In *Falk*, the Supreme Court held that the real estate management service company Drucker & Falk (“D & F”) and apartment owners were joint employers of apartment maintenance workers.<sup>47</sup> “Under its contracts with the apartment owners, D & F agree[d] to perform, on behalf of each [apartment complex] owner and under his nominal supervision, virtually all management functions that are

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40. *See id.*

41. *See id.* at 729.

42. *See id.* at 729-30.

43. *See id.* at 730.

44. *Id.*

45. *See id.*

46. *See* Donald F. Kiesling, Jr., *Title VII and the Temporary Employment Relationship*, 32 VAL. U. L. REV. 1, 10 (1997).

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

ordinarily required for the proper functioning of an apartment complex.”<sup>48</sup> The maintenance workers at issue in the case worked under the supervision of D & F, were paid from the rental income of the apartment complex where they worked, and were “considered in the contracts between the [apartment] owners and D & F as ‘employees of the project owners.’”<sup>49</sup>

The Supreme Court granted certiorari to answer this question: “Are maintenance workers employed at the buildings managed by [D & F] employees of the apartment owner or of [D & F]?”<sup>50</sup> In answering this question, the Supreme Court held “it is clear that the maintenance workers are employees of the building [apartment complex] owners.”<sup>51</sup> Additionally, the Supreme Court believed “that the Court of Appeals was unquestionably correct in holding that D & F [was] also an ‘employer’ of the maintenance workers” because the FLSA “defines ‘employer’ as ‘any person acting directly or indirectly in the interest of an employer in relation to an employee’” and “‘employee’ to include ‘any individual employed by an employer.’”<sup>52</sup> Considering the “view of the expansiveness of the [FLSA’s] definition of ‘employer’ and the extent of D & F’s managerial responsibilities at each of the [apartment] buildings, which gave it substantial control<sup>53</sup> of the terms and conditions of the work of these employees,” the Supreme Court held that D & F was also an employer of the maintenance workers.<sup>54</sup>

*Rutherford* and *Falk* both illustrate the expansive scope of the term “employee” under the FLSA.<sup>55</sup> However, they do not easily answer the question of an employment relationship between a franchisor and its franchisee’s worker, where control is typically exerted indirectly through the requirements on the franchise.<sup>56</sup>

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48. *Id.* at 192.

49. *Id.* at 193.

50. *Id.* at 195.

51. *Id.*

52. *Id.*

53. In *Carter v. Dutchess*, the Second Circuit noted that since the Supreme Court referred to the amount of control exercised by D & F over the workers as substantial, “[t]he fair inference is that ultimate control was exercised by the apartment owners.” *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12-13 (2d Cir. 1984).

54. *Falk*, 414 U.S. at 195.

55. *See id.*; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947).

56. *See* discussion *infra* Part IV.

### B. Second Circuit Leading Joint Employment Cases

The Second Circuit has had to determine whether a joint employment relationship existed in a number of different factual circumstances. In *Carter v. Dutchess Community College* (“*Carter*”), the Second Circuit was confronted with the question of whether Defendant Dutchess Community College (“DCC”), who used prison inmates<sup>57</sup> as tutors, could be considered an employer even though the Department of Correctional Services (“DCS”) had the ultimate control over the prisoners.<sup>58</sup> In discussing the FLSA, the Second Circuit explained that:

The “economic reality” test since has been refined and now is understood to include inquiries into: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”<sup>59</sup>

The Second Circuit also explained that “[t]he power to control a worker clearly is a crucial factor in determining whether an employment relationship exists” but rejected the argument that such control over the “worker must be ‘ultimate’ in order to justify a finding of an employer-employee relationship.”<sup>60</sup> The Second Circuit reasoned that:

The statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy. It runs counter to the breadth of the statute and to the Congressional intent to impose a qualification which permits an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party’s veto, to escape compliance with the Act.<sup>61</sup>

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57. The Second Circuit also had to determine whether prisoners were entitled to the protection of the FLSA; the court concluded they were. *Carter*, 735 F.2d at 15.

58. *Id.* at 12. The Second Circuit has also looked to a traditional test that “arises out of the common law of agency and focuses primarily on the ‘hiring party’s right to control the manner and means by which the product is accomplished.’” *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993) (quoting *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)). However, this traditional test has for the most part been incorporated into the *Carter* factors.

59. *Carter*, 735 F.2d at 12 (quoting *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). These four factors are known as the *Carter* factors. *See id.*

60. *Id.*

61. *Id.*

Applying the four factors, the Second Circuit reversed the dismissal of the FLSA claim and allowed the prison inmate to proceed with his claim against DCC.<sup>62</sup>

In a contracting out case, *Zheng v. Liberty Apparel Co.* (“Zheng”), the Second Circuit decided whether Liberty Apparel Company, Inc. (“Liberty”), a “jobber” in the garment industry,<sup>63</sup> could be considered a joint employer to the workers of a separate corporation, Contractor Corporations.<sup>64</sup> Contractor Corporations had contracts with Liberty to assemble garments for Liberty.<sup>65</sup> The District Court dismissed the case because it found that Liberty had not exercised any of the *Carter* factors.<sup>66</sup> After reviewing its prior cases, the Second Circuit clarified that it “never suggested that, in analyzing joint employment, the four *Carter* factors alone are relevant, and that other factors that bear on the relationship between workers and potential joint employers should be ignored.”<sup>67</sup> The Second Circuit decided that “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.”<sup>68</sup> The Second Circuit vacated the dismissal and remanded to the District Court to determine whether Liberty was a joint employer.<sup>69</sup> The Second Circuit instructed the District Court that the determination should be based on “the circumstances of the whole activity. . . . viewed in the light of economic reality.”<sup>70</sup> The Court thought the District Court would find the factors from *Rutherford* “illuminating in these circumstances.”<sup>71</sup> The factors were:

- (1) whether Liberty’s premises and equipment were used for the plaintiffs’ work;
- (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint

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62. *Id.* at 14-15.

63. A “jobber . . . is a manufacturing company that contracts out the last phase of its production process.” *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 64 (2d Cir. 2003).

64. *Id.* at 63-64.

65. *Id.* at 64.

66. *Id.* at 66.

67. *Id.* at 68.

68. *Id.* at 69.

69. *Id.* at 71.

70. *Id.*

71. *Id.*

employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.<sup>72</sup>

The Second Circuit explained "[t]hese particular factors are relevant because, when they weigh in plaintiffs' favor, they indicate that an entity has functional control over workers even in the absence of the formal control measured by the *Carter* factors."<sup>73</sup> The Second Circuit also instructed the District Court that it was "free to consider any other factors it deems relevant to its assessment of the economic realities."<sup>74</sup>

The Second Circuit has addressed the issue of an individual and corporation being joint employers.<sup>75</sup> More recently, in *Irizarry v. Catsimatidis* ("*Irizarry*"), the Second Circuit addressed two legal issues mentioned in the earlier case.<sup>76</sup> In *Irizarry*, the plaintiffs had moved for partial summary judgment to determine whether John Catsimatidis ("*Catsimatidis*"), the chairman and CEO of Gristede's Foods, Inc., could be held personally liable for damages as their employer.<sup>77</sup> In deciding the case, the Court noted two legal questions mentioned in its prior decision: the scope of operational control over a company and hypothetical versus actual power.<sup>78</sup> Addressing the first question of operational control,<sup>79</sup> Catsimatidis argued "that he was a high-level employee who made . . . decisions that only affected the lives of the plaintiffs through an attenuated chain of but-for causation" and "that a FLSA 'employer' must exercise decision-making in a 'day-to-day'

72. *Id.* at 72.

73. *Id.*

74. *Id.* at 71-72.

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

76. *Irizarry v. Catsimatidis*, 722 F.3d 99, 106 (2d Cir. 2013).

77. *Id.* at 101-02. The district court had found Catsimatidis was an employer, based on the finding that "[t]here is no area of Gristede's which is not subject to [Catsimatidis's] control, whether [or not] he chooses to exercise it," and that, therefore, Catsimatidis "had operational control and, as such, [ ] may be held to be an employer." *Id.* at 103 (quoting *Torres v. Gristede's Operation Corp.*, No. 04 Civ. 3316 (PAC), 2011 WL 4571792, at \*3 (S.D.N.Y. Sept. 9, 2011) (alterations in original)).

78. *Id.* at 106. In the joint enterprise context, the Federal Regulations explain "control" as "the act of fact of controlling; power or authority to control; directing or restraining domination. 'Control' thus includes the power or authority to control." 29 C.F.R. § 779.221 (2014).

79. *Irizarry*, 722 F.3d at 106-07 ("'Operational control' is at the heart of this case.").

capacity.”<sup>80</sup> Plaintiffs countered, contending “that many cases have found individuals with ‘operational control’ on a more general level to be employers.”<sup>81</sup> After reviewing the decisions of other circuits, the Second Circuit held:

Evidence that an individual is an owner or officer of a company, or otherwise makes corporate decisions that have nothing to do with an employee’s function, is insufficient to demonstrate “employer” status. Instead, to be an “employer,” an individual defendant must possess control over a company’s actual “operations” in a manner that relates to a plaintiff’s employment. It is appropriate, as we implicitly recognized in *RSR*, to require some degree of individual involvement in a company in a manner that affects employment-related factors such as workplace conditions and operations, personnel, or compensation—even if this appears to establish a higher threshold for individual liability than for corporate “employer” status.<sup>82</sup>

Accordingly, the Second Circuit explained that “[a] person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees’ employment.”<sup>83</sup> The Second Circuit clarified that in determining whether operational control exists, there is no requirement that an individual employer be “personally complicit in FLSA violations.”<sup>84</sup> “The statute provides an empty guarantee absent a financial incentive for individuals with control, even in the form of delegated authority, to comply with the law, and courts have continually emphasized the extraordinarily generous interpretation the statute is to be given.”<sup>85</sup> The Second Circuit further clarified that while the individual employer does not need to “be responsible for managing plaintiff employees—or, indeed . . . [to] directly come into contact with the plaintiffs, their workplaces, or their schedules—the relationship between the individual’s operational function and the plaintiffs’ employment must be closer in degree than simple but-for causation.”<sup>86</sup>

As for the second question of actual versus hypothetical power, the Second Circuit left open the question whether “unexercised authority is

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80. *Id.* at 107.

81. *Id.*

82. *Id.* at 109.

83. *Id.* at 110.

84. *Id.*

85. *Id.*

86. *Id.*

insufficient to establish FLSA liability” since authority had been exercised in the case.<sup>87</sup> However, the Second Circuit discussed an Eleventh Circuit case which “squarely held that even when a defendant ‘could have played a greater role in the day-to-day operations of the [] facility if he had desired . . . unexercised authority is insufficient to establish liability as an employer.’”<sup>88</sup> The *Irizarry* Court indicated that there needs to be “some involvement in the company’s employment of the employees” to have individual liability.<sup>89</sup>

After exploring these two legal questions, the Second Circuit proceeded to apply the “economic reality” test to “decide whether Catsimatidis [was] an employer under the FLSA.”<sup>90</sup> Specifically, the Second Circuit asked, “[i]s there ‘evidence showing [Catsimatidis]’ authority over management, supervision, and oversight of [Gristedes]’ affairs in general,’ as well as evidence under the *Carter* framework or any other factors that reflect Catsimatidis’s exercise of direct control over the plaintiff employees?”<sup>91</sup> Although characterizing the facts of the case as a “close” one, the Second Circuit found Catsimatidis to be an employer under the FLSA.<sup>92</sup>

The Second Circuit has yet to be faced with the factual scenario of a franchisor-franchisee worker relationship.<sup>93</sup> District courts in the

87. *Id.* at 111.

88. *Id.* (first omission in original) (quoting *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008)).

89. *See id.*

90. *Id.* (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir.1999)).

91. *Id.* (third alteration in original) (citation omitted). Specifically, the Second Circuit reviewed any evidence of the individual defendant’s “overall authority,” *id.*, “involvement with stores,” *id.* at 113, and the individual *Carter* factors of whether the defendant: “had the power to hire and fire employees,” “supervised and controlled employee work schedules or conditions of employment,” “determined the rate and method of payment,” or “maintained employment records.” *Id.* at 114-16 (quoting *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008)).

92. *Id.* at 116-17.

93. *See supra* note 5. Recently, the Fifth Circuit Court of Appeals reversed a jury verdict and award of damages for violations of the FLSA entered against the individual owner of a franchise. *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014). The Fifth Circuit focused mainly on the *Carter* formal factors. *Id.* at 448 (quoting *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012)). The Fifth Circuit downplayed the significance of the terms of the franchise agreement, describing a provision of the franchise agreement requiring the franchisee to follow “policies and procedures promulgated by the franchisor for selection, supervision, or training of personnel” as an “innocuous statement.” *Id.* at 452 (internal quotation marks omitted). The Third Circuit affirmed the granting of summary judgment to Enterprise Holdings, Inc., a franchisor of Enterprise Rent-a-Car. *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 471 (3d Cir. 2012). The court held that “plaintiffs produced no evidence that Enterprise Holdings, Inc.’s actions at any time amounted to mandatory directions rather than mere recommendations.” *Id.* at 470. Given the nature of the franchise business, and requirement for uniformity, it is unclear how the court was able to determine

Second Circuit that have been confronted with the issue of franchisor liability under FLSA have used a combination of the formal and functional control factors from *Carter* and *Zheng*.<sup>94</sup> For example, in *Cordova v. SCCF, Inc.*, the district court stated that “*Carter* and *Zheng* thus establish ‘a nonexclusive and overlapping set of factors to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA . . . .’”<sup>95</sup> However, this Article asserts that because the nature of the franchise business model focuses on the uniformity of operations among franchisees, courts and practitioners should look to the operational control of a franchisor over its franchisee’s workers employment conditions as the primary factor for determining an employment relationship.

### III. UNIFORMITY AS PART OF THE FRANCHISEE BUSINESS MODEL

In *Patterson v. Domino’s Pizza, L.L.C.*, the California Supreme Court explained that “[a] franchisor, which can have thousands of stores located far apart, imposes comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way.”<sup>96</sup> Uniformity is important for customer expectations and

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these directions were treated as mandatory or not. In most instances, it should be a factual question for the jury to determine, not a motion for summary judgment when facts should be construed in favor of the non-moving party. Additionally, given the role a franchisor plays among its franchises, it is difficult to reconcile how the Third Circuit was able to conclude that it was “readily apparent [ ] that Enterprise Holdings exercised *no* control, let alone *significant* control, over the assistant managers.” *Id.* at 471.

94. See, e.g., *Benitez v. Demco of Riverdale, L.L.C.*, No. 14 Civ. 7074(CM), 2015 WL 803069, at \*1 (S.D.N.Y. Feb. 19, 2015) (stating that “[e]conomic reality is largely a function of four [*Carter*] factors” and that “other factors can mix [in]”); *Cordova v. SCCF, Inc.*, No. 13 Civ. 5665-LTS-HP, 2014 WL 3512838, at \*3-5 (S.D.N.Y. July 16, 2014); *Olvera v. Bareburger Group, L.L.C.*, 2014, No. 14 Civ. 1372(PAE), 2014 WL 3388649, at \*4 (S.D.N.Y. July 10, 2014); *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 258 (S.D.N.Y. 2012) (stating that the *Carter* factors are sufficient but not necessary to establish an employment relationship and that functional control may be sufficient).

95. *Cordova*, 2014 WL 3512838, at \*4.

96. *Patterson v. Domino’s Pizza, L.L.C.*, 333 P.3d 723, 725-26 (Cal. 2014); see Sean Obermeyer, Note, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees*, 40 IND. L. REV. 611, 616 (2007) (“Strict adherence by the franchisee to the franchisor’s system is a hallmark of the business format model.”). In *Patterson v. Domino’s Pizza, L.L.C.*, the Court further elaborated that:

Under the [franchise] business format model, the franchisee pays royalties and fees for the right to sell products or services under the franchisor’s name and trademark. In the process, the franchisee *also* acquires a business plan, which the franchisor has crafted for all of its stores. This business plan requires the franchisee to follow a system of standards and procedures. A long list of marketing, production, operational, and



franchisor success.<sup>97</sup> The amount of control over a franchised business may vary depending on the nature of services or products and the particular desires of the franchisor.<sup>98</sup> Ways to evaluate the extent of franchisor control over a franchised business include reviewing: (1) the process of obtaining a franchisee; (2) the terms of the franchised agreement; (3) policies, manuals, guidelines, and training programs promulgated by the franchisor;<sup>99</sup> (4) the extent franchisor's employees or agents are involved in the business operations of the franchisor;<sup>100</sup> and (5) the extent the franchisor reviews or performs oversight over the franchisor operations.<sup>101</sup>

Obtaining uniformity of operations in the franchised locations is designed to ensure the franchised product meets consumer expectations.<sup>102</sup> *The Economics of Franchising* explains "it is the consistency of system's operations, service, and product quality that attracts customers and induces loyalty: customers become loyal if the

administrative areas is typically involved. The franchisor's system can take the form of printed manuals, training programs, advertising services, and managerial support, among other things.

*Patterson*, 333 P.3d at 733 (citations omitted).

97. Obermeyer, *supra* note 96, at 616 (explaining that the success and growth of franchising is due to the consumer's preference for "proven quality and uniformity in goods and services" and the franchisor ensuring consistency "by creating, marketing, and ultimately enforcing its system").

98. See Raymond G. McGuire, *The Labor Law Aspects of Franchising*, 13 B.C. INDUS. & COM. L. REV. 215, 224-25 (1971).

99. For example, "7-Eleven franchisees complete an in-depth orientation comprised of interactive classroom sessions, completed at the 7-Eleven Store Support Center in Dallas" and then undergo "self-paced in-store training." *Industry Leading Training and Support*, 7-ELEVEN FRANCHISE, <http://franchise.7-eleven.com/franchise/training-support> (last visited Apr. 6, 2015). For store employees, "7-Eleven offers in-store training sessions as well as computer-based training modules that are interactive, trackable, and consistently updated to keep employees at the forefront of 7-Eleven customer service standards." *Id.*

100. Cf. *The 7-Eleven Business Consultant*, 7-ELEVEN FRANCHISE, <http://franchise.7-eleven.com/franchise/business-consulting> (last visited Apr. 6, 2015) ("7-Eleven provides all franchisees with a Business Consultant who visits in-store, once a week, to help with all the challenges involved with running the business.").

101. See *Patterson*, 333 P.3d at 744 (Werdegar, J., dissenting).

For example, a franchisor, pursuing its legitimate interest in ensuring that customers enjoy a similar experience in each franchised location, may implement the franchise agreement in various ways, including ways short of day-to-day oversight, to exercise control over employee selection, training, personal appearance, interaction with customers, and compliance with in-store procedures. *This retention of control by the franchisor, enforced by regular inspections and the threat that a noncompliant franchisee will be placed in default, presents occasions for the franchisor to act as an employer by forcing the termination of problematic employees.*

*Id.* (emphasis added).

102. See Obermeyer, *supra* note 96, at 616.

experiences they enjoy at diverse units of these chains routinely meet their expectations.”<sup>103</sup> Dairy Queen lists several reasons why someone might consider opening one of its franchises, including a “[p]roven business model with a 70-year history” and “[s]trong customer loyalty and relationship with the brand.”<sup>104</sup> In deciding *In re Enterprise Rent-A-Car Wage & Hour Employment*, the Third Circuit noted “[t]he Enterprise website does not draw any distinction between Enterprise Holdings, Inc. or its 38 subsidiaries, and represents that ‘Enterprise Rent-a-Car’ has a fleet of nearly 900,000 rental vehicles, 64,000 employees, and 6,900 offices throughout the world.”<sup>105</sup> John Schnatter, known to most people as “Papa” John, states in a video on franchising that he is “really proud of the 80,000 team members that wake up every day and make Papa John’s Better Ingredients, Better Pizza promise come to life.”<sup>106</sup> Sean Obermeyer explains the potential harm a lack of uniformity presents: “[s]ince consistency and uniformity of operations play such a central role in modern business format franchising, franchisors have a legitimate concern that a wayward franchisee might do considerable harm to the franchisor’s brand image and, consequently, to its ultimate profitability.”<sup>107</sup>

Franchisors must enforce uniformity, because without enforcement, an individual franchisee is incentivized to increase profits margins by offering lower quality products or services while still capitalizing on the franchisor’s name to attract new customers.<sup>108</sup> It has been reported that enforcement has become stricter over time, with most franchisors retaining “the right to periodically inspect franchised locations to ensure compliance with the franchise agreement” and retaining the “right to terminate the relationship if the franchisee’s performance is inadequate.”<sup>109</sup>

Franchisors are not shy about their control over uniformity.<sup>110</sup> In a

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103. ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* 117 (2005).

104. *Franchise with Us*, DAIRY QUEEN, <http://www.dairyqueen.com/us-en/Company/Franchise-With-Us/Franchise-With-Us> (last visited Apr. 7, 2015).

105. *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 465-66 n.8 (3d Cir. 2012).

106. Papajohns, *An Invitation from “Papa” John—Founder*, YOUTUBE (Oct. 9, 2012), <https://www.youtube.com/watch?v=fiaFe410ulk>.

107. Obermeyer, *supra* note 96, at 619.

108. *Id.* at 619-20.

109. *Id.* at 620.

110. *See id.* at 611, 632-33; *Popular South Florida Restaurants Ordered Shut*, LOCAL10.COM (Dec. 19, 2014, 11:34 PM), <http://www.local10.com/news/popular-south-florida-restaurants-ordered-shut/30328596>.

public statement, Tim McIntyre, Vice President of Communications for Domino's, stated: "We are very serious about the quality and safety of our food and would never consciously overlook health code regulations, *nor our own rigorous standards.*"<sup>111</sup> Chick-fil-A explains that "[franchise] [o]perators must successfully complete an extensive, multi-week training program prior to commencing operation of a franchised Chick-fil-A Restaurant business."<sup>112</sup> Jamba Juice states on its franchising website that it will train both the franchisee and its staff to help open new stores and the region franchise leader will also regularly visit the store.<sup>113</sup> John Kimmins, President of Arthur Murray International, Inc. (AMI), explained that the franchised Arthur Murray dance studios are "contractually obligated to operate in accordance with AMI's business formats, methods, standards and specifications, in order to obtain uniformity of operations, as is typical in franchised businesses."<sup>114</sup>

If a franchisor is controlling only the appearance of a store or a physical product that is sold, there is a good argument that the franchisor's involvement is too remote from the work of the franchisee's workers to consider the franchisor to be a joint employer.<sup>115</sup> However, if the franchisor at the operational level controls how franchisee workers performs services for customers or other terms and conditions of employment, then this type of operational control likely justifies treating the franchisor as a joint employer even if the franchisor is not involved in the day-to-day employment decisions.<sup>116</sup>

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111. *Popular South Florida Restaurants Ordered Shut*, *supra* note 110 (emphasis added).

112. *Franchise Opportunities*, CHICK-FIL-A, <http://www.chick-fil-a.com/Company/Franchise-Opportunity> (last visited Apr. 7, 2015).

113. *Franchise Info*, JAMBA JUICE, <http://jambafranchise.com> (last visited Apr. 7, 2015) ("We train you to manage a Jamba Juice unit, and we'll train your team to help ensure a successful opening. . . . Your Region Franchise Leader will visit you regularly to ensure we are meeting your needs on an ongoing basis."). Orkin pest care also provides its franchisees "[i]nitial training to launch [the] business" and "[o]ngoing training for [the franchisee] staff." *Franchise Opportunities*, ORKIN, <http://www.orkin.com/franchise> (last visited Apr. 7, 2015).

114. Declaration of John Kimmins in Support of Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b) and 12(b)(6) of Defendants Arthur Murray International, Inc. & John Kimmins at 2, *Ziscand v. Arthur Murray International, Inc.*, No. 12-cv-1841 (E.D.N.Y. dismissed Jan. 21, 2015). The author was an attorney for the plaintiff in this FLSA action against AMI and one of its franchise locations.

115. See Obermeyer, *supra* note 96, at 612.

116. See *id.*

#### IV. WHY OPERATIONAL CONTROL SHOULD BE THE PRIMARY FACTOR TO DETERMINE AN EMPLOYMENT RELATIONSHIP BETWEEN A FRANCHISOR AND ITS FRANCHISEE'S WORKERS

This section discusses the reasons operational control over franchisee workers' employment conditions should be the primary factor to determine an employment relationship between a franchisor and franchisee workers under the FLSA. This section also discusses how holding franchisors liable as a joint employer incentivizes them to enforce the wage laws while being able to avoid the costs of violations committed by the franchisee.

##### A. *Reasons to Use Operational Control of a Franchisor for FLSA Liability*

As defined in *Irizarry*, operational control is exercised over employees if the decisions made by the person (or here, the corporation) "directly affect the nature or conditions of the employees' employment."<sup>117</sup> Determining an employment relationship between a franchisor and its franchisee's worker should focus on operational control for the following reasons.

First, the broad definition of employee under the FLSA supports holding a franchisor liable for exerting operational control.<sup>118</sup> A franchisor should be considered to "suffer or permit" the work of franchisee employees when the franchisee exerts operational control over that work and profits from that work. The franchisor permits the work by allowing the franchisee to operate the franchise according to the specifications of the franchisor.<sup>119</sup> The franchisor also suffers the work since it has the power to prevent or restrict the work through agreements with the franchisee or policies it promulgates.<sup>120</sup> The franchisee workers are also economically dependent on the franchisor in the sense that the franchisor's permission is needed for the continuation of the franchised business.<sup>121</sup> If the franchisor terminates the franchisee, a worker may

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117. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 110 (2d Cir. 2013).

118. See *supra* notes 6-8 and accompanying text.

119. See *infra* notes 142-46 and accompanying text.

120. See Goldstein, et al., *supra* note 11, at 1122 (explaining that "[e]mployers on whom workers are economically dependent may have the power to prevent their work" and "those who fail to use their economic power to prevent work have suffered or permitted it just like those who fail to use their physical control").

121. See Obermeyer, *supra* note 96, at 620 ("In the end, however, the franchisor's ability to

continue to work, but such work will no longer be under the control of the franchisor, assuming the franchisee owner is not subject to a non-compete preventing him from continuing operations.<sup>122</sup> Concluding that a franchisor employs franchisee workers if it has operational control over the worker's employment conditions conforms to the FLSA's broad definition of employee, which includes those who are suffered or permitted to work.<sup>123</sup>

Second, an "employer" under the FLSA "includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."<sup>124</sup> If a franchisee is considered the direct employer of its workers, a franchisor that exerts operational control of the franchisee's employment conditions should be considered "acting directly or indirectly in the interest"<sup>125</sup> of the franchisee by creating and enforcing the franchisor's "proven business system."<sup>126</sup> Thus, the extended definition of employer also supports that a franchisor falls within this scope.

Third, a franchisor has the rights to the franchised business, and delegates those rights to the franchisees to use through contractual agreements where the franchisor retains control and oversight over the franchisee.<sup>127</sup> *Irizarry* noted that an individual (or entity) could still be held vicariously liable for an FLSA violation, even if the individual was not personally complicit in the particular violation.<sup>128</sup> Thus, even though the franchisor delegates much of its authority for the day-to-day decision-making to the franchisees, if the franchisor retains and

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control the franchisee's operations is most striking in the franchisor's retained right to terminate the relationship if the franchisee's performance is inadequate. Thus, although the franchisor does not directly manage daily operations, the franchisor holds an impressive club with which to control and punish wayward franchisees that deviate significantly from the franchisor's wishes." (footnote omitted)).

122. See Jason Daley, *The Legal Issues that Could Change Franchising Forever*, ENTREPRENEUR, Jan. 8, 2015, <http://www.entrepreneur.com/article/240709>. Jim Coen, Executive Director of the Maine Franchise Owners Association stated that:

When push comes to shove, in most franchise agreements franchisees don't have anything but the equipment they buy. They have no right to the name, to their customer base, and because of noncompete clauses they can't use the skills they've learned. Yet franchising sells units by telling people they can be in business for themselves.

*Id.*

123. See *supra* notes 6-8 and accompanying text.

124. 29 U.S.C. § 203(d) (2012).

125. *Id.*

126. Obermeyer, *supra* note 96, at 616.

127. See *id.* at 615-16.

128. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 110 (2d Cir. 2013).

asserts<sup>129</sup> operational control over a franchisee worker's conditions of employment, then the franchisee workers should be considered employees of the franchisor.

Fourth, a franchisor should not be required to have the ultimate control over a franchisee worker's employment conditions to be considered an employer. The Second Circuit in *Carter* rejected the notion that "an entity's control over a worker must be 'ultimate' in order to justify a finding of an employer-employee relationship."<sup>130</sup> As discussed in *Irizarry*, to be an employer one does not need to manage employees or even have direct contact with them.<sup>131</sup> If a franchisor has operational control over the uniformity of operations that affects franchisee worker's employment conditions, then this exercise of control should be sufficient to hold them liable as an employer.<sup>132</sup>

Fifth, since the franchisor and franchisee have mutual interests, the workers should be considered employees of both. A franchisee serves the interest of the franchisor in ensuring the quality of the franchised name, and in some instances helps strengthen the franchisor business, enabling it to attract additional franchisees.<sup>133</sup> Both the franchisor and franchisee mutually benefit from the sales of the franchised business, the franchisor in the form of royalties and the franchisee in the form of potential profit.<sup>134</sup> Thus, workers at a franchisee that serves the interest of the franchisee and the franchisor should be considered employees of both.<sup>135</sup>

Sixth, courts in the Second Circuit need to recognize that the

129. The Second Circuit indicated in *Irizarry* that unexercised authority may be insufficient to establish individual liability but declined to resolve the question. See *id.* at 111. Whether unexercised authority over operational control is insufficient in the context of a franchisor involves similar questions, but the concern between individual and corporate liability may justify a distinction.

130. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

131. See *Irizarry*, 722 F.3d at 110.

132. This is not to say that if a franchisor exercises additional, more formal control over a worker a court should not consider that in the totality of the circumstances. But even without formal control, the exercise of operational control over a franchisee worker's employment conditions should be sufficient so long as it is more than de minimis.

133. See *Patterson v. Domino's Pizza, L.L.C.*, 333 P.3d 723, 733 (Cal. 2014). A franchisee does not operate to serve only his own interest, otherwise it might be motivated to offer lower quality of goods and services the franchisor is known for in order to make more money. See *Obermeyer*, *supra* note 96, at 619.

134. See *Obermeyer*, *supra* note 96, at 617, 619.

135. The Supreme Court has held that the definition of employee under the FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

franchise relationship differs in significant respects from the ones which the Second Circuit has used to develop factors for analyzing joint employment. For example, in *Zheng*, the Second Circuit drew factors from *Rutherford* because both cases involved performing work as part of a production line.<sup>136</sup> The Second Circuit, in coming up with these six factors, made clear that it offered them as guidance, specifically stating that the factors, “listed in no particular order,” were factors the District Court “will find illuminating *in these circumstances*” and the District Court was “free to consider any other factors.”<sup>137</sup> Additionally, while there are many similarities between the operational control of Catsimatidis—the CEO, President, and Chairman in *Irizarry*—and that of a corporate franchisor,<sup>138</sup> relying on the more formal *Carter* factors to determine an employment relationship may be too restrictive; a franchisor more often controls a worker’s employment indirectly through the policies it imposes on its franchisees.<sup>139</sup> Also, the higher threshold for individual liability discussed in *Irizarry* is inapplicable to a corporate franchisor.<sup>140</sup>

Eighth, many of the factors the Second Circuit has used in other cases support an employment relationship in the franchise context.<sup>141</sup> Looking to the formal control factors, franchisors have the power to hire and fire by virtue of the ability to terminate the franchise for failing to meet standards.<sup>142</sup> Franchisors also supervise conditions of employment through inspections<sup>143</sup> and providing both employees and the public with an avenue to address concerns.<sup>144</sup> Depending on the particular franchise business format, the rate of payment (or formula for determining same) may be dictated by the franchisor.<sup>145</sup> Finally, a franchisor may require

136. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003).

137. *Id.* (emphasis added).

138. See *Irizarry v. Catsimatidis*, 722 F.3d 99, 102, 107 (2d Cir. 2013).

139. See Obermeyer, *supra* note 96, at 617.

140. See *Irizarry*, 722 F.3d at 105, 109 (“[T]he question we confront here [is] whether *an individual* within a company that undisputedly employs a worker is personally liable for damages as that worker’s ‘employer.’” (emphasis added)).

141. See *supra* Part II.B.

142. See *supra* notes 125-26 and accompanying text.

143. See Obermeyer, *supra* note 96, at 611; see also *Patterson v. Domino’s Pizza, L.L.C.*, 333 P.3d 723, 744 (Cal. 2014) (Werdegarr, J., dissenting).

144. Cf. Blair & Lafontaine, *supra* note 103, at 117-18. (“Franchisees will complain to the franchisor about under-performing outlets and request that the franchisor intervene because they know how a bad experience by a customer in one location can have an adverse impact throughout the entire franchise system and ultimately on them.”).

145. See *id.* at 62-63 (“In addition to collecting an initial franchise fee, franchisors typically require franchisees to make ongoing payments throughout the life of their contracts.”).

the submission of employment records to determine or audit royalty payments.<sup>146</sup>

When a franchisor exerts operational control over a franchisee worker's employment conditions, it is in essence asserting functional control in the context of a franchisor-franchisee relationship. By comparison, *Zheng* involved a relationship in the garment industry where one company contracted with another to assemble a garment according to the company's specifications.<sup>147</sup> Under a franchise relationship, the franchisee is contracting to assemble a franchise location according to the franchisor's specifications.<sup>148</sup> Looking to functional control factors, the uniform format of the franchised business can be passed from one franchisee to the next without material changes.<sup>149</sup> While certain equipment and real estate may be purchased by the franchisee, the products, services, and trademarked name are owned by the franchisor and only provided to the franchisee to use pursuant to the terms of the franchise contract.<sup>150</sup> The franchisee does not shift from one franchisor to another, often because he is precluded by agreement from competing after the franchise agreement ends.<sup>151</sup> The franchisor also exercises oversight on the operation of the franchise to ensure uniformity and efficient operations.<sup>152</sup> Finally, while a franchisee may have "initiative, judgment or foresight" more akin to an independent contractor,<sup>153</sup> the franchisee is still relying on the franchisor's "proven business system" for success.<sup>154</sup>

Finally, the FLSA should be construed to encourage compliance with the statute's wage requirements. The next section proposes that imposing liability on a franchisor encourages the franchisor to be more proactive in ensuring compliance, while not necessarily imposing additional costs.

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146. See Constantine T. Fournaris & Robert S. Burstein, *The Franchise Option*, in *STARTING A NEW BUSINESS: A PRACTICAL GUIDE TO STARTING A NEW BUSINESS, PRACTICE, OR FRANCHISE* 315, 357-58 (Pa. Bar Inst. ed., 2010) (including a clause in a sample franchise agreement which permits the franchisor to audit documents, including employee records).

147. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 64 (2d Cir. 2003).

148. See Fournaris & Burstein, *supra* note 146, at 321.

149. See Blair & Fontaine, *supra* note 103, at 54 (explaining that franchised chains tend to use uniform contracts for all franchisees).

150. See *id.* at 3-4; Daley, *supra* note 122.

151. See Daley, *supra* note 122.

152. See Blair & Fontaine, *supra* note 103, at 119.

153. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1946).

154. See Obermeyer, *supra* note 96, at 616-17.



### B. Increased Enforcement and Assignment of Liability

Franchisors should ensure compliance with those policies regarding uniformity of operations, but if their policies affect the franchisee workers, they should also ensure franchisee workers are paid the required wages for their work.<sup>155</sup> If a franchisor could be sued as a joint employer,<sup>156</sup> the franchisor would be incentivized to create policies and monitor franchisees<sup>157</sup> for compliance with the FLSA.<sup>158</sup>

Meanwhile, being held responsible as a joint employer does not necessarily mean that the franchisor will be on the hook for a franchisee worker's claims. Franchisors have the ability to select franchisees that have the economic resources to ensure proper wages are paid and who can withstand liability if there is a failure to pay.<sup>159</sup> A franchisor can require franchisees to indemnify litigation and liability costs resulting

155. Bruce Goldstein, et al., have noted that:

The purpose of the broad imposition of liability on business owners with the power to prevent the work is to provide incentives for them to assert their power to prevent the violations. It is presumed that the power to prevent the performance of the work carries with it the power to allow the work, conditioned on compliance with minimum labor standards contained in these laws.

Goldstein, et al., *supra* note 11, at 1137.

156. Just because a franchisor can be sued does not mean that they will be. Additionally, even if they are named, the franchisor may just be a nominal defendant.

157. Such policies may include educating franchisees about compliance with the laws, reviewing payroll for compliance with overtime, and a complaint system for violations. See Tiffany Robertson, *6 Tips for Avoiding Wage-and-Hour Claims Under the FLSA*, WEComPLY (June 17, 2014), <http://www.wecomply.com/post/2280715-6-tips-for-avoiding-wage-and-hour-claims> (proposing steps employers should take to ensure compliance with the FLSA).

158. Franchisors should have an existing incentive to ensure franchisees comply with wage laws because of the negative publicity and its effect on the brand image as a result of a wage and hour lawsuits. See Annalyn Kurtz, *Subway Leads Fast Food Industry in Underpaying Workers*, CNN MONEY (May 1, 2014, 3:50 AM), <http://money.cnn.com/2014/05/01/news/economy/subway-labor-violations>.

159. See *Franchise Frequently Asked Questions*, FIELDFISHER, <http://www.fieldfisher.com/expertise/franchising/franchise-frequently-asked-questions> (last visited Apr. 12, 2015) (explaining that the franchisor has complete discretion in choosing who will be brought in as a franchisee). Joel Griswold tells employers to keep in mind that:

As a general proposition, plaintiffs look for the biggest classes and the deepest pockets. It is only natural that they gravitate towards naming franchisors as defendants. In the meantime, it is important for franchisors (and other entities vulnerable to being named as joint employers) to stay current on how courts are analyzing joint employment issues in their respective jurisdictions and to act accordingly.

*Joel Griswold Highlights Employer Liability Issues in Professional Sports, Unpaid Internships and Food Franchises*, FLSA LITIGATION TRACKER LITIGATOR Q&A (BLOOMBERG BNA), July 16, 2014, at 5, available at <https://www.bakerlaw.com/files/uploads/Documents/News/Articles/EMPLOYMENT/2014/Griswol dJFinalJuly2014.pdf>.

from FLSA violations committed by the franchisee.<sup>160</sup> To cover this risk of liability, a franchisor can further require a franchisee to purchase employment practices liability insurance that covers wage and hour violations.<sup>161</sup> While most policies only cover the defense of wage and hour claims,<sup>162</sup> some policies tailored to larger companies define “loss” to include “defense costs, settlements, and judgments.”<sup>163</sup> The fact that franchisors have the ability to require franchisees to obtain such insurance highlights the nature of operational control they can exert<sup>164</sup> and why franchisors should ultimately have some responsibility for wage violations if they are exerting operational control over employment conditions and profiting from that work.<sup>165</sup> As one scholar posits, “the underlying protective statutory purposes must shape enforcement and adjudication: identifying the employers should not be the minimum-wage workers’ burden.”<sup>166</sup> Thus, the burden should be on the franchisor and franchisee to distribute the potential liability among each other, rather than obligate the franchisee worker to identify who is responsible.

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160. See Fournaris & Burstein, *supra* note 146, at 374 (including an indemnification clause in a sample franchise agreement); see also Goldstein, et al., *supra* note 11, at 1144 (“Instead, the colliable [sic] entities should be required to work out the legal responsibility contractually through indemnification—provided that the workers are not remitted to a remedy against a judgment-proof labor contractor or other intermediary.”).

161. See Obermeyer, *supra* note 96, at 639.

[I]n most cases, a franchisee’s general liability insurance policy will not cover claims for sexual harassment and discrimination. For this reason, a franchisor should require in the franchise agreement that its franchisees maintain adequate “employment practices liability insurance,” which is specifically designed to cover employee claims of sexual harassment. To ensure that franchisees maintain adequate coverage, franchisors should periodically request proof of insurance from the franchisee. Moreover, the franchise agreement should contain a provision that allows the franchisor to terminate the relationship if a franchisee is unwilling or unable to maintain an adequate policy.

*Id.* Though “employment practice liability insurance (EPLI) policies typically exclude wage and hour claims. . . . Marsh” offers a policy “designed to cover wage and hour risks typically excluded under traditional EPLI policies.” *Marsh Wage and Hour Preferred Solution*, MARSH, <http://usa.marsh.com/Portals/9/Documents/WageandHourFactSheet.pdf> (last visited Apr. 12, 2015).

162. See David A. Gauntlett, *Insurance Coverage for Wage and Hour Claims*, LEXISNEXIS, 2014 Emerging Issues 7192 (May 2014).

163. See Marsh, *supra* note 161.

164. See *supra* note 96 and accompanying text.

165. See discussion *supra* notes 120-22.

166. Goldstein, et al., *supra* note 11, at 1144.

## CONCLUSION

The work performed by franchisee workers profits both the franchisee and franchisor.<sup>167</sup> It is not unfair to hold a franchisor responsible for ensuring minimum and overtime wages are paid to franchisee workers when that franchisor also asserts operational control over aspects of the franchised business that affect the franchisee employment conditions.<sup>168</sup> Franchisors are also in the best position to create policies and monitor compliance with the FLSA and can do so without exposing themselves to additional costs.<sup>169</sup> Thus, when determining a franchisor's liability under the FLSA, i.e. whether there is an employment relationship between the franchisor and franchisee workers, the primary factor practitioners and courts should consider is the operational control of the franchisor over the franchisee workers' conditions of employment.

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167. See Obermeyer, *supra* note 96, at 612.

168. See *supra* note 129 and accompanying text.

169. Franchisors already have enforcement mechanisms in place to ensure compliance with the franchise agreement. See *supra* note 96 and accompanying text.