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The Seven Deadly Sins of MSPA Joint Employer Liability: Strict Liability, the Department of Labor's Hidden Agenda!

by

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The Seven Deadly Sins of MSPA Joint Employer Liability: Strict Liability, the Department of Labor's Hidden Agenda!

INTRODUCTION

New regulations issued by the United States Department of Labor (DOL) on March 11, 1997[1] completely revised the factors considered in determining joint employer liability under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[2] The original five regulatory factors that focused on the *control* possessed by the alleged joint employer[3] have been replaced by seven factors[4] that focus on the metaphysical doctrine of *economic reality*.[5] The practical effect of these regulations amounts to a victory for those who advocate strict liability for farmers and other agricultural employers (growers) for MSPA violations of the independent farm labor contractors (contractors) they utilize.[6] With deft manipulation of the Congressional Record by Congressman George Miller of California,[7] and the political appointment

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[1] 29 C.F.R. § 500.20 (1997).

[2] Migrant and Seasonal Agricultural Worker Protection Act [hereinafter MSPA], 29 U.S.C. §§ 1801-1872 (1997).

[3] 29 C.F.R. § 500.20(h)(4)(ii)(A)-(E) (1996).

[4] 29 C.F.R. § 500.20(h)(5)(iv)(A)-(G) (1997).

[5] Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

[6] Agricultural Worker Protection Reform Act of 1993, H.R. 1173, 103rd Cong. (1993). This was a failed attempt to amend the MSPA to expressly declare that "the agricultural employer or agricultural association shall be deemed *strictly liable* for any violation of [the MSPA]." *See also* George Hostetter, *Report Says 77% of Grape Industry Violates Laws*, FRESNO BEE, Sept. 16, 1998, at A1 (quoting Marcos Camacho, general counsel for the United Farm Workers, concerning the legal responsibility for labor contractor violations of farm labor laws: "Our position is that ultimately the grower is always responsible, no matter who supplies the workers . . . .").

[7] 128 CONG. REC. S32459 (daily ed. Dec. 19, 1982) (statement of Sen. Hatch). On the day H.R. 7102 (the MSPA) was passed by the Senate, Senator Hatch said "[i]t is true that the Labor Committee has not formally filed a *report* on this measure, nor on S. 2930 for that matter. However, I think it is appropriate to set forth some explanation for purposes of *legislative history*." Therefore, some have strongly suggested that the House Labor and Education Committee Report, H.R. Rep. No. 97-885 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, was "simply not considered at the time the Senate voted on MSPA." Letter from Bobby F. McKown, Executive Vice-President/CEO, Florida Citrus Mutual, to Maria Echaveste, Administrator, Wage and Hour Division,

of Maria Echaveste as Administrator of the Wage and Hour Division of the Employment Standards Administration of the DOL,[8] that which strict liability proponents could not achieve legislatively[9] has finally been accomplished administratively.[10] Judicial legitimacy to the tortured reasoning embodied in the new regulations was contemporaneously provided by the Ninth Circuit Court of Appeals.[11]

The narrow focus of this comment is the *de facto* strict liability of the grower under the new MSPA regulations where the employee status of the agricultural worker and the independent status of the con-

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U.S. Department of Labor (June 11, 1996) [hereinafter Letter from McKown] (commenting in response to the proposed rules, MSPA, 61 Fed. Reg. 14035 (1996) (to be codified at 29 C.F.R. pt. 500) (proposed Mar. 29, 1996)).

[8] *Maria Echaveste Biography* (visited December 16, 1997) <http://www.cquest.com/hepm/maria_e.html> (confirmed by U.S. Senate on June 24, 1993).

[9] Agricultural Worker Protection Reform Act of 1993, H.R. 1173, 103rd Cong. (1993).

[10] 29 C.F.R. § 500.20 (1997).

[11] Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997). Although the rules were not final at the time of its decision, the court cited to the proposed rules as additional justification for its strained application of the original five regulatory factors plus judicially developed non-regulatory factors. *See infra* notes 59-67 and accompanying text. In *Torres*, a grower was held to be a joint employer of farm workers even where the contractor had sole responsibility for the following activities: recruiting workers; complying with MSPA disclosures; arranging the numbers of workers needed and which days to harvest; selecting rows to harvest; matching workers with specific rows; supervising picking routines, speed of picking, picking quality, and picking schedules; filling up the bins; hiring the workers; firing the workers; ensuring working conditions met state and federal law; the use of piece-rate for workers; the amount to pay workers; when to pay workers; the rate of pay for workers; the withholding of SSI and taxes; the preparation and retention of payroll records; the issuance of W-2s; the payment of payroll taxes; and the preparation and retention of picking records for the workers to determine minimum wage. *Torres*, 111 F.3d at 637.

The court found that: (1) by staggering the planting dates of the cucumbers, the grower controlled the harvest schedule and the number of workers needed; (2) the grower had the *power* to decide when to harvest because when bins were short one day, grower called off the harvest; (3) since grower's employee (who transported the full bins to the packing shed from the field) had the *right* to inspect all farm worker work, this constituted substantial supervision; (4) because grower agreed with contractor to increase his compensation during the early harvest so that the contractor could afford to pay a high enough piece-rate to pay a minimum wage equivalent, the grower exercised *some power* in determining pay rates for the farm workers. *Id.* at 642. The court then applied the non-regulatory factors focusing on the economic reality test to prove that the farm workers were indeed employees and economically dependent on the grower: (1) they performed a specialty job in an integral step in the production of a cucumber crop; (2) they were unskilled; (3) they exercised no managerial skill in the amount of money they earned; (4) they were not part of a business organization moving as a unit from field to field; and (5) they had nowhere near the investment in the cucumber crop as did the grower. *Id.* at 643-45.

tractor are given.[12] This comment explores a number of questions arising from the new MSPA. What circumstances will qualify the grower as a joint employer with unlimited liability for MSPA violations of the contractor? More importantly, are there any realistic circumstances under the new MSPA regulations where the grower will not be found a joint employer? Have the proponents of strict liability for the grower finally achieved their goal of accessing deeper pockets than that of the guilty contractor for victims of MSPA violations? Should strict liability be imposed through judicial and administrative implication rather than express legislation? What is being done on behalf of the grower to remedy this situation? And finally, what should be done to "assure the necessary protections for . . . agricultural workers, agricultural associations, and *agricultural employers*"?[13]

I. BACKGROUND AND DEVELOPMENT OF THE MSPA

A. The Nature of Agricultural Work

Migrant and seasonal agricultural workers have long endured a livelihood "historically characterized by low wages, long hours and poor working conditions."[14] Most seasonal farm work consists of such labor intensive operations as thinning, weeding, pruning, tying, and harvesting.[15] Such operations are necessarily performed where the crops are grown, namely, in the fields and under the sun.[16] By nature, these functions are of short duration and must be completed over vast growing areas by a large labor pool.[17] Growing areas are typically distant from domestic services such as housing, potable water, and sanitation

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[12] The status of the agricultural worker can fall into only one of two categories. He/she is either a self-employed independent contractor or an employee. Once employee status is determined, the courts then wrestle with the identification of the responsible employer(s), for only these are the proper defendants. Under the broad definition of employ as applied under the Fair Labor Standards Act of 1938 [hereinafter FLSA], it is possible for the employee to have more than one employer. FLSA, 29 U.S.C. § 203(g) (1997). In agriculture, there are three possible employment relationships. The agricultural worker may be the employee of (1) the grower; (2) the contractor; or (3) both under the joint employer doctrine. Prerequisite to a finding that the worker is an employee of a contractor, the court must first ascertain the independent status of the farm labor contractor. If independence is absent, then both the worker and the contractor are employees of grower by definition.

[13] MSPA, 29 U.S.C. § 1801 (1997) (emphasis added).

[14] H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547.

[15] The author is the son of an immigrant farm worker turned grower and worked on a typical row-crop farm weeding, thinning, harvesting, and performing other unskilled farm labor from childhood through early adulthood.

[16] *Id.*

[17] *Id.*

facilities.[18] Even with portable field sanitation and water services, field rows are typically a quarter mile to one-half mile in length making access to these services inherently inconvenient.[19] Fieldwork is typically dirty, dusty, repetitive, and physically exhausting.[20] The hours are usually long and the worker is exposed to the weather.[21] Most of these conditions are dictated by the horticultural requirements of the crops grown and are not particularly designed or controlled by the grower.

Certainly, when compared to the working conditions of congressmen, judges, lawyers, or anyone else laboring in an office atmosphere with ready access to sanitary facilities and refreshment, agricultural working conditions are indeed "poor." So too, are the working conditions "poor" of other low wage, low skilled workers.[22] Unique to the farm workers' situation however, is the short duration of the demand for their services in any particular field by any particular grower. This seasonal demand for labor moves around the countryside following the maturity and variety of the crops grown. The farm worker must continually seek new employment, arrange for transportation to the job site and, in the case of migrant workers, find suitable temporary housing. Often, these farm worker needs are satisfied by the contractor and/or the grower.

B. The Rise and Fall of the Farm Labor Contractor Registration Act of 1963

Testimony abounds of the exploitation of vulnerable farm workers by unscrupulous contractors.[23] The Farm Labor Contractor Registration Act of 1963 (FLCRA) was the legislative response to the unique needs of farm workers.[24] It was designed to protect them from economic ex-

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *E.g.*, workers in a garment industry "sweatshop" or in a typical fast-food establishment.

[23] H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547-49. The 1963 enactment was the Committee's response to testimony which revealed:

> [I]n many cases the contractor tends to exaggerate conditions of employment when he recruits workers in their home base or that he fails to inform them of their working conditions at all; tends to transport them in unsafe vehicles; fails to furnish promised housing or else furnishes substandard and unsanitary housing; often operates a company store while making unitemized deductions from workers' paychecks for purchases, and usually pays the workers in cash without records or units worked and taxes withheld (citations omitted).

[24] H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547; Farm Labor Contractor Registration Act of 1963 [hereinafter FLCRA], 7 U.S.C. §§ 2014-

ploitation by the contractor,[25] "a middleman who recruited, transported and supervised migrant and seasonal workers and who was thought to be not only the primary violator but the most unscrupulous."[26]

Ten years later, the "abuses . . . continued unabated . . . , the Act ha[d] failed to achieve its original objectives, . . . [and could not] be effectively enforced."[27] The FLCRA was amended in 1974 to create a private cause of action for victims of violations of the Act.[28] However, since virtually all duties and responsibilities under the Act applied only to farm labor contractors,[29] civil remedies were limited to the depth of their pockets alone. The typical contractor is a small operator of limited means, often times insolvent and unable or unwilling to provide minimum wages and working conditions mandated under the Act.[30] Litigation under the FLCRA typically involved attempts by farm worker advocates to expand the definition of a contractor to encompass the activities of the grower with the presumably deeper pocket.[31] Defendants, on the other hand, sought to avoid legal responsibility by claiming their activities did not qualify them as contractors or by alleging the farm worker was not an employee but an independent contractor not covered by the Act.[32]

2055 (repealed 1983).

[25] Strict liability proponents often use the term "crew leader" in place of "farm labor contractor" to imply less independence from the grower that engages his/her services than does the more common term. Jeanne E. Varner, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 ARIZ. L. REV. 433, 434 (1996). "Farm labor contractor" is the term defined and used in the MSPA and its predecessor, the FLCRA. MSPA, 29 U.S.C. § 1802(7) (1997); FLCRA, 7 U.S.C. §§ 2041-2055 (repealed 1983).

[26] H.R. REP. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4548.

[27] *Id.*

[28] *Id.*; 7 U.S.C. § 2050 (repealed 1983).

[29] H.R. REP. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4548.

FLCRA, 7 U.S.C. §§ 2041-2055 (repealed 1983).

[30] Letter from Bruce Goldstein, Co-Director, Farmworker Justice Fund, Inc., to Maria Echaveste, Administrator, Wage and Hour Division, U.S. Department of Labor (June 12, 1996) (commenting on the proposed rules, MSPA, 61 Fed. Reg. 14035 (1996) (to be codified at 29 C.F.R. pt. 500) (proposed Mar. 29, 1996)).

[31] H.R. REP. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4548. If a grower could be shown to have performed the acts of a farm labor contractor, then the grower could be defined as a farm labor contractor with liability for the worker protections under the FLCRA. If a farm worker could be shown to have operated as an independent contractor rather than as an employee, then the worker would be excluded from the Act's protections.

[32] *Id.*

II. THE BIRTH OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA)

By 1983 three facts became clear: (1) the FLCRA as amended failed to reverse the abuses; (2) the ability of the DOL to enforce the Act was doubtful; and (3) an entirely new approach to the problem was needed.[33] After "extensive negotiation between representatives of the agricultural community, organized labor, migrant groups, the United States Department of Labor, and the committees of jurisdiction in both the U.S. House of Representatives and the United States Senate[,]" the MSPA passed as a consensus bill.[34] Congressman George Miller of California was its author.[35]

A. Private Right of Action Against Any Violator

The MSPA essentially parallels the FLCRA by protecting migrant and seasonal agricultural workers with guidelines and requirements concerning wages, information and record keeping, safety and sanitation of housing, and motor vehicle safety.[36] However, the MSPA provides for a private right of action in the federal courts against *any violator* for damages or other equitable relief.[37] This right extends to *anyone* experiencing a violation of *any provision* of the MSPA or *any regulation promulgated under the Act.*[38] Unlike the FLCRA, the MSPA applies to all agricultural employers, not just the contractor.[39] The MSPA, therefore, has teeth that were previously lacking under the FLCRA, by potentially extending worker remedies to deeper pockets than those of the typical contractor.

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[33] *Id.* at 4549.

[34] *Id.* at 4547.

[35] 139 Cong. Rec. 23, E 484 (1993) (extension of remarks not spoken on the floor by Rep. Miller).

[36] MSPA, 29 U.S.C. §§ 1821-1832, 1841-1844 (1997).

[37] MSPA, 29 U.S.C. § 1854(a), (c) (1997).

[38] MSPA, 29 U.S.C. § 1854(a), (c) (1997) (emphasis added). Much of FLSA case law deals with the appropriate tests to determine the worker's status under the law, for employee status is prerequisite to recovery for violation of any rights under the FLSA. MSPA, 29 U.S.C. § 1801 (1997).

[39] MSPA, 29 U.S.C. § 1802(2) (1997): "The term 'agricultural employer' means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."

B. Adoption of the Fair Labor Standards Act Definition of "Employ" and the Joint Employer Doctrine

The MSPA adopts by specific reference the same definition of the term "employ" as is given under the Fair Labor Standards Act of 1938 (FLSA).[40] While the FLSA broadly defines "employ" as "to suffer or permit to work,"[41] this definition does not automatically include those who would utilize the services of independent contractors who may "alone be responsible for . . . their own employees."[42] But independent contractor status does not necessarily imply the contractor is solely responsible for his/her employees under the FLSA. Another employer may be jointly responsible for the contractor's employees.[43] "The term joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time . . . ."[44] Indeed, whether a purported joint employer possesses "sufficient indicia of control" over the work of the employees of a purported independent contractor is a factual question unaffected by any possible determination of the independent contractor status.[45]

Congressman Miller's House Report, however, justifies the use of an all encompassing "joint employer" doctrine by its adoption of the FLSA definition of "employ."[46] The report proclaims an expansive interpretation of the word to be consistent with an inaccurate ascription of a quote from the United States Supreme Court.[47] In *United States v.*

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[40] MSPA, 29 U.S.C. § 1802(5) (1997); FLSA, 29 U.S.C. § 203(g) (1997).

[41] FLSA, 29 U.S.C. § 203(g) (1997).

[42] Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947).

[43] Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973).

[44] 29 C.F.R. § 500.20(h)(4) (1996).

[45] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964); *but see* Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997): "Whether an entity is a 'joint employer' under the FLSA and [MSPA] is a question of law (citations omitted)."

[46] H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4552. "The Committee's use of [employ] was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute . . . ."

[47] *Id.* The report claimed that in defining employ under the FLSA, the Court stated: "a broader or more comprehensive coverage of employees within the stated concept would be difficult to frame." In fact, the Court was referring to the definition of the term "employee." United States v. Rosenwasser, 323 U.S. 360, 362 (1945). The Court pointed to the plain language of the Act, which used modifiers "each" and "any" with the word "employee," and used the word "any" in the definition of "employee" meaning "any individual employed by an employer." *Id.* This, together with the definition of the term "employ" being "to suffer or permit to work," led the Court to conclude that the Act's language was comprehensive. *Id.* It clearly extended the applicability of the concept of the minimum hourly wage under the Act to all workers, no matter the method of compensation, whether hourly, by piece-rate, or any other mea-

Rosenwasser, the Court held that the plain language of the minimum wage provisions of the FLSA extended the scope of its coverage to piece-rate workers as well as to hourly workers.[48] This determination was made because the modifiers "each," "any," and "every" were used with the words "employees" and "employers," as those words were defined in the Act.[49] This case did not address the issue of joint employment or the determination of the worker's status as an employee or independent contractor.

C. The Joint Employer Doctrine

According to Congressman Miller's House Report, the "joint employer" doctrine is the central foundation for the MSPA.[50] Yet the term "joint employer" is foreign to the plain language of the MSPA and is nowhere to be found in its section of definitions.[51] The term is common in FLSA case law[52] and was therefore only incorporated by reference under the MSPA adoption of the FLSA definition of "employ."[53] One must look to the DOL regulations promulgated under the MSPA to find any mention and definition of the term "joint employment."[54]

The pre-1997 regulations set forth a nonexclusive list of five factors to be considered in determining whether a joint employment relationship exists:

> [1] the nature and degree of control of the workers;

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surement. *Id.* at 363. "A worker is as much an employee when paid by the piece as he is when paid by the hour." *Id.*

[48] *Rosenwasser*, 323 U.S. at 362.

[49] *Id.*

[50] H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4552. It is interesting that such a central foundation for the Act was never included in its plain language, but only mentioned in the committee report which, as alleged by Senator Hatch, did not accompany the Act when it was passed by the Senate. 128 CONG. REC. S32459 (daily ed. Dec. 19, 1982).

[51] MSPA, 29 U.S.C. § 1802 (1997).

[52] FLSA, 29 U.S.C. § 203 (1997). See Interpretive Notes and Decisions II(B)(14) for list of cases.

[53] MSPA, 29 U.S.C. § 1802(5) (1997).

[54] 29 C.F.R. § 500.20(h)(4) (1996): "The term joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time . . . . If . . . two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist." But see 29 C.F.R. § 500.20(h)(5) for the current definition after the rule changes went into effect on March 11, 1997 adding: "When the putative employers share responsibility for activities set out in the following factors or in other relevant facts, this is an indication that the putative employers are not completely disassociated with respect to the employment and that the agricultural worker *may be economically dependent* on both persons . . . ." (Emphasis added).

> [2] the degree of supervision, direct or indirect of the work;
> [3] the power to determine the pay rates or the methods of payment of the workers;
> [4] the right, directly or indirectly, to hire, fire or modify the employment conditions of the workers; and
> [5] preparation of payroll and payment of wages.[55]

The DOL distilled these factors from federal court decisions that discussed the issue of the plaintiff's status as employee or independent contractor and/or the issue of the defendant's status as a possible joint employer under the FLSA.[56] These five factors clearly involve "indicia of control;" that is powers, rights, and acts that may implicate the joint employer status of a defendant.[57] They do not concern elements that implicate the employee status of a plaintiff. The joint employer question is only reached if the employee status of the plaintiff has already been established.[58] This is an important distinction that has become somewhat blurred in the cases.

Recognizing that the five factors cited in the DOL regulations were not meant to be exhaustive,[59] certain "non-regulatory factors" were

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[55] 29 C.F.R. § 500.20(h)(4)(ii)(A)-(E) (1996).

[56] *Id.* (citing Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973) (joint employment not considered; independent status of contractor not considered); Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973) (joint employment discussed in dicta; no determination made as to independent status of contractor); Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956) (joint employment considered focusing on control factors); United States v. Rosenwasser, 323 U.S. 360 (1945) (nothing to do with independent contractor status or joint employment; definition of employee broad enough to include workers paid by piece-rate as well as wages); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (employee status versus independent contractor status considered; joint employment not discussed); Real v. Driscoll Strawberry Assocs., 603 F.2d 748 (9th Cir. 1979) (employee status versus independent contractor status considered); Mednick v. Albert Enters, Inc., 508 F.2d 297 (5th Cir. 1975) (independent contractor status considered); and Usery v. Pilgrim Equip. Co., 527 F.2d 1308 (5th Cir. 1976) (employee status versus independent contractor status considered)).

[57] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).

[58] Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL'Y 321, 332-33 (1989): "Joint employment . . . does not . . . determine whether the workers are employees or [not] . . . the [contractor] has already conceded that they are employees. Instead, the . . . function . . . is to establish a link with the deep pocket where it is only through the intermediary that the larger employer relates to the workers." *See also* 29 U.S.C. § 1801 (1997); *supra* note 38 and accompanying text. Only employees are proper plaintiffs under the MSPA. Only employers are proper defendants. Joint employment is only reached if the employee status of the plaintiff has been established and there exists a situation where a contractor is the primary employer. Whether the grower who engages the services of the contractor will be a joint employer of the employee is a separate determination.

[59] 29 C.F.R. § 500.200(h)(4)(ii) (1996).

developed by courts considering employment relationships under the FLSA:

> (6) investment in equipment and facilities;
> (7) the opportunity for profit and loss;
> (8) permanency and exclusivity of employment;
> (9) the degree of skill required to perform the job;
> (10) ownership of property or facilities where work occurred; and
> (11) performance of a specialty job within the production line integral to the business . . . .[60]

However, these additional factors tend to focus on the question of whether the plaintiff is an employee—economically dependent on an employer—or an independent contractor.[61] They do not particularly determine the existence of a joint employment relationship.[62] The distinction has been largely ignored by most courts, which in their zeal to apply the "economic realities"[63] test to the "circumstances of the whole activity"[64] and to eschew common law definitions of employment,[65] apply such non-regulatory factors to the joint employment determination as well.[66] However, in 1994, the Eleventh Circuit in *Aimable v. Long & Scott Farms*, held that the judicially derived factors

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[60] Aimable v. Long and Scott Farms Inc., 20 F.3d 434, 439 (11th Cir. 1994).

[61] In order to determine employee status, courts apply what is known as "the economic reality of dependence test." Linder, *supra* note 58, at 323. This test "eschews the traditional common law 'right to control' test." H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4543. Rather, it looks to the "circumstances of the whole activity." Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). Even Congressman Miller's House Report distinguishes between the different employment scenarios alleged in agriculture where a worker may be either an independent contractor, an employee of an independent farm labor contractor, an employee of a grower, or an employee of both the contractor and grower under a joint employer determination. H.R. REP. NO. 97-885, *supra* note 14, at 4552-53. It endorses the economic reality of dependence test as applied by the courts as to whether the worker is an employee or and independent contractor. *Id.* But, as to joint employer determinations the report endorses the formulation of *Hodgson v. Griffin* and *Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973). *Id.* However, this case "never reached the question of how to analyze the structure of employment relationships where the crew leader is a bona fide independent contractor." Linder, *supra* note 58, at 333. Its test is described as a "hybrid manipulable control/quasi-economic reality test" for determining whether the workers are the grower's employees. *Id.* The point being that the committee report impliedly recognized some notion of control in the joint employer determination.

[62] *Aimable*, 20 F.3d at 439 (citations omitted). After applying each of the six non-regulatory factors to the facts of *Aimable*, the court cautions that the non-regulatory factors "are not necessarily useful in all . . . situations and *are of no value to joint employment determinations*." (Emphasis added).

[63] *Rutherford*, 331 U.S. at 727.

[64] *Id.* at 730.

[65] Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947).

[66] *See, e.g.*, Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997); Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996).

were irrelevant to the joint employer question and only relevant to the plaintiff's employee status.[67] Such courts that correctly discern the distinction between the determination of employee status and joint employer status have been vehemently criticized by advocates of *per se* liability for growers.[68]

III. A STRICT LIABILITY AGENDA

Proponents of a strict liability theory for all beneficiaries of farm labor attempted to implement their designs through the offices of Congressman George Miller of California, who in 1993 authored H.R. 1173 as a proposed amendment to the MSPA.[69] This bill specifically provided that:

> An agricultural worker shall not be deemed to be self employed and a farm labor contractor shall not be deemed to be the sole employer of an agricultural worker. Any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery or who produces or conditions seed and who uses, retains, or benefits from, the services of a farm labor contractor with respect to the employment of an agricultural worker shall be deemed the employer of such worker for purposes of this Act.[70]

It went on to provide:

> Where an agricultural employer or agricultural association uses, retains, or benefits from the services of a farm labor contractor with respect to the employment of an agricultural worker, the agricultural employer or agricultural association shall be deemed *strictly liable* for any violation of this act suffered by such worker or an immediate family member of such worker in relation to any farm labor contracting activity connected with

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[67] Aimable v. Long and Scott Farms, Inc., 20 F.3d 434, 445 (11th Cir. 1994). However, after publication of the proposed new rules in March 1996, the Eleventh Circuit underwent a seemingly miraculous conversion when it overturned a lower court decision that relied heavily on *Aimable*. The court quoted extensively from Rep. Miller's legislative history of the MSPA and repeated the mantra of economic dependence. While not vacating or overruling its decision in *Aimable*, this court went to great lengths to distinguish its facts from those of *Aimable*, and, while applying those factors deemed indicative of a joint employment relationship in *Aimable*, it distanced itself from the distinction *Aimable* advocated between the employee/independent contractor determination and the joint employer determination and simply stated that those factors were indicative of the employee's economic dependence on *any* putative employer. *See Antenor*, 88 F.3d 925.

[68] *See, e.g.*, Varner, *supra* note 25, at 452 (calling the Eleventh Circuit's application of the test factors "arbitrary" and accusing the court of "utter blindness to economic reality" in its decision in *Aimable*).

[69] Agricultural Worker Protection Reform Act of 1993, H.R. 1173, 103rd Cong. (1993).

[70] Agricultural Worker Protection Reform Act of 1993, H.R. 1173, 103rd Cong. (1993).

that employment.[71]

Thus, the author of the MSPA and of its committee report revealed his true agenda: *strict liability for all beneficiaries of agricultural labor*! Even with liberal Democratic Party control of the House of Representatives and the White House in 1993 and 1994, such an open and honest declaration of strict liability for violations of the MSPA failed to attract enough support to get the bill out of committee.[72] With the Republican Party gaining control of the House in 1995, a more subtle implementation of strict liability was needed.

IV. THE ADMINISTRATIVE SOLUTION: THE SEVEN DEADLY SINS

On March 29, 1996, Clinton appointee Maria Echaveste, Administrator of the Wage and Hour Division of the Employment Standards Administration of the DOL, published proposed changes to MSPA rules defining "joint employment."[73] Drawing heavily on Congressman Miller's Education and Labor Committee House Report 97-885 as the expressed intent of Congress, and on liberal judicial interpretation of the term under analogous statutes, the proposed rules were billed as reflecting the DOL's *current* understanding of the term.[74]

A review of the Congressional Record reveals a very different contemporaneous understanding of the relevant term by the DOL in 1983.[75] A statement by Robert B. Collyer, then Deputy Under Secretary of Labor, was read into the Senate record on the day the MSPA was passed.[76] Mr. Collyer stated that crew members employed by a la-

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[71] *Id.* at § 13(c) (emphasis added).

[72] Only 16 Democratic co-sponsors were found. Agricultural Worker Protection Reform Act of 1993, H.R. 1173, Bill Tracking Report, available in LEXIS, Legis Library, BLT103 file.

[73] Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 51 Fed. Reg. 14035, 14035-14036 (1996) (to be codified at 29 C.F.R. pt. 500) (proposed Mar. 29, 1996).

[74] *Id.* at 14036.

[75] 128 CONG. REC. S32455 (daily ed. Dec. 19, 1982) (statement by Robert B. Collyer, then Deputy Under Secretary of Labor, accompanying the MSPA's introduction in the Senate giving detailed explanation of joint employment diametrically opposed to Congressman Miller's House Report 97-885).

[76] *Id.*:

> Finally, in order to deal with the potentially ambiguous situation where workers may be jointly employed by a farm labor contractor and an agricutural employer, the bill adopts the definition of the term "employ" used under the [FLSA] as the term has been interpreted by the courts over the years for joint employment circumstances . . . . That determination is based on the facts of the individual case . . . . For example, crew members would be considered jointly employed by the labor contractor and farmer if the crew leader assembles a crew and brings them to the farm, and the farmer exercises the power to direct, control or supervise

bor contractor "would be considered jointly employed . . . if . . . the farmer exercises the power to direct, *control* or supervise the work or to determine the pay rates and the methods of payments."[77] Furthermore, Congressman Miller's oft-cited Committee report apparently never accompanied the MSPA to the Senate and was therefore not considered by that body on the day of the MSPA's passage.[78] This should cast some doubt as to the report's value in determining the legislative intent behind the MSPA.[79]

After an appropriate comment period, the new MSPA regulations became effective on April 11, 1997.[80] These rules effectively did away with much of the five control factors for joint employer determination under the old DOL rules and incorporated instead the essence of the judicially developed factors discussed earlier. Employment status is now to be determined under the metaphysical "economic reality of dependence" doctrine, which evolved out of the judicial swamps of the New Deal Era.[81] As enacted the current rules read:

> (iv) The factors set forth . . . are analytical tools to be used in determining the ultimate question of economic dependency . . . in determining whether or not an employment relationship exists . . . :
> (A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor Contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);
> (B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or

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> the work or to determine the pay rates and methods of payments. Our goal in dealing with "joint employer" issues was very simple: if a fixed situs agricultural business "employs" a covered farm worker for FLSA purposes, it also "employs" that farm worker for MSPA purposes. The exact same principles will be used to define the term "employ" in MSPA "joint employment" situations as are used under the FLSA.

[77] *Id.* (emphasis added).

[78] *Id.* at S32459 (statement of Sen. Hatch). *See also supra* note 7.

[79] Letter from McKown, *supra* note 7. Mr. McKown cites judicial skepticism about reliance on committee reports for statutory interpretation. *See* Pierce v. Underwood, 487 U.S. 552, 556 (1994): "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."; NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 582 (1994): "The isolated statement in the 1974 Committee Report [did] not represent an authoritative interpretation of the phrase . . . ."; "Ordinarily a committee report that is not explaining a new or altered statutory language has little or no significance in the interpretation of the statue." American Hospital Ass'n v. NLRB, 899 F.2d 651, 657 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991).

[80] 29 C.F.R. § 500.20 (1997).

[81] H.R. REP. No. 97-885. at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4552; *see also, infra* notes 88-98 and accompanying text.

> fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);
> (C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;
> (D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;
> (E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;
> (F) Whether the work is performed on the agricultural employer/association's premises, rather than on premises owned or controlled by another business entity; and
> (G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing worker's compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).[82]

Again, the listed factors are not exhaustive.[83] Courts should consider any other factors deemed significant to the determination of the economic dependency of the aggrieved worker on the putative joint employer.[84] The factors are not a checklist, nor should they be considered quantitatively.[85] Rather, a "qualitative" approach is appropriate with no one factor or combination of factors being dispositive of the "ultimate question of economic dependency."[86]

The MSPA expressly adopts the FLSA definition of "employ" and by implication its "joint employer doctrine" as derived by FLSA case law.[87] But the foundation for the judicial interpretation of "employ" and the evolution of the "joint employer" doctrine of the FLSA was, in turn, derived by analogy from other remedial social legislation of the New Deal Era.[88] Liberal and expansive meanings were justified to effectuate the remedial purposes of the legislation.[89] Common law tests for employment relationships were abandoned in favor of a "consideration of all the circumstances" approach[90] that evolved into an "eco-

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[82] 29 C.F.R. § 500.20 (h)(5)(iv)(A)-(G) (1997).

[83] 29 C.F.R. § 500.20 (h)(5)(iv) (1997).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] H.R. REP. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4552.

[88] Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947). The Court said the FLSA was part of the social legislation of the 1930s such as the National Labor Standards Act and the Social Security Act. Decisions under those acts defining employer-employee relationships were therefore persuasive by analogy.

[89] NLRB v. Hearst Pub., 322 U.S. 111, 124 (1944).

[90] *Rutherford*, 331 U.S. at 730.

nomic realities" test[91] based on an "economic dependency" standard.[92] The Supreme Court adopted, for FLSA purposes, a list of six factors developed in contemporary FLSA cases to test the employer-employee relationship under the Social Security Act.[93]

In reaction to the Supreme Court decisions of 1947, Congress repudiated the economic reality test and restored the common law control test for employer determination for the National Labor Relations Act (NLRA), social security, and income tax purposes.[94] It is particularly important to note that Congress expressly excluded independent contractors from being classified as employees under these acts.[95] Today, the economic reality test for employer status is found only in FLSA[96] and MSPA litigation,[97] where it metastasized only analogously from congressionally repudiated judicial reasoning.[98]

A logical argument can be made for the modern use of the control test for joint employer determination under the FLSA and the MSPA by analogous application of the expressed intent of Congress on the issue.[99] If the very statutes from which the economic dependency test was cloned have had that test excised by congressional surgery, should not its analogous removal from the FLSA and the MSPA also follow? What Congress intentionally removed should not now have some talismanic value over what Congress explicitly restored to the statutory body. While it is true that "the economic reality test has never been

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[91] United States v. Silk, 331 U.S. 704, 713 (1947).

[92] Bartels v. Birmingham, 332 U.S. 126, 130 (1947): "In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."

[93] Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 REV. OF LAW AND SOC. CHANGE 435, 449-50 (1986-87):

> (1) skill required to perform work; (2) capital investment by the worker; (3) opportunity for profit or loss by the worker; (4) degree of control by the employer; (5) performance of the work as part of an integrated unit of the employer's business; and (6) permanency and exclusivity of the relationship (citing *Silk*, 331 U.S. at 716).

[94] *Id.* at 451. Congress restored the control test to the NLRA. In 1948 the Republican controlled Congress specifically "wrote the control test into the definition of 'employee' for social security, and income tax purposes." *Id.* (commenting on The Taft-Hartley Act of 1947, 29 U.S.C. § 152(3) (1973)).

[95] *Id.* The significance is that the economic realities test cannot be applied to an otherwise independent contractor to label him/her an "employee" of the grower. If the contractor is an employee of the grower, then so are the contractor's employees and the joint employment issue is moot.

[96] *Id.*

[97] Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997).

[98] *See supra* notes 87-92 and accompanying text.

[99] *Id.*

challenged by Congress as applied to FLSA,"[100] it is also true that the attempted legislation of its logical implication of strict liability for growers under the MSPA was never approved by Congress.[101]

V. Application of the Economic Reality of Dependence Test

It is difficult to conceive of a situation where an employee of a bona-fide independent farm labor contractor—which employee by definition is economically dependent upon the contractor for his living—is not also economically dependent upon those who engage the contractor's services.[102] But for his/her clients, the contractor has no work to offer his/her employee. By the same token, but for the purchasers of his/her production, the grower has no need to produce and therefore no need of the services of either a contractor or his/her own direct agricultural employees. And taken to the extreme, but for the ultimate consumer of agricultural products, there would be no market, no need for processors, growers, contractors, or agricultural workers. The transitive nature of "economic dependency" taken to its Euclidian extreme illustrates its inapplicability to federal employment law.[103]

The economic dependency test for proper plaintiff employee status is arguably appropriate given the remedial nature of social legislation such as the FLSA and the MSPA.[104] It is particularly helpful where a grower seeks to avoid liability under the MSPA by claiming the agricultural worker/plaintiff is not really an employee, but an independent contractor.[105] It is an inappropriate test, however, in the determination for proper defendant/joint employer status.[106]

If a *per se* rule of strict liability for beneficiaries of the services of an agricultural worker through utilization of a contractor was ever the intent of Congress, it would have been easy enough to so state in the plain language of the MSPA.[107] Indeed, Congressman Miller's 1993 attempt to establish that intent with his strict liability amendment to the MSPA failed to attract sufficient co-sponsors and died in committee.[108]

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[100] Linder, *supra* note 58, at 323-24 & n.15.

[101] *See supra* notes 69-72 and accompanying text.

[102] Linder, *supra* note 58, at 326: "Yet identifying precisely what 'economic dependence' entails is difficult for it could plausibly encompass the relationships of the entire economically active population except those able to live on their capital indefinitely."

[103] Aimable v. Long and Scott Farms, Inc., 20 F.3d 434, 442 (11th Cir. 1994): "[T]he laws that bind the Euclidian world do not apply with equal force in federal employment law; appellants' leap of logic is unfounded."

[104] Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947).

[105] H.R. Rep. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4552-53.

[106] *Aimable*, 20 F.3d at 445.

[107] 29 U.S.C. §§ 1801-1872 (1997).

[108] Agricultural Worker Protection Reform Act of 1993, H.R. 1173, Bill Tracking

Clearly, there must be some liability-forming nexus beyond mere economic dependence between the employee of a violating contractor and the grower that would implicate a "joint employer" status.[109] There must be some volitional act on the grower's part that if avoided, prevents liability and if committed, invites it. In short, there must be "sufficient indicia of control" by the grower to qualify him/her as a joint employer.[110]

VI. STRICT LIABILITY DISCLAIMER OR "THE [DOL] DOTH PROTEST TOO MUCH, METHINKS"[111]

During the public comment period for the 1996 proposed regulations, allegations surfaced that the new joint employer rules would establish, in effect, a strict liability standard for joint employment issues.[112] In response, the DOL gratuitously included this hollow disclaimer in the final rules adopted in 1997: "The analysis as to the existence of an employment relationship is not a strict liability or per se determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor."[113]

The DOL insists there are some "circumstances which do not constitute joint employment,"[114] and cites three examples in support of this proposition.[115] Each succeeds only if the now repudiated control factors are considered and each fails under the liberal application of the new rules.

The first example given is where a grower sells his/her entire crop to a harvesting company, which then becomes responsible for harvesting and transporting the crop to market.[116] In this situation, the farmer

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Report, available in LEXIS, Legis Library, BLT103 file. There were 16 co-sponsors, all Democrats.

[109] Linder, *supra* note 58, at 322: "[B]ecause the structure of a joint employment relationship differs significantly from the structure of an employment relationship not utilizing a middleman, the dispositive analysis for determining whether joint employment is present should, in the typical case, be the control test."

[110] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1984).

[111] William Shakespeare, *Hamlet,* Act 3, Scene 2: "The lady doth protest too much, methinks."

[112] MSPA, 62 Fed. Reg. 11734, 11737 (1997) (to be codified at 29 C.F.R. pt. 500.20) (proposed Mar. 12, 1997): "[National Council of Agricultural Employers] contends that the proposed regulation effectively establishes a strict liability test for joint employment."

[113] 29 C.F.R. § 500.20 (h)(5)(iv) (1997).

[114] MSPA, 62 Fed. Reg. 11734, 11738 (1997) (to be codified at 29 C.F.R. pt. 500.20) (proposed Mar. 12, 1997).

[115] *Id.*

[116] *Id.*

is not engaging the services of a contractor to perform harvesting functions and so the issue of joint employment of the harvest workers presumably cannot arise. But this is only true because the grower has relinquished all power to control the labor of the harvest workers. Only under a control test would joint employer liability fail.

However, this analysis does not address the economic dependency of the farm worker on the existence of the crop to be harvested, which was planted by the grower. The work must be performed on the grower's property.[117] The labor is repetitive and unskilled.[118] The permanency of the work lasts until the harvest is complete.[119] Through his/her planting decisions, the grower indirectly controls working conditions.[120] The harvest is an integral part of the grower's enterprise, for without it, the standing crop has no value.[121] Under the new rules, joint employer status can still be found.

Note how the same result would follow under the Miller *per se* rule.[122] Since the grower arguably benefits from the harvesting services of an agricultural worker, liability results even where ownership of the crop and all direct benefits from the labor of the harvest workers are transferred before the labor is performed.

The second situation given by the DOL is where:

> [A] grower may turn his/her entire harvesting operation over to a farm labor contractor, who makes all the meaningful decisions regarding the harvesting of the crops and provides his/her own materials and equipment needed in the harvest, such as with custom combiners who harvest grain crops or other custom harvesting operations common in many agricultural commodities.[123]

In this situation, it appears the grower has simply given up any meaningful control over the activities of the contractor.[124] The grower provides no materials, equipment, or supervision. If control factors alone were determinative, no joint employer liability would result.

But the economic reality test eschews common law notions of con-

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[117] 29 C.F.R. § 500.20 (h)(5)(iv)(F) (1997); *see supra* text accompanying note 82.

[118] 29 C.F.R. § 500.20 (h)(5)(iv)(D) (1997); *see supra* text accompanying note 82.

[119] 29 C.F.R. § 500.20 (h)(5)(iv)(C) (1997); *see supra* text accompanying note 82.

[120] 29 C.F.R. § 500.20 (h)(5)(iv)(B) (1997); *see also* Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997).

[121] 29 C.F.R. § 500.20 (h)(5)(iv)(E) (1997); *see supra* text accompanying note 82.

[122] *See supra* notes 69-72 and accompanying text.

[123] MSPA, 62 Fed. Reg. 11734, 11738 (1997) (to be codified at 29 C.F.R. pt. 500.20) (proposed Mar. 12, 1997).

[124] MSPA, 29 U.S.C. §§ 1801, 1803(a)(3)(E) (1997). This DOL example is disingenuous because under the MSPA, custom combining, hay harvesting, or sheep shearing operations are already specifically exempted. If truly no liability would attach to such entities under the new expansive rules as DOL suggests, why was it necessary to exempt such operations under the Act for which the more narrow rules were written?

trol.[125] Surely the workers here are no less dependent on the grower's crops for their livelihood than if the grower retained the power to control harvest operations.[126] Indeed, some courts have found that by merely influencing the harvest time by staggering the planting dates of different blocks or fields of a crop, a grower exercises sufficient control over the harvest schedule to implicate joint employer status.[127] Certainly, the harvest operation would be conducted on the premises of the grower.[128] It would involve repetitive, unskilled tasks by the workers.[129] It would be permanent until the harvest ended;[130] and so forth. Therefore, even under this scenario, the new regulations would implicate joint employer status. No one factor is determinative, and the absence of one or more will not necessarily negate the existence of joint employer status.[131] The key is the farm worker's economic dependence on the putative employer.[132]

The third and final example given by the DOL is the case where:

> [A]n agricultural employer/association secures the services of a [farm labor contractor] and sets out ultimate performance standards for the job, but then has no right to control or further involvement in the work or the employment, all of which are in the [farm labor contractor's] hands. The [farm labor contractor] and his/her employees are free to schedule work under any other contracts. The [farm labor contractor] provides all the equipment, tools and resources necessary to complete the job for which his/her services were retained and to manage all aspects of the worker's employment. The [farm labor contractor] has the financial and managerial ability to conduct his/her business without the involvement or assistance of the agricultural employer/association and undertakes all responsibilities commonly performed by an employer.[133]

Again, this fact pattern only goes to the lack of control by the grower over the contractor's activities and those of his/her workers. It does not address the "economic reality" of the employee's dependence or lack thereof on the grower. Here again, the work is performed on the grower's premises.[134] The tasks are repetitive and presumably un-

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[125] H.R. REP. No. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4553.

[126] 29 C.F.R. § 500.20 (h)(5)(iv)(A) (1997); *see supra* text accompanying note 82.

[127] Torres-Lopez v. May, 111 F.3d 633, 642 (9th Cir. 1997). The court found that the grower "controlled the overall harvest schedule and the number of workers needed for harvesting by staggering the planting dates of the cucumbers."

[128] 29 C.F.R. § 500.20 (h)(5)(iv)(F) (1997); *see supra* text accompanying note 82.

[129] 29 C.F.R. § 500.20 (h)(5)(iv)(D) (1997); *see supra* text accompanying note 82.

[130] 29 C.F.R. § 500.20 (h)(5)(iv)(C) (1997); *see supra* text accompanying note 82.

[131] 29 C.F.R. § 500.20 (h)(5)(iv) (1997).

[132] *Id.*

[133] MSPA, 62 Fed. Reg. 11734, 11738 (1997) (to be codified at 29 C.F.R. pt. 500.20) (proposed Mar. 12, 1997).

[134] 29 C.F.R. § 500.20 (h)(5)(iv)(F) (1997); *see supra* text accompanying note 82.

skilled.[135] The permanency of the employment lasts until completion of the job, notwithstanding the freedom to contract and schedule work with others.[136] The farm worker under this scenario is no less economically dependent on the grower than were the grower to exercise the control so painstakingly eliminated in the example.

In every example given by the DOL, the critical determinant of joint employer status is not the economic dependency of the agricultural worker but the extent to which the putative employer possessed or exercised the power to control the worker.[137] The DOL emphasizes, however, that the failure to exercise control is not enough to avoid joint employer status if the grower "in fact retains the power to, or actually performs" the controlling functions of an employer.[138]

VII. JUST TELL IT LIKE IT IS

There is no need to proceed through the tortured analysis of the seven-plus factors of joint employment if, in fact, common law notions of control are not determinative[139] and the only relevant inquiry is the economic dependency of the worker on the putative employer.[140] *Employ* means "to suffer or permit to work."[141] "[A]n entity [will be deemed to 'suffer or permit'] an individual to work if, as a matter of economic reality, the individual is dependent on the entity."[142] Therefore, to determine the relationship one need only examine economic dependency from the worker's perspective and ignore the actions or omissions of the employer. "I work, therefore I am economically dependent!" This should be the test,[143] and any entity that furnishes the opportunity[144] for the work to take place should be fair game for joint employer status under the MSPA.

Indeed, a *per se* test for joint employer status has finally been achieved. If public policy finds justice in holding growers strictly lia-

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[135] 29 C.F.R. § 500.20 (h)(5)(iv)(D) (1997); *see supra* text accompanying note 82.

[136] 29 C.F.R. § 500.20 (h)(5)(iv)(C) (1997); *see supra* text accompanying note 82.

[137] MSPA, 62 Fed. Reg. 11734, 11738 (1997) (to be codified at 29 C.F.R. pt. 500.20) (proposed Mar. 12, 1997).

[138] *Id.*

[139] Aimable v. Long and Scott Farms, Inc., 20 F.3d 434, 439 (11th Cir. 1994).

[140] Antenor v. D & S Farms, 88 F.3d 925, 929 (11th Cir. 1996); *Aimable*, 20 F.3d at 439.

[141] MSPA, 29 U.S.C. § 1802(5) (1997).

[142] *Antenor*, 88 F.3d at 929.

[143] Linder, *supra* note 58, at 326: "[I]dentifying precisely what 'economic dependence' entails is difficult for it could plausibly encompass the relationships of the entire economically active population except those able to live on their capital indefinitely."

[144] FLSA, 29 U.S.C. § 203(g) (1997): " 'Employ' includes to suffer or permit to work."

ble for any contractor violation of the MSPA, whether on or off the grower's premises, that policy should be explicitly set forth. Strict liability should be recognized as such and simply codified to eliminate wasteful litigation on the issue and to provide more resources for the redress of MSPA violations.

VIII. Corrective Action

Legislation introduced in July 1997 would repudiate the new rules for joint employer determination and replace them with the five control factors under the old regulation.[145] This bill would not simply restore the *status quo ante*, but would make the original five regulatory factors the exclusive test for joint employer status.[146] The economic dependency test would be effectively repudiated in joint employer determination, but would remain unchanged for the employer-employee determinations.[147] This bill also distinguishes between joint employer liability and joint responsibility for contractor violations of housing and transportation rules.[148] Unlike the present rules, which threaten joint employers with unlimited liability for *any* violation of MSPA provisions,[149] the proposed bill would trigger liability only if the joint employer was also found to be jointly responsible for the violation.[150] Ownership and control of the housing or vehicles would be taken into account in determining joint responsibility.[151] As proposed, this bill would clarify the crucial distinction between the broad remedial tests of a proper employee plaintiff and the more narrow control test of a proper joint employer defendant.

Conclusion and Recommendations

The economic reality of dependence test is sufficiently broad to extend MSPA protections to those farm workers whose direct employers would defend by claiming that the workers are themselves independent contractors. Strict liability proponents would argue that MSPA protections are meaningless if farm workers are left without a real remedy. Judgments against financially irresponsible, fly-by-night contractors are

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[145] MSPA Clarification Act of 1997, H.R. 2038, 105th Cong. (introduced June 25, 1997 by Rep. Canady of Fla.). Twenty-three co-sponsors had been attracted as of July 14, 1998; subcommittee hearings held Apr. 21, 1998.

[146] *Id.* at § 7.

[147] *Id.*

[148] *Id.*

[149] *See supra* text accompanying notes 36-39.

[150] MSPA Clarification Act of 1997, H.R. 2038, 105th Cong. (introduced June 25, 1997 by Rep. Canady of Fla.).

[151] *Id.*

worthless. Therefore, victims should have access to the deeper pockets of the grower who ultimately benefits from their labor. But the economic benefits of farm labor go beyond the grower to the ultimate consumer, upon whom both the worker and grower are economically dependent. Perhaps society as a whole should bear the cost of insuring a remedy to victims of contractor violations of the MSPA.[152] After all, contractors are licensed annually by the DOL by issuance of a certificate of registration "after appropriate investigation and approval."[153] Curiously, proof of financial responsibility is inexplicably absent from the certification requirements under the MSPA.[154]

Growers who do not qualify as joint employers should not face strict liability for any contractor violation of any MSPA protection occurring on or off their premises.[155] The joint employer doctrine affords access to the deeper pockets of responsible growers. Joint employer liability is justified by the indicia of control[156] giving rise to a presumption of grower power to prevent the alleged violation. The test for joint employer status should focus on the control exercised by the putative employer over the activities of the employee through his/her control of the contractor. The proposed legislation would accomplish this result.

Additionally, certification and renewal standards for farm labor contractors should be raised. DOL resources should be spent in the field rather than in the courtroom. Labor law education, proof of financial responsibility, and continuing education are recommended. Similar requirements have been imposed on other activities to afford a measure of public protection from the unqualified.[157] Critical to addressing the lack of a remedy for a victim of contractor violations of the MSPA would be the proof of financial responsibility in the form of general liability insurance or bonding.[158]

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[152] Consider "no-fault" automobile insurance schemes to address the lack of a remedy for victims of financially irresponsible uninsured motorists.

[153] MSPA, 29 U.S.C. § 1812-1814 (1997).

[154] *Id.*

[155] MSPA, 29 U.S.C. § 1854 (1997): "Any person aggrieved by a violation of this Act and or regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States."

[156] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).

[157] Real estate agents and brokers, appraisers, pest control advisers to mention a few.

[158] The MSPA only requires contractors to have "an insurance policy or a liability bond . . . for damage to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker." MSPA, 29 U.S.C. § 1841(b)(1)(C) (1997).

In this era of specialization and out-sourcing, such economies should not be denied the agri-business person. By the same token, fly-by-night contractors unfamiliar with worker protections or unwilling or unable to abide by them, should not be privileged to hold a license to steal, exploit, or abuse. Growers who will not or cannot deal with a licensed contractor without exercising more than "a reasonable degree of contract performance oversight and coordination with third parties"[159] will still be joint employers, liable parties, and deep pockets under MSPA rules.[160] Therefore, the "necessary protections for . . . agricultural workers, agricultural associations, and *agricultural employers*" will be assured.[161]

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[159] 29 C.F.R. § 500.20 (h)(5)(iv)(A) (1997).
[160] 29 C.F.R. § 500.20 (h)(5) (1997).
[161] MSPA, 29 U.S.C. § 1801 (1997) (emphasis added).