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Picking Produce and Employees: Recent Developments in Farmworker Injustice

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PICKING PRODUCE AND EMPLOYEES: RECENT DEVELOPMENTS IN FARMWORKER INJUSTICE

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INTRODUCTION

In 1980, migrant onion pickers went on strike in Hereford, Texas. They hoped to gain higher wages and better working conditions, such as drinking water and toilets in the fields. As a result of the strike, the onion growers and packers sued the farmworkers' union and its attorneys, Texas Rural Legal Aid. During the strike, the growers met to discuss the picketing by the migrant workers. A Hereford sheriff, sympathetic to the growers at the meeting, complained about the presence of Legal Aid attorneys in Hereford:

> I think that Texas Rural Legal Aid is the problem because they're supplying these people [migrant workers] with the information and they're telling them all about the Federal laws and everything.... I think it's just a terrible injustice when our tax money is being used against us [to fund Texas Rural Legal Aid]. But this is what's happening with Texas Rural Legal Aid. And I don't think this is the American way.[1]

The sheriff thought it was a terrible injustice that farmworkers should be advised of their rights. If this sounds like an outrageous viewpoint, it is nothing compared to the outrageous defenses created by agribusiness[2] to deny farmworkers their civil remedies in the courts.

Migrant farmworkers are protected by legislation called the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[3] The AWPA requires, inter alia, that migrant farmworkers be paid at least minimum wage and that housing provided to them by employers meet federal and state health and safety standards.[4] Although employers of migrant workers are required to comply with the AWPA, growers often do somersaults to avoid providing workers these protections. For example, growers have convinced courts that

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1. Howard Gault Co. v. Texas Rural Legal Aid, 615 F. Supp. 916, 925 (N.D. Tex. 1985) (quoting Travis McPherson, Sheriff of Deaf Smith County, Tex. at that time).

2. The terms "agribusiness" and "growers" will be used interchangeably throughout this Note, with the use of the term "growers" predominating. These terms are meant to refer to large agricultural operations rather than small farmers and family businesses.

3. 29 U.S.C.A. §§ 1801–72 (West 1985 & Supp. 1995).

4. *See infra* notes 62–72 and accompanying text.

migrant cucumber pickers are independent contractors and hence not entitled to AWPA statutory protections.[5] More recently, growers have succeeded in convincing courts that the migrant workers laboring in their fields are not their employees.[6] Instead, the growers successfully argue, the workers are employed by a crewleader,[7] a middleman field supervisor who recruits the workers. Since only an employer can be liable for AWPA violations,[8] courts which accept this argument hold the crewleaders in these cases solely liable for the violations. Unfortunately, this usually means that the workers will receive neither statutory protections nor compensation for being denied these statutory protections. This is because crewleaders are often transient, fly-by-night individuals with no resources to satisfy a judgment.[9]

So the real injustice is that even if migrant workers are told of their rights, they may still be unable to enforce these rights or to recover damages for being denied AWPA protections. Part I of this Note summarizes the AWPA and its predecessor, the Farm Labor Contractor Registration Act.[10] Part II discusses the defenses commonly used by large growers to avoid liability under the AWPA.[11] These defenses revolve around the issue of whether a migrant worker is an "employee" and hence subject to AWPA protections. As part of this discussion, attention is given to the jurisprudential history of the Supreme Court test used to determine whether a worker is an "employee."[12] Finally, Part II touches on the illogical and arbitrary results which this test can produce.[13] Part III sets forth the test for joint employment contained in the AWPA.[14] The AWPA's joint employment doctrine provides that workers may be considered employees of both a grower and a crewleader.[15] This AWPA test is based on the Supreme Court test discussed in Part II.[16] Part IV focuses on a recent

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5. *See* Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984).

6. *See* Aimable v. Long & Scott Farms, Inc., 20 F.3d 434 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 351 (1994).

7. Crewleaders are commonly called "farm labor contractors." However, this Note uses the term "crewleader" exclusively because the term "farm labor contractor" implies that crewleaders have more responsibility than they actually do. In fact, a crewleader is often more like a field supervisor than a contractor. Viviana Patino of Texas Rural Legal Aid has stated:

> Crew leaders are middlemen who recruit farm workers for growers and packing sheds. They are usually ex-farm workers who have worked with the same company for a number of years and may have some trucks to haul produce from the fields to the packing shed. Crew leaders assemble crews of up to 300 farm workers, who will harvest the crop in three or four weeks.

Viviana Patino, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43, 44 (1987).

"[T]he average annual income for [farm labor contractor]-employed farmworkers was $4,700 (in real 1989 dollars) as compared to $6,900 for farmworkers who were directly employed by the grower." Brief Amici Curiae for Petitioners at 8, Aimable v. Long & Scott Farms, Inc. 20 F.3d 434 (11th Cir. 1994) (citing Report of the Commission on Agricultural Workers at 1 (1992)), *cert. denied*, 115 S. Ct. 351 (1994).

8. See *infra* notes 52–62 and accompanying text.

9. *See infra* notes 85, 87–89. The crewleader found to be the sole employer of the migrant workers in *Aimable* has declared bankruptcy and is unable to pay the judgment against him. *See infra* note 414 and accompanying text.

10. *See infra* notes 19–79 and accompanying text.

11. *See infra* notes 80–206 and accompanying text.

12. *See infra* notes 90–185 and accompanying text.

13. *See infra* notes 191–206 and accompanying text.

14. *See infra* notes 207–42 and accompanying text.

15. *See infra* notes 225–35 and accompanying text.

16. *See infra* notes 236–38 and accompanying text.

Eleventh Circuit decision, *Aimable v. Long & Scott Farms, Inc.*, which this Note contends misapplied the tests discussed to accept the grower's defense that the crewleader was the sole employer of the migrant workers.[17] The workers in *Aimable* effectively have been denied compensation for the wrongdoing they suffered because the crewleader is bankrupt. Finally, Part V suggests that a per se rule is necessary to avoid arbitrary results like those in *Aimable*, to effectively enforce the AWPA, and to guarantee workers remedies for violations.[18] This per se rule would make growers the employers of their migrant workers, thereby rightly holding them liable for all AWPA violations.

I. THE LEGISLATION

A. The Farm Labor Contractor Registration Act of 1963

In 1963, Congress recognized that migrant farmworkers were being subjected to exploitation and abuse by certain irresponsible farm labor contractors.[19] These farm labor contractors, or crewleaders, are middlemen who recruit workers for the growers. Congress noted that, because workers are often particularly dependent upon these crewleaders, the workers are more vulnerable to the abuses commonly found in these employment relationships.[20] Some of the common abuses committed by crewleaders included leaving workers stranded without transportation, underpaying workers, collecting wages from growers but not paying workers, and grossly misrepresenting anticipated earnings to workers.[21] Further, some crewleaders were selling alcohol and illegal drugs to workers and forcing workers to buy goods and services from them at elevated prices deducted from the workers' pay.[22] Moreover, Congress noted that these unscrupulous crewleaders frequently had criminal records.[23]

In response to these findings, and in an effort "to protect agricultural workers whose employment had been historically characterized by low wages, long hours and poor working conditions,"[24] Congress established the first system of federal registration for interstate farm labor contractors, the Farm Labor Contractor Registration Act ("FLCRA").[25] This legislation imposed requirements specifically on farm labor contractors rather than on growers.[26]

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17. Aimable v. Long & Scott Farms, Inc., 20 F.3d 434 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 351 (1994). *See infra* notes 243–421 and accompanying text.

18. *See infra* notes 422–44 and accompanying text.

19. S. REP. NO. 202, 88th Cong., 2d Sess. (1963), *reprinted in* 1964 U.S.C.C.A.N. 3690, 3690–92.

20. *Id.* at 3690, 3692.

21. *Id.* at 3692.

22. *Id.*

23. *Id.*

24. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4547.

25. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88–582, 78 Stat. 920 (repealed 1983). For an in-depth discussion of FLCRA, see John A. VanSickle, *Recent Developments Under the Farm Labor Contractor Registration Act*, 11 CAP. U. L. REV. 733, 734–59 (1982); W. Gary Vause, *The Farm Labor Contractor Registration Act*, 11 STETSON L. REV. 185, 198–246 (1982); Richard S. Fischer, Note, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531, 535–43 (1981).

26. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88–582, 78 Stat. 920 (repealed 1983).

In addition, the FLCRA required the crewleader to register with the Department of Labor ("DOL") by giving information regarding his method of operation as a contractor.[27] Also, the crewleader had to provide proof of public liability insurance, or proof of financial responsibility, for all vehicles used in the business.[28]

If the DOL decided the contractor was qualified, it issued a registration certificate which the contractor was required to carry at all times.[29] The DOL could refuse to issue a certificate of registration because of failure to comply with FLCRA provisions, or because of certain criminal convictions or other violations on the part of the crewleader.[30] Furthermore, the FLCRA required crewleaders to keep proper payroll records and accurately inform workers about employment terms and anticipated earnings.[31]

In 1974, Congress amended the FLCRA in order to strengthen the existing protections and provide for stricter enforcement of the Act.[32] Despite the fact that FLCRA protections had been in effect since 1963, testimony before Congress in 1974 revealed continuing abuse.[33] Examples of typical abuse by farm labor contractors included exaggerating conditions of employment when recruiting workers, transporting workers in unsafe vehicles, furnishing substandard and unsanitary housing, and paying the workers in cash without records of units worked or taxes withheld.[34] Moreover, a DOL investigation in 1973 found that seventy percent of crewleaders checked were in violation of the FLCRA.[35] Those crewleaders that the DOL could find were brought into compliance, but thousands of unregistered crewleaders could not be located.[36] As a result of these findings, Congress sought to provide the DOL with enhanced enforcement powers so that the DOL would "no longer have to seek voluntary compliance with the law from a violator who has plainly disregarded it."[37] Consequently, in addition to strengthening the protections given to the workers, the FLCRA as amended gave a private right of action to persons aggrieved by violations and empowered the DOL to investigate violations and levy civil penalties.[38]

Following the passage of the 1974 amendments to the FLCRA, DOL and private enforcement actions increased dramatically.[39] Ray Marshall, the Secretary of Labor, was a former farmworker advocate and actively pursued enforcement of the Act.[40] In addition, an increase in the number of specialized farmworker advocates in the federally funded Legal Services Program resulted in more private actions against violators.[41] Many of the successful actions

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. S. REP. NO. 93-1295, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6441, 6441.
33. *Id.* at 6441-45.
34. *Id.* at 6442.
35. *Id.* at 6443.
36. *Id.*
37. *Id.* at 6444.
38. *Id.* at 6446.
39. *See* Fischer, *supra* note 25, at 538 n.69.
40. *Id.*
41. *Id.*

included large damage awards.[42] Consequently, agribusiness made repeated attempts to weaken the FLCRA through various amendments.[43]

With most of these attempts, agribusiness sought to reduce the scope of the FLCRA by both reducing the number of workers who benefitted from the protections and reducing the number of employers who were subject to the regulations.[44] These repeated attempts to weaken the FLCRA were unsuccessful. Instead, in 1983, the FLCRA was repealed and replaced with a completely new piece of legislation, the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[45] As a result of extensive negotiations, the AWPA was acceptable to both farmworker advocates and the agricultural industry.[46]

B. The Migrant and Seasonal Agricultural Worker Protection Act

In 1982, the House Committee on Education and Labor conducted hearings which revealed that the pattern of abuse and exploitation of farmworkers which had prompted passage of the FLCRA in 1963 was continuing, despite almost twenty years of federal regulation.[47] The Committee concluded that the DOL could not effectively enforce the provisions of the Act, particularly because of the ambiguity surrounding the Act's definition of "farm labor contractor."[48] Indeed, because the FLCRA assigned virtually all duties and responsibilities solely to farm labor contractors, litigation centered on either expanding the definition of farm labor contractor to make growers subject to the Act or reducing the scope of the farm labor contractor definition by using statutory exclusions from the Act to limit liability.[49]

In response to these problems, Congress passed the AWPA and repealed the FLCRA.[50] The AWPA imposes disclosure and recordkeeping responsibilities on both farm labor contractors and growers, provides separate protections for workers depending on whether they are classified as migrant or seasonal, and sets forth enhanced enforcement mechanisms to deal with violations of the Act.[51] Certainly, the most important distinction between the AWPA and the FLCRA is that, under the AWPA, both growers and farm labor contractors have duties and responsibilities with regard to worker protections; therefore, both can now be held liable for violations.

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42. *Id.*
43. *Id.* at 539–40. For a thorough discussion of the amendments proposed in 1980, see *Id.* at 543–58.
44. *Id.*
45. 29 U.S.C.A. §§ 1801–72. Regulations for AWPA, promulgated pursuant to 29 U.S.C.A. § 1861 (West 1985), can be found at 29 C.F.R. §§ 500.1–.271 (1995).
46. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4547.
47. *Id.* at 4548–49.
48. *Id.* at 4549–50.
49. *Id.* at 4548.
50. 29 U.S.C.A. §§ 1801–72.
51. *Id.* For in-depth discussions of AWPA's provisions, see John J. Dingfelder, *1983 Migrant and Seasonal Agricultural Workers Act Results in a Harvest of Litigation Ripe for the Picking*, 5 LAB. LAW. 239, 241–61 (1989); Marion Quisenbery, *A Labor Law for Agriculture: The Migrant and Seasonal Agricultural Workers' Protection Act*, 30 S.D. L. REV. 311, 313–25 (1985); Donald B. Pedersen, *The Migrant and Seasonal Agricultural Worker Protection Act: A Preliminary Analysis*, 37 ARK. L. REV. 253, 258–90 (1984).

1. Employers Subject to the AWPA

As with the FLCRA, farm labor contractors are required to register with the DOL and carry a certificate of registration at all times.[52] A farm labor contractor is defined as "any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity."[53] Farm labor contracting activity "means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker."[54] Agricultural employers and associations are exempt from the registration requirement because, unlike transient crewleaders who can easily evade liability for violations, they are generally large, fixed-situs operations that cannot easily move or disappear.[55]

In contrast to the registration requirements, which are only applicable to farm labor contractors, responsibility for worker protection is imposed on all farm labor contractors, agricultural employers and agricultural associations which recruit agricultural workers.[56] In addition to the farm labor contractors, this includes "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed."[57] Also included is "any nonprofit or cooperative association of farmers, growers, or ranchers" that "either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."[58] Exemptions are available for several classes of employers, most notably family or small businesses.[59] Worker protection requirements are contained in two separate subchapters, depending on whether the worker is considered migrant or seasonal.[60] Both migrant and seasonal workers are employed in agricultural work of a seasonal or temporary nature, but a migrant worker is one who is required to be absent overnight from her permanent place of residence.[61]

2. Worker Protections

The AWPA provides migrant worker protections which include information and recordkeeping requirements, wage payment guidelines and housing standards requirements.[62] Farm labor contractors, agricultural employers and agricultural associations who recruit workers must provide the workers with a written disclosure statement informing them of the wage rates, the period of employment, where the employment will take place and what it will involve, and whether housing, transportation or other benefits are provided.[63] The employer also must post in a conspicuous place a poster

52. 29 U.S.C.A. § 1811.
53. *Id.* § 1802.
54. *Id.*
55. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4549.
56. 29 U.S.C.A. §§ 1821–44.
57. *Id.* § 1802.
58. *Id.*
59. 29 U.S.C.A. § 1803.
60. *Id.* §§ 1821–44.
61. *Id.* § 1802.
62. *Id.* §§ 1821–23.
63. *Id.* § 1821.

provided by the DOL which advises workers of their rights under the AWPA.[64] Both the disclosure statement and the poster must use the language common to the workers, whether that be Spanish, English or another language.[65] Furthermore, farm labor contractors, agricultural employers and agricultural associations which employ workers must keep records for three years regarding the wage rate, the number of hours worked, the number of piecework units earned, the total earnings for a pay period, what sums of money are withheld and for what purpose, and the net pay.[66] These records must be kept for each individual worker, and an itemized statement must be given to each worker at the end of each pay period.[67]

If a farm labor contractor makes the records for the workers he recruits, he must provide them to the agricultural employer or association to which he furnishes the workers; the agricultural employer or association must keep these records for at least three years from the end of the employment period.[68] In addition, housing provided for workers must meet federal and state health and safety standards, and the certificate of compliance must be posted at the site.[69] The AWPA also dictates that wages must be paid when due, that an employer may not violate the terms of the work arrangement which was agreed upon at the outset, and that an employer may not force workers to buy goods and services solely from the employer himself.[70] Finally, the AWPA contains vehicle safety and insurance requirements and a provision which requires agricultural employers or associations to verify whether the farm labor contractors they are using are registered with the DOL.[71] With the exception of housing requirements, seasonal workers' protections are the same as those set forth for migrant workers.[72]

3. Enforcement Provisions

Violations of AWPA provisions can result in criminal sanctions, administrative sanctions or civil liability.[73] The DOL may bring a criminal action against any person who violates the AWPA; both fines and prison terms are available as punishment depending on the severity and circumstances of the violation.[74] Moreover, the DOL may petition the appropriate district court for injunctive relief if the Secretary of Labor determines that an AWPA provision has been violated.[75] Most importantly, the AWPA establishes a private right of action for persons aggrieved by violations of the Act.[76] On a showing of intentional violation by the defendant, a plaintiff may recover actual damages without limit or statutory damages of up to $500 per plaintiff for each violation

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. 29 U.S.C.A. § 1823.
70. *Id.* § 1822.
71. *Id.* §§ 1841–42.
72. *Id.* §§ 1831–32.
73. *Id.* §§ 1851–54.
74. *Id.* § 1851.
75. *Id.* § 1852.
76. *Id.* § 1854.

of a single provision.[77] Other equitable relief is also available.[78] Depending on the circumstances and the nature of the violation, the trial court has discretion in deciding the amount of statutory damages.[79]

II. DEFENSES DESIGNED TO PRECLUDE LIABILITY

Congress recognized that agricultural work often involves unique employment relationships, the most common being the triangle between the grower, the crewleader and the worker.[80] Moreover, Congress envisioned that defendant-growers would seek to avoid liability for AWPA violations by using these unique employment relationships to create two types of defenses: either that the worker is an independent contractor or that the worker is employed solely by an independent contractor crewleader.[81] "It [was]...the intent of the [congressional] Committee that any attempt to evade the responsibilities imposed by [AWPA] through spurious agreements among such parties be rendered meaningless...."[82] The Committee stressed that agricultural associations and agricultural employers may be subject to duties and liabilities under the AWPA either as sole or joint employers.[83]

Despite Congress' warnings, nothing has prevented powerful growers from asserting superficial defenses to liability. Indeed, both defenses mentioned above have been accepted by various courts in the ten years since the passage of the AWPA.[84] In 1987, Marc Linder described the burden which plaintiff-farmworkers still face today:

> a considerable portion of all private actions brought under legislation such as...AWPA...and...FLSA...has been and continues to be bogged down in the Sisyphean labor of proving time and again that the plaintiffs are not independent contractors or employees of judgment-proof, straw-men crewleaders or contractors, but are indeed employees of powerful and financially responsible agricultural employers.[85]

The independent contractor defense, if accepted by a court, prevents plaintiff farmworkers from recovering under the AWPA because these protections are only offered to employees, not independent contractors.[86] The other defense, that the farmworkers are employees of a crewleader, makes the

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77. *Id.* Damages are limited to a maximum of $500,000 for a class action. *Id.*

78. *Id.*

79. *Id.*

80. H.R. REP. NO. 97-885, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553.

81. *Id.* at 4552-53.

82. *Id.* at 4553.

83. *Id.* at 4551.

84. *See* Aimable v. Long & Scott Farms, Inc., 20 F.3d 434, 445 (11th Cir. 1994) (crewleader is sole employer of migrant workers), *cert. denied*, 115 S. Ct. 351 (1994); Howard v. Malcom, 852 F.2d 101, 105 (4th Cir. 1988) (crewleader is sole employer of migrant corn pickers); Donovan v. Brandel, 736 F.2d 1114, 1120 (6th Cir. 1984) (pickle harvesters are independent contractors); Charles v. Burton, 857 F. Supp. 1574, 1581-82 (M.D. Ga. 1994) (crewleader is sole employer of migrant workers).

85. Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 N.Y.U. REV. L. & SOC. CHANGE 435, 436-37 (1987) (footnote omitted).

86. 29 U.S.C.A. § 203(g) (West 1978); 29 U.S.C.A §§ 1802(2), 1802(3), 1802(5), 1821-44 and 1854(a). *See, e.g.*, Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1467-71 (1991).

crewleader solely responsible for any judgment rendered in the farmworkers' favor.[87] Unfortunately, because of the transient nature and lack of substantial resources of most crewleaders, the farmworkers may never recover the money due them.[88] This, then, effectively denies farmworkers any recovery as well.[89]

These defenses have a rich jurisprudential history in litigation dealing with the Fair Labor Standards Act ("FLSA"), the National Labor Relations Act ("NLRA") and the Social Security Act ("SSA").[90] In passing the AWPA, Congress specifically adopted FLSA definitions and jurisprudence.[91] In its House Report, the Committee referred to the broad construction which courts have given to the terms "employ," "independent contractor," "employee" and "employer" in order to effectuate the FLSA's remedial purposes; these broad constructions are also applicable to AWPA provisions.[92] Therefore, a thorough understanding of AWPA cases begins with an examination of FLSA jurisprudence and the evolution of the legal definitions of "employee."

A. History of the Economic Reality of Dependence Test

1. Brief History of Employment Status Distinctions

Throughout history, there has been a distinction between a worker who contracts to sell a product or service to another and a worker who sells only his own labor to another. The distinction lies in who has dominion or control over how the work is performed.[93] It suggests that one worker is free and independent in her work, while the other is held captive by her dependency on her employer.[94] Indeed, America's New Deal legislation extended social protections only to those workers deemed to be dependent and in need of protection.[95] These workers were classified as "employees." Independent contractors were not given those protections until the self-employed were brought within the Social Security program in the 1950s.[96]

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87. 29 U.S.C.A. § 203(g); 29 U.S.C.A §§ 1802(2), 1802(3), 1802(5), 1821–44 and 1854(a). *See, e.g.*, Glader, *supra* note 86, at 1471–73; Michael G. Tierce, Note, *The Joint Employer Doctrine Under the Federal Migrant and Seasonal Agricultural Workers Protection Act*, 18 RUTGERS L.J. 863, 865 (1987).

88. *See, e.g.*, Brief Amici Curiae for Petitioners at 4, Aimable v. Long & Scott Farms, Inc., 20 F.3d 434 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 351 (1994); Linder, *supra* note 85, at 437; Tierce, *supra* note 87, at 866.

89. *See, e.g.*, Brief Amici Curiae for Petitioners at 4, *Aimable*; Tierce, *supra* note 87, at 866.

90. *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 727–28 (1947); United States v. Silk, 331 U.S. 704, 706–08 (1947); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 750 (9th Cir. 1979); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1310–12 (5th Cir. 1976).

FLSA (29 U.S.C.A. §§ 201–19 (West 1978 & Supp. 1995)), NLRA (29 U.S.C.A. §§ 151–69 (West 1973 & Supp. 1995)) and SSA (42 U.S.C.A. §§ 301–1395 (West 1991 & Supp. 1995)) were all enacted by the New Deal Congress.

91. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552.

92. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 6–7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552–53.

93. *See* Linder, *supra* note 85, at 441.

94. *Id.* at 442.

95. *Id.* at 442–43.

96. Act of Aug. 28, 1950, § 104(a), 64 Stat. 492 (1950) (amending Social Security Act of 1935 (adding § 211)). *See* Linder, *supra* note 85, at 442–43.

In the eighteenth and nineteenth centuries, courts began to develop tests to distinguish employees from independent contractors.[97] These tests were mainly connected with vicarious liability cases where the plaintiff sought to recover from the alleged employer of a third party who had injured the plaintiff.[98] However, courts also used the tests in common law disputes between employers and employees and in cases which arose from protective regulations designed to deal with master-servant disputes.[99]

2. An Era of New Deal Litigation—The Economic Reality of Dependence Test Emerges

By the time of the New Deal, the control test had emerged as the common law test to determine employment status.[100] The control test dictates that one is an employer if he has the right to tell the worker what to do and how to do it.[101] "The control test looks exclusively at the personal, physical subordination of the worker to the employer at the work site and ignores the overriding socioeconomic dependence of employees on the employing class that manifests itself in the individual employment relationship."[102]

Congress enacted New Deal legislation such as the NLRA, the FLSA and the SSA to grant various protections and benefits to "employees."[103] However, in passing this legislation, Congress attached empty, elusive definitions to terms such as "employ" and "employee."[104] These terms were crucial to successful implementation of the legislation. As a result, the courts were left with the task of determining who and what these words included in order to fix the scope of coverage of the laws.[105]

In the 1940s, the courts began to construe the terms "employee" and "employ" in the context of controversies over statutory protections of New Deal legislation.[106] The Supreme Court rejected the common law control test as used in the context of the NLRA in 1944.[107] In *NLRB v. Hearst Publications, Inc.*, the Court resurrected an old test for "economic reality of dependence" which previously had been rejected in favor of the control test.[108] This test was further refined in four cases the Court handed down in 1947.[109]

In the 1947 cases, the Court listed the factors which are used to determine whether an employment relationship exists.[110] The test is often called

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97. *Id.* at 443.
98. *Id.*
99. *Id.* 444–45.
100. *Id.* at 446.
101. Bartels v. Birmingham, 332 U.S. 126, 129 (1947) (describing the common law control test as used by the Eighth Circuit Court of Appeals).
102. Linder, *supra* note 85, at 446.
103. *Id.* at 448.
104. 29 U.S.C.A. § 152(3) (West 1973); 29 U.S.C.A. § 410(a)(4) (West 1985). *See* Linder, *supra* note 85, at 448.
105. *See* Linder, *supra* note 85, at 448–49.
106. *Id.* at 449.
107. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124–32 (1944).
108. *Id.* at 127–30.
109. *See* United States v. Silk, 331 U.S. 704 (1947); Harrison v. Greyvan Lines, 331 U.S. 704 (1947); Bartels v. Birmingham, 332 U.S. 126 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
110. *See Silk*, 331 U.S. at 716; *Bartels*, 332 U.S. at 130; *Rutherford*, 331 U.S. at 729–30.

the "economic reality of dependence" test.[111] The factors include: 1) capital investment in equipment and facilities by the worker; 2) opportunity for profit or loss by the worker; 3) permanency and exclusivity of the employment relationship; 4) skill required to perform the job; 5) degree of control by the employer; and 6) whether the employee performs a specialty job integral to the business.[112] With these cases, the Court also extended the reach of the "economic reality" test by applying it in the context of SSA and FLSA litigation.[113]

In *United States v. Silk* the Court held that, for purposes of the SSA, workers who unloaded coal from railroad cars were employees, while truckers who hauled the coal were independent contractors.[114] The employer in this case, a coal retailer named Albert Silk, sued the United States to recover taxes paid on the workmen under the SSA.[115] The unloaders came to the company yard with their own picks and shovels.[116] If work was available, Silk assigned them a railroad car and paid them a set price per ton to shovel coal from the cars.[117] Truckers came to the office when the coal was ready for delivery.[118] They owned their own trucks and set their own hours.[119] The coal company did not supervise or instruct the truckers.[120] However, the company did pay for any damage the truckers caused.[121] The truckers were told where to deliver the coal and whether to collect payment from the customer.[122] Silk paid them as they requested, either after each trip or at the end of the day or week.[123] No records of the truckers' time were maintained.[124]

Silk argued that both the truckers and the unloaders were independent contractors and not covered by the SSA.[125] The Court relied on the "economic reality" test articulated in *NLRB v. Hearst Publications, Inc.*[126] In citing that case, the Court emphasized that the term "employee" in the context of social legislation such as the NLRA and the SSA was to be construed "'in the light of the mischief to be corrected and the end to be attained'" by those Acts.[127] "Employee" was not to be interpreted technically or narrowly by looking to its common law meaning.[128] Since the aim of the NLRA was to eliminate labor disputes and remedy the inequality of bargaining power between employers and

111. *Silk*, 331 U.S. at 716; *Greyvan*, 331 U.S. at 716; *Bartels*, 332 U.S. at 130; *Rutherford*, 331 U.S. at 730. The terms "economic reality" and "economic reality of dependence" will be used interchangeably to refer to this test throughout this Note.
112. *Silk*, 331 U.S. at 716; *Greyvan*, 331 U.S. at 716; *Bartels*, 332 U.S. at 130; *Rutherford*, 331 U.S. at 730.
113. *Silk*, 331 U.S. at 716; *Greyvan*, 331 U.S. at 716; *Bartels*, 332 U.S. at 130; *Rutherford*, 331 U.S. at 730.
114. *Silk*, 331 U.S. at 716–19.
115. *Id.* at 706.
116. *Id.*
117. *Id.*
118. *Id.* at 706–07.
119. *Id.*
120. *Id.* at 707.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 713.
127. *Id.* (quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944)).
128. *Id.*

workers, the Acts were meant to cover all workers who are employees as a matter of "economic reality."[129] Application of the SSA, the Court noted, "should follow the same rule."[130] In other words, courts should construe "employee" to effectuate the policies and purposes of the Act in question.[131]

The Court in *Silk* used the six factor "economic reality" test to construe "employee" according to the SSA provisions.[132] In concluding that the unloaders were employees, the Court noted that though they provided their own picks and shovels, these were simple tools.[133] They had no opportunity for profit or loss except by the work of their hands.[134] Their job was an integral step in the employer's business and Silk, the employer, supervised their labor.[135] According to the Court, Congress intended to include this type of worker within the scope of the SSA.[136]

In contrast, despite a strong dissent, the Court found the truckers to be independent contractors.[137] The truckers owned their own trucks and hired their own helpers.[138] There was no supervision by the company.[139] In short, they could gain or lose depending on how they managed themselves and their time.[140]

The dissent argued that the truckers were borderline cases.[141] To fulfill the broad, beneficial purposes of the SSA, borderline cases should be decided in favor of coverage.[142] The dissent also pointed out that, in a hypothetical tort case, Silk might be held vicariously liable for the acts of the truckers.[143] "Certainly the question of coverage under the statute, as an employee, should not be determined more narrowly than that of employee status for purposes of imposing vicarious liability in tort upon an employer."[144]

In *Harrison v. Greyvan Lines, Inc.*, Greyvan also sought to recover taxes paid under the SSA.[145] Greyvan was a furniture moving company. Truckers were required by contract to haul exclusively for the company.[146] The truckers paid their own operating expenses, furnished their own trucks with Greyvan's name painted on the side, furnished insurance and collected payment from customers.[147] Greyvan paid the truckers a percentage of the customer tariff.[148]

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129. *Id.*
130. *Id.* at 713–14.
131. The Court here extended the "economic reality of dependence" test to the SSA litigation. *See id.*
132. *Id.* at 716.
133. *Id.* at 716–17.
134. *Id.* at 717–18.
135. *Id.* at 718.
136. *Id.*
137. *Id.* at 719, 719–22 (Rutledge, J., dissenting in part).
138. *Id.* at 719.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 721.
143. *Id.* at 721 n.2.
144. *Id.*
145. *Id.* at 705. The Court combined *Harrison v. Greyvan Lines* with *Silk* because of the similarities of the two cases. *Id.*
146. *Id.* at 708.
147. *Id.*
148. *Id.* at 709.

The Court held that the truckers were independent contractors.[149] There was no significant difference, the Court said, between the truckers in *Silk* and the truckers in *Greyvan*.[150]

In 1947 the Court also decided *Bartels v. Birmingham*, another SSA case.[151] In *Bartels*, the issue was whether dance hall owners or band leaders should pay taxes on the members of bands playing in dance halls.[152] Hence, the question was not whether or not the band members were employees, but rather who was their employer.[153] Name bands were hired by dance halls to play limited engagements.[154] The leader of each band was the attraction; his name drew the crowd.[155] The leader controlled the band members, fixed and paid their salaries, told them what to play, paid their transportation expenses and provided their sheet music, public address system and uniforms.[156] The halls furnished pianos, but not other instruments.[157] The contracts between the band leaders and the hall owners specifically stated that the band members were employees of the hall owners.[158]

Once again, the Court applied the six factor "economic reality" test which originated in *Hearst*.[159] The Court disregarded the contracts, saying that as a matter of "economic reality," considering all the factors of the test, the band members were employees of the band leader and not the dance hall owner.[160] When the Court applied the six factors it noted that the relationship between the band leader and the band members was permanent, while the relationship between the dance hall owner and the band members was transient.[161] The leader provided most of the instruments.[162] Finally, the leader's profit or loss depended both on his management of the band and its expenses and on his musical skill and showmanship.[163]

Rutherford Food Corp. v. McComb further extended the "economic reality" test to the context of FLSA litigation.[164] In *McComb*, the DOL sought to enjoin a slaughterhouse and meat packing company from violating the FLSA provisions.[165] The question was whether workers who deboned meat in the slaughterhouse were independent contractors or employees of either Rutherford Food Corporation (the slaughterhouse operator) or Kaiser Packing Company (the slaughterhouse owner).[166] Only if the workers were found to be employees

149. *Id.* at 719.
150. *Id.*
151. Bartels v. Birmingham, 332 U.S. 126 (1947).
152. *Id.* at 127.
153. *See id.*
154. *Id.*
155. *Id.*
156. *Id.* at 128.
157. *Id.*
158. *Id.*
159. *Id.* at 130.
160. *See id.* at 130–32.
161. *Id.* at 128.
162. *Id.* at 132.
163. *Id.*
164. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
165. *Id.* at 723.
166. *Id.* at 727. Rutherford owned 51% of Kaiser stock. Because Kaiser was operating at a loss, Rutherford advanced money for Kaiser's operation. Finally, in 1943, Rutherford leased the Kaiser slaughterhouse and took over its operations. This arrangement lasted until 1944. *Id.* at 724.

would the employer be subject to FLSA requirements.[167]

Kaiser contracted with various experienced deboners to assemble a crew of deboners to work in the slaughterhouse.[168] The deboners furnished their own tools including a hook, a knife, a knife sharpener and an apron.[169] Kaiser did not set hours but workers were required to keep their work current; this meant that the workers' hours depended on the number of cattle which Kaiser slaughtered.[170] Kaiser's manager circulated through the deboning room many times daily, making sure the deboners cut all the meat off the bones.[171] The process of deboning was just one of the interdependent steps which comprised the entire slaughterhouse operation.[172] Kaiser paid the head deboner who in turn paid the other workers an hourly wage.[173]

In its analysis of the case, the Court once again employed the "economic reality" test, this time to determine whether the deboners were employees for the purposes of the FLSA.[174] The Court reasoned that the "economic reality" test was just as appropriate in the context of FLSA litigation as it was in the context of NLRA and SSA litigation because "[a]s in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act....The definition of 'employ' is broad."[175] Moreover, the Court noted that the FLSA is of the same general character as other New Deal legislation, namely the SSA and the NLRA.[176] Hence, "[d]ecisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act."[177]

The Court proceeded to look at the circumstances of the entire activity and concluded that the workers were Kaiser employees performing a specialty job on the production line.[178] Kaiser owned the plant and most of the equipment.[179] Kaiser's managers closely supervised the work. The job was essentially piecework because the deboner's profits did not actually depend on their initiative, judgment or foresight.[180] Therefore, the employer could not label the deboners independent contractors in order to escape compliance with the FLSA.[181]

Today the "economic reality of dependence" test remains only in the context of FLSA litigation.[182] In 1947, Republicans controlled both houses of Congress for the first time since 1929 and the last time until 1995. They were

167. *Id.* at 727.
168. *Id.* at 724–25.
169. *Id.* at 725.
170. *Id.* at 726.
171. *Id.*
172. *Id.* at 725–26.
173. *Id.* at 725, 730.
174. *Id.* at 726–28.
175. *Id.*
176. *Id.* at 723.
177. *Id.*
178. *Id.* at 730.
179. *Id.*
180. *Id.*
181. *See id.*
182. Linder, *supra* note 85, at 451.

anxious to amend the NLRA for the benefit of corporate constituents.[183] Therefore, when Congress passed the Taft–Hartley Act, it included a provision requiring that the narrow, common law control test be used in the context of the NLRA.[184] In 1948, the same test was written into the definition of "employee" for social security and income tax purposes.[185] Congress had succeeded in effectively repealing the progressive "economic reality of dependence" test for all purposes except FLSA litigation.

3. Recent Use of the Economic Reality of Dependence Test in FLSA Suits

In recent years, the "economic reality of dependence" test has been used repeatedly by courts in the context of migrant farmworker law to determine whether plaintiff-farmworkers are employees under the provisions of the FLSA.[186] In the most common situation, the grower seeks to label the workers as independent contractors to avoid complying with FLSA requirements regarding minimum wage and child labor.[187] This is strikingly similar to the situation in *Rutherford* discussed in Part II.A.2.

The broad "economic reality" test has been called "progressive" in comparison with the restrictive common law control test.[188] Indeed, the test's stated purpose is to effectuate the aims and policies of remedial social legislation.[189] It concentrates on the totality of circumstances and the economic reality rather than on restrictive, common law notions.[190] However, despite the test's potential to break down superficial defenses and play up the reality of the employment relationship, it is also subject to abuse and absurd applications.[191] A 1984 Sixth Circuit decision, *Donovan v. Brandel*, illustrates how a court can abuse the subjective nature of the test to arrive at an illogical conclusion.[192]

In *Donovan v. Brandel*, heads of migrant families contracted with Brandel, a grower, to harvest pickle fields.[193] Brandel supplied irrigation and pesticides at his discretion, but the families did all the harvesting.[194] The

183. *Id.* at 450.

184. Ch. 120, tit. I, § 101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141–88 (1973)). *See* Linder, *supra* note 85, at 451.

185. H.R.J. Res. 296, 80th Cong., 2d Sess., 62 Stat. 438 (1948); S. REP. NO. 1255, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S. Code Congressional Service 1752. *See* Linder, *supra* note 85, at 451.

186. *See, e.g.*, Department of Labor v. Lauritzen, 835 F.2d 1529, 1536–38 (7th Cir. 1987); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327–30 (5th Cir. 1985); Donovan v. Brandel, 736 F.2d 1114, 1117–20 (6th Cir. 1984); Castillo v. Givens, 704 F.2d 181, 185–93 (5th Cir. 1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Cavazos v. Foster, 822 F. Supp. 438, 441–44 (W.D. Mich. 1993); Brock v. Lauritzen, 624 F. Supp. 966, 968–70 (E.D. Wis. 1985); Donovan v. Gillmor, 535 F. Supp. 154, 161–63 (N.D. Ohio 1982).

187. *See, e.g., Lauritzen*, 835 F.2d at 1531–32; *Brandel*, 736 F.2d at 1115; *Real*, 603 F.2d at 750; *Cavazos*, 822 F. Supp. at 439; Maldonado v. Lucca, 629 F. Supp. 483, 485 (D. N.J. 1986); *Brock*, 624 F. Supp. at 966; *Gillmor*, 535 F. Supp. at 156.

188. *See* Linder, *supra* note 85, at 450–51.

189. United States v. Silk, 331 U.S. 704, 713 (1947) (quoting NLRB v. Hearst Publications, Inc., 332 U.S. 111 (1944)).

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

191. Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984), is the most obvious example. *See* Linder, *supra* note 85, at 451–52; Glader, *supra* note 86, at 1479–82.

192. *Brandel*, 736 F.2d 1114.

193. *Id.* at 1116.

194. *Id.*

workers' total investment in equipment consisted of pails and gloves.[195] Each family received fifty percent of the money from Brandel's sale of the pickles to processors.[196] The families were generally paid weekly;[197] the sale prices were set unilaterally by the processors prior to the harvest.[198]

The court in *Brandel* held that the migrant pickle harvesters were independent contractors rather than employees subject to the FLSA.[199] The court used a five factor version of the "economic reality" test to analyze the issue.[200] The court found: 1) the relationship was not permanent or exclusive; 2) pickle harvesting required workers to possess skills and judgment which set them apart from other farmworkers; 3) Brandel's significant investment in equipment was insignificant because the equipment was not used primarily for harvesting; 4) despite little risk of loss, the worker's remuneration increased if they successfully managed the harvest by picking more pickles in a shorter time; 5) Brandel did not dictate hours or supervise the day-to-day harvesting.[201]

The *Brandel* holding is limited to the facts of the case.[202] Other Circuits have specifically distinguished and criticized the case for its faulty analysis of the situation.[203] Indeed, lower courts within the Sixth Circuit have distinguished cases on almost identical facts to avoid following the holding, thereby limiting the power and significance of *Brandel*.[204] Still, *Brandel* is an example of the arbitrary nature of the "economic reality" test.[205] *Brandel* illustrates how the test can be manipulated to justify erroneous attitudes about migrant workers and utter blindness to the reality of the employment relationship between growers and farmworkers.[206]

III. HISTORY OF THE AWPA REGULATORY TEST FOR JOINT EMPLOYMENT

In a 1973 Fifth Circuit case, *Hodgson v. Griffin & Brand, Inc.*, the Secretary of Labor brought suit to enjoin the defendant grower from violating minimum wage, record-keeping and child labor provisions of the FLSA.[207] Griffin & Brand employed crewleaders to recruit and transport workers to

195. *Id.* at 1118.
196. *Id.* at 1116.
197. *Id.*
198. *Id.*
199. *Id.* at 1120.
200. The court cited five factors to consider. They were: 1) the permanency of the relationship; 2) the degree of skill required for the job; 3) the workers' investment in equipment; 4) the workers' opportunity for profit or loss; and 5) the degree of control by the alleged employer. A sixth factor discussed by the court but not considered by the trial court was whether the service rendered was an integral part of the business. Hence, this is a slight variation on the "economic reality of dependence" test developed by the Supreme Court in *Hearst* and the 1947 cases that followed. *Id.* at 1117. *See also supra* notes 106–13 and accompanying text.
201. 736 F.2d at 1117–20.
202. *Id.* at 1120 n.11.
203. *See, e.g.*, Department of Labor v. Lauritzen, 835 F.2d 1529, 1535–37, 1539–45 (7th Cir. 1987) (Easterbrook, J., concurring); Brock v. Lauritzen, 624 F. Supp. 966, 969–70 (E.D. Wis. 1985).
204. *See e.g.*, Cavazos v. Foster, 822 F. Supp. 438, 441–45 (W.D. Mich. 1993); Fegley v. Higgins, 760 F. Supp. 617, 621–22 (E.D. Mich. 1991).
205. *See* Linder, *supra* note 85, at 451–54; Glader, *supra* note 86, at 1479–80.
206. *See* Linder, *supra* note 85, at 451–54; Glader, *supra* note 86, at 1479–80.
207. Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 235 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973).

fields ready to be harvested.[208] Griffin & Brand paid the crewleaders a set rate per bucket of vegetables picked and the crewleaders in turn paid the workers.[209] Supervisors employed by Griffin & Brand gave harvesting instructions to the crewleaders who in turn instructed the workers.[210] The defendant argued that the crewleaders, as independent contractors, were the sole employers of the plaintiffs.[211] Therefore, the defendant concluded, the crewleaders were solely responsible for any FLSA violations.[212] However, the Fifth Circuit rejected this defense, finding that the grower was in fact a joint employer of the workers and was therefore jointly responsible for FLSA violations.[213]

The court analyzed the employment relationship using a five part test derived from *Wirtz v. Lonestar Steel Co.*[214] First, it noted that the independent contractor status of the crewleaders did not necessarily negate the possibility of joint employment.[215] The court went on to emphasize that whether an employment relationship exists depends on the economic reality of the situation.[216] Echoing the Court in *Rutherford*, the Fifth Circuit further stated that a proper analysis requires consideration of the total employment situation, not just isolated factors.[217] Therefore, the court employed the *Lonestar Steel* test to examine the situation as a whole and to decide whether, as a matter of economic reality, the grower was an employer of the workers.[218]

In deciding that Griffin & Brand was a joint employer of the plaintiff farmworkers, the Fifth Circuit noted that an analysis of each of the five factors tended to indicate an employment relationship.[219] The work took place on Griffin & Brand property.[220] Also, Griffin & Brand set rates of pay for both the crewleaders and the farmworkers and paid social security taxes.[221] Further, the court observed that Griffin & Brand employees supervised the work of the crewleaders and the workers.[222] The fact that Griffin & Brand gave instructions by speaking through the crewleaders did not negate the on-the-job control Griffin & Brand exercised.[223] Therefore, the court affirmed the district court's holding that Griffin & Brand was an employer of the farmworkers.[224]

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208. *Id.* at 236.
209. Griffin & Brand deducted social security before giving the paychecks to the crewleaders and also set the rate at which the crewleaders paid the workers. *Id.* at 236–37.
210. *Id.*
211. *Id.* at 237.
212. *See id.*
213. *Id.* at 237–38.
214. *Id.* The five factors include: (1) whether or not the employment takes place on company premises; (2) how much control the company exerts over the workers; (3) whether the company has the power to hire, fire or modify employment conditions of the workers; (4) whether the workers perform a specialty job in a production line; and (5) whether the worker works exclusively for the company. *Id.* (citing Wirtz v. Lonestar Steel Co., 405 F.2d 668, 669 (5th Cir. 1968)).
215. *Id.* at 237.
216. *Id.*
217. *Id.*
218. *Id.* at 237–38.
219. *Id.* at 238.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*

Ten years after the Fifth Circuit employed this test as the proper analysis of employment status, Congress passed the AWPA and repealed the FLCRA.[225] The House Report included a lengthy discussion of the joint employer doctrine which had arisen under the FLSA.[226] In fact, the AWPA adopts both the FLSA meaning of "employ" and the FLSA joint employer doctrine.[227] Moreover, Congress specifically endorsed the *Griffin & Brand* approach to the joint employment issue.[228] The House Report stated:

> [I]t is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin and Brand of McAllen, Inc.* be controlling....The *Griffin and Brand* decision summarizes the proper approach and the appropriate criteria to be used in making these determinations and it is the Committee's intent that such construction be applied for 'joint employer' determinations made under this Act.[229]

Hence, the test for joint employment used in that case was codified, with slight modifications, in the regulations promulgated pursuant to the AWPA.[230]

In adopting the test for joint employment, the House Education and Labor Committee included strong language regarding its adoption of the FLSA joint employer doctrine.[231] Congress noted that the joint employment doctrine

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225. *See supra* notes 25 & 45 and accompanying text.

226. H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 6-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552-54.

227. 29 C.F.R. § 500.20(h)(4) (1994) provides: "The definition of the term *employ* includes the *joint employment* principles applicable under the Fair Labor Standards Act. *Joint employment* under the Fair Labor Standards Act is *joint employment* under MSPA."

228. H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553. *See supra* notes 214-24 and accompanying text.

229. H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553.

230. 29 C.F.R. § 500.20(h)(4)(ii) (1995). Although the House Report specifically endorsed the *Griffin & Brand* approach, the actual AWPA regulations provide a test for joint employment composed of five factors which are derived not only from *Griffin & Brand*, but also from other federal cases in which the courts have addressed the issue of joint employment. Thus, the AWPA regulatory test is slightly different from the test used in *Griffin & Brand*. The AWPA regulations state:

> Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. See *Hodgson v. Okada*, 472 F.2d 965 [(10th Cir. 1973)], *Hodgson v. Griffin and Brand, Inc.*, 471 F.2d 235 [(5th Cir. 1973)], *Mitchell v. Hertzke*, 234 F.2d 183 [(10th Cir. 1956)], *United States v. Rosenwasser*, 323 U.S. 360, [65 S. Ct. 295, 89 L.Ed. 301 (1945)], *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S. Ct. 1473 [91 L.Ed. 1772 (1947)], *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 [(9th Cir. 1979)], *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 [(5th Cir. 1975)], and *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308 [(5th Cir. 1976)]. In determining whether such a joint employment relation exists the courts have cited the broad definition of employ in the Fair Labor Standards Act which includes to suffer or permit to work. The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:
>
> (A) The nature and degree of control of the workers;
>
> (B) The degree of supervision, direct or indirect, of the work;
>
> (C) The power to determine the pay rates or the methods of payment of the workers;
>
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
>
> (E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii).

231. H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 6-7 (1982), *reprinted in* 1982

"is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties."[232] Congress stressed that determinations of employment status should be made in light of the protective purposes of the AWPA.[233] Further, one party's status as an independent contractor should not be allowed to negate the possibility of joint employment.[234] Finally, the House Report stated:

> The Committee's adoption of the 'joint employer' doctrine was deliberat[e]...for it presented the best means by which to insure that the purposes of this Act would be fulfilled. It is, therefore, the intent of the Committee that any attempt to evade the responsibilities imposed by this Act through spurious agreements among such parties be rendered meaningless.[235]

Hence, Congress emphasized that the remedial purposes of the AWPA were to be implemented despite any superficial defenses offered by agricultural defendants.

A. The AWPA Regulatory Test and the Economic Reality of Dependence Test

It is no coincidence that the five factors of the AWPA regulatory test[236] complement the six factors of the economic reality of dependence test developed in *Silk*, *Bartels* and *Rutherford*.[237] After all, the AWPA regulatory test is based on these three cases' prior interpretation of social welfare legislation.[238] Additionally, both tests have the same focus and ask the same question: What is the economic reality of the situation as a whole? When applying either test, courts have assessed each of the factors with the purpose of determining the economic reality of the relationship involved. Hence, the underlying question is the same regardless of which test is used.

The economic reality of dependence test, as discussed above, has been criticized for its arbitrary and inconsistent nature.[239] But courts have employed the AWPA regulatory test to reach even more inconsistent results.[240] These

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U.S.C.C.A.N. 4547, 4552–53.

232. *Id.* at 4552.

233. *Id.*

234. *Id.* at 4553.

235. *Id.*

236. Throughout this Note, the five factor test given in the AWPA regulations at 29 C.F.R. § 500.20(h)(4)(ii) will be referred to as the AWPA regulatory test.

237. The economic reality of dependence test factors include: (1) the capital investment in equipment and facilities by the worker; (2) the opportunity for profit or loss by the worker; (3) the permanency and exclusivity of the employment relationship; (4) the skill required to perform the job; (5) the degree of control by the employer; and (6) whether the employee performs a specialty job integral to the business. *See* United States v. Silk, 331 U.S. 704, 716 (1947); Harrison v. Greyvan Lines, 331 U.S. 704, 716 (1947); Bartels v. Birmingham, 332 U.S. 126, 130 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

The AWPA regulatory test factors include: (1) the nature and degree of control of the workers; (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) the preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4)(ii).

238. *See* Howard v. Malcom, 852 F.2d 101, 106 (4th Cir. 1988) (Winter, C.J., concurring in part and dissenting in part).

239. *See supra* note 191 and accompanying text.

240. While most courts find migrant workers to be employees of a grower, some courts hold that a crewleader is the workers' sole employer. *See, e.g.*, Aimable v. Long & Scott

results are not unlike the illogical result reached by the Sixth Circuit in *Brandel*. Indeed, a recent Eleventh Circuit decision, *Aimable v. Long & Scott Farms, Inc.*,[241] might be called the "*Brandel* of 1994." Unlike the *Brandel* court, the Eleventh Circuit in *Aimable* was dealing with a joint employment defense, not an independent contractor defense.[242] But considering the court's arbitrary application of the test factors and its utter blindness to economic reality, *Aimable* is *Brandel* all over again.

IV. *AIMABLE V. LONG & SCOTT FARMS, INC.*

A. Background

In *Aimable v. Long & Scott Farms, Inc.*, the plaintiff farmworkers brought suit against a crewleader and a grower to recover unpaid wages.[243] The plaintiffs were 206 migrant and seasonal farmworkers with little formal education.[244] Defendant Long & Scott Farms owned and operated a 1200 acre vegetable farm in Florida.[245] Long & Scott hired the other defendant, John Miller, Jr., a farm labor contractor, to recruit migrant farmworkers to harvest Long & Scott's crops.[246] Miller had a seventh grade education.[247] The plaintiffs alleged that the defendants were liable as joint employers for violations of the minimum wage and recordkeeping provisions of the FLSA and the AWPA.[248] The United States District Court for the Middle District of Florida held that the crewleader was the sole employer of the farmworkers for the purposes of the FLSA and the AWPA.[249] On appeal, the Eleventh Circuit upheld these findings.[250]

Miller and his crews had worked for Long & Scott for twenty-five years.[251] In fact, Long & Scott continued to employ Miller despite his long history of labor law violations while working for the farm.[252] Moreover, when

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Farms, Inc., 20 F.3d 434 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 351 (1994); Howard v. Malcom, 852 F.2d 101 (4th Cir. 1988); Charles v. Burton, 857 F. Supp. 1574 (M.D. Ga. 1994).

241. *Aimable*, 20 F.3d 434.

242. *Id.* at 436; Donovan v. Brandel, 736 F.2d 1114, 1115–16 (6th Cir. 1984).

243. *Aimable*, 20 F.3d at 436–37; Brief for Petitioners at 9, *Aimable*.

244. Brief for Petitioners at 4, *Aimable*.

245. *Id.*

246. *Id.* at 5.

247. *Id.*

248. *Id.* at 9.

249. *Aimable*, 20 F.3d at 436–37; Aimable v. Long & Scott Farms, Inc., No. 89–96–Civ–Oc–10 (M.D. Fla. June 30, 1992).

250. *Aimable*, 20 F.3d at 445.

251. *Id.* at 437.

252. Brief for Petitioners at 5, *Aimable*. Miller has been a defendant in numerous other cases besides *Aimable*, including Brock v. John Miller, Jr., No. 86–606–CIV–ORL–18 (M.D. Fla. May 20, 1987) (enjoining Miller from further violations of AWPA and ordering him to pay $50,433.06 in back wages and $25,716.53 in liquidated damages under FLSA); Washington v. John Miller, Jr., No. 82–343–ORL–CIV–EK (M.D. Fla. Apr. 26, 1983), *aff'd*, 721 F.2d 797 (11th Cir. 1983) (trial court found that Miller had misrepresented nearly every term of employment, housed workers in unsanitary facilities, paid the workers less than minimum wage, and failed to keep accurate payroll records or provide adequate wage statements); Dunlop v. John Miller, Jr., No. 75–484 (E.D. Va. Sept. 12, 1975) (Miller enjoined to comply with FLCRA).

In finding Miller liable to the plaintiff farmworkers for violations of FLCRA and FLSA, the *Washington* court noted that "[t]here is no question that Miller was fully aware of his

Miller was jailed for violations, Frank Scott, a fifty percent owner of Long & Scott, provided $20,000 to bail Miller out of jail.[253]

Miller recruited the plaintiff workers to harvest Long & Scott's corn, cabbage and cucumbers.[254] Some workers came from out of state, while others were recruited from various farms and migrant camps in Florida.[255] Miller provided some workers with housing at his labor camp and/or transportation to the Long & Scott fields.[256]

Long & Scott used Miller and his crews exclusively; Miller would work for other farms, but only when such work did not interfere with Long & Scott's harvest.[257] That is, if Long & Scott did not have any work, Miller might take his crews to another farm for a few days until the Long & Scott harvest resumed.[258]

Long & Scott paid Miller a flat rate per amount harvested, and Miller in turn compensated most workers on a piece-rate basis.[259] The rate at which Long & Scott paid Miller was set at the beginning of the season and did not fluctuate according to the market.[260] Regardless of how much Long & Scott received for the vegetables after the harvest, Miller would receive the same flat rate agreed to at the beginning of the season.[261] Also, Miller and the workers were compensated for their work despite any unforeseen problems with crop quality.[262] Hence, Long & Scott bore all market risks. If Miller asked Long & Scott for pay increases, he often cited the need to pay workers more or the rising costs of housing the workers in labor camps. In fact, the workers' pay increased only if Miller got more money from Long & Scott.[263]

Long & Scott controlled all planting and harvesting decisions and exercised control over the workers' activities.[264] Long & Scott told Miller which crops to harvest and when, and Miller followed these orders strictly.[265] Long & Scott also exercised substantial indirect control over workers in the field.[266] Frank Scott would tell Miller if a worker was doing a poor job or if the vegetables picked were too small.[267] Miller, in turn, would convey this disapproval to the workers and order them to correct the problems.[268] Some workers said that Long & Scott employees occasionally gave them direct orders

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obligations under the FLCRA; he had previously been enjoined to comply with the Act by a U.S. District Court in Virginia." *Washington*, 721 F.2d at 803.

253. Brief for Petitioners at 5, *Aimable*.
254. *Aimable*, 20 F.3d at 437.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*; Brief for Petitioners at 5, *Aimable*.
259. For example, if Long & Scott paid Miller $1.00 per crate of corn, Miller would pay the 24 corn pickers $0.20 per crate (divided 24 ways). Other field workers would be paid varying piece rates according to the task performed. Brief for Petitioners at 7, *Aimable*.
260. *Aimable*, 20 F.3d at 437.
261. Brief for Petitioners at 7, *Aimable*.
262. For example, even when a federal inspector rejected corn because it had worms, Miller and the farmworkers were paid for their work. Long & Scott absorbed the loss. *Id.*
263. *Id.* at 7–8.
264. *Id.* at 6–7.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

regarding what to pick and how to pack the vegetables.[269]

The farmworkers performed physically demanding tasks but none that required any special skill or training.[270] Basically, they cut the vegetables, assembled boxes, packed the vegetables, and sealed and stacked the boxes.[271] For example, using a "muletrain"[272] custom made by Long & Scott for its own use, a crew of about sixty workers would harvest a corn crop.[273] Pickers placed the corn on a conveyor belt and packers would then load the corn into boxes assembled by other workers.[274] A checker tracked the number of boxes filled by a packer.[275] Then workers would close the boxes; other workers would push empty boxes to the packers and full boxes to the stackers who loaded the boxes onto trucks.[276] Separate groups of workers performed each of the different tasks in assembly line fashion.[277]

Long & Scott supplied all necessary equipment and facilities for the harvest except for a small number of hand tools owned by Miller.[278]

> The items furnished by Long & Scott included: (1) the mule train, which was custom built by Long & Scott and driven by its mechanic, Larry Petty; (2) the tractor and trailer used to haul boxes and crates to the fields; (3) the cucumber buckets and bins used by pickers; (4) the crates and boxes into which the vegetables were packed; (5) the pallets on which the grading crew stacked the crates and boxes; (6) the trucks used to transport the crops from the field; and (7) the packing/grading shed and the pre-cooler.[279]

Long & Scott also provided Miller with free office space near the grading shed; this was where Miller distributed wages to the workers.[280]

B. The Eleventh Circuit Opinion

In its decision, the court used a seven factor test to determine whether Long & Scott was a joint employer of the plaintiffs.[281] The plaintiffs argued that an eleven factor test should be used.[282] The test proposed by the plaintiffs included the five factors of the AWPA regulatory test and the six factors of the economic reality of dependence test derived from *Silk*, *Bartels* and *Rutherford*.[283] However, the defendants argued that only the five factors

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269. *Id.*
270. *Id.* at 5.
271. *Id.* at 6.
272. "A muletrain is a tractor with two wings extending across twenty-four rows." *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* at 8.
279. *Id.*
280. *Id.*
281. *Aimable*, 20 F.3d at 445.
282. *Id.* at 439.
283. *Id.* The factors include: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates of the workers; (4) the right, directly or indirectly, to hire, fire or modify employment conditions of the workers; (5) preparation of payroll and payment of wages; (6) investment in equipment and facilities; (7) the opportunity for profit and loss; (8) permanency and exclusivity of employment; (9) the degree of skill needed for the job; (10) ownership of property or facilities where work was performed; and (11) performance of a specialty job integral to the business. *Id. See* United

specifically listed in the AWPA regulations were relevant in a case of alleged joint employment.[284] The court rejected both positions, in effect creating a test of its own.[285]

The court decided that four of the eleven factors proposed by the plaintiffs were not relevant to the question of joint employment.[286] The four factors the court rejected were: (1) investment in equipment and facilities; (2) opportunity for profit and loss; (3) permanency and exclusivity of employment; and (4) the degree of skill required to perform the job.[287] These four factors, the court stated, are only relevant to the question of whether a worker is an independent contractor or an employee and should not be considered when the issue is joint employment.[288] Hence, the court seemed to indicate that two fundamentally different tests apply depending on whether the case deals with a single or joint employment situation.[289] The court first considered the five regulatory factors of the AWPA which were derived from *Griffin & Brand*.[290] The court concluded that an analysis of each factor indicated that Miller was the sole employer of the plaintiff farmworkers.[291]

1. The Five Regulatory Factors

a. The Nature and Degree of Control of the Workers

In a random departure from FLSA and AWPA jurisprudence, the Eleventh Circuit in *Aimable* returned to a narrow, common law notion of control. The court called planting and harvesting decisions "abstract" and held that the analysis should be limited "to specific indicia of control" such as direct employment decisions regarding hiring and worker instruction.[292] The plaintiffs were required to show that Long & Scott exercised direct control over workers' daily activities in order to prove joint employment.[293] The court was unimpressed by the fact that Long & Scott indirectly controlled plaintiffs' work by requiring them to pick certain fields on certain days.[294] Similarly, the court rejected the argument that Long & Scott's planting decisions ultimately determined how much harvesting the plaintiffs had to perform.[295] In sum, the court decided, against the weight of prior decisions,[296] that control only arises

States v. Silk, 331 U.S. 704, 716 (1947); Harrison v. Greyvan Lines, 331 U.S. 704, 716 (1947); Bartels v. Birmingham, 332 U.S. 126, 130 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); 29 C.F.R. § 500.20(h)(4)(ii).

284. *Aimable*, 20 F.3d at 439–40.
285. *Id.* at 440–45.
286. *Id.* at 443–45.
287. *Id.*
288. *Id.* at 443–44.
289. *See id.*
290. *Id.* at 440–43.
291. *Id.* at 443.
292. *Id.* at 440–41.
293. *Id.*
294. *Id.* at 441.
295. *Id.* at 440.
296. *See, e.g.*, Hodgson v. Griffin & Brand, Inc., 471 F.2d 235 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973); Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973); Alviso-Medrano v. Harloff, 868 F. Supp. 1367 (M.D. Fla. 1994); Leach v. Johnston, 812 F. Supp. 1198 (M.D. Fla. 1992); Aviles v. Kunkle, 765 F. Supp. 358 (S.D. Tex. 1991); Haywood v. Barnes, 109 F.R.D. 568, 587 (E.D.N.C. 1986); Maldonado v. Lucca, 629 F. Supp. 483, 487–88 (D.N.J. 1986).

"when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work."[297]

b. The Degree of Supervision, Direct or Indirect, of the Work

In a similarly limited analysis, the court decided that Long & Scott's supervision of the workers was de minimis.[298] Rejecting the undisputed fact that Long & Scott exercised control over harvesting activities by issuing instructions through Miller, the court maintained that the "infrequent assertions of minimal oversight...do not rise to the level of supervision necessary to satisfy this factor."[299] The court seemed to dismiss from consideration those workers who said they occasionally received direct orders from Long & Scott employees.[300] Instead, the court focused solely on the fact that Miller gave the orders to the workers, seemingly ignoring the fact that those orders and decisions came directly from Long & Scott.[301]

c. The Power to Determine the Pay Rates or Methods of Payment

The plaintiffs in *Aimable* argued that Long & Scott indirectly controlled the workers' wages.[302] The plaintiffs emphasized the fact that Miller refused to pay the workers more money unless Long & Scott paid Miller more money.[303] In effect, the workers' wages were inextricably linked to how much Long & Scott was willing to pay.[304]

The Eleventh Circuit rejected these arguments. The court held that Long & Scott had no power to control how Miller decided to spend the money he received from Long & Scott.[305] Moreover, the court speculated that even if Long & Scott paid Miller more, Miller would still have been free to keep the wage increase for himself rather than raise the workers' wages.[306] By focusing solely on this reasoning, the court was able to ignore the commonsense conclusion that workers down the vertical chain of control must indisputably be affected by the amount of money originally distributed by the employer at the top of the chain.

d. The Right, Directly or Indirectly, to Hire, Fire or Modify the Employment Conditions of the Workers

The plaintiffs conceded that this factor did not point to a finding of joint employment.[307] Both sides and the court agreed that Long & Scott never

297. *Aimable*, 20 F.3d at 441.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* The court even seemed to ignore its own express recognition of the conclusion in *Griffin & Brand* that "supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor." *Id.*
302. *Id.* at 442. Plaintiffs argued: "first, Long & Scott indirectly controlled the amount Miller received; second, Miller controlled the amount appellants received; therefore, Long & Scott controlled the amount appellants received." *Id.*
303. *Id.*
304. *See id.*; Brief for Petitioners at 7–8, *Aimable*.
305. *Aimable*, 20 F.3d at 442.
306. *Id.*
307. *Id.*

demanded that particular workers be hired or fired.[308] Also, Long & Scott did not decide which workers performed which tasks and never dictated the hours that the plaintiffs worked.[309] Moreover, Long & Scott did not decide whether the workers would be paid hourly or piece-rate wages.[310] Therefore, this factor clearly did not support a conclusion that Long & Scott was a joint employer of the plaintiffs.

e. Preparation of Payroll and Payment of Wages

The plaintiffs also agreed that since Long & Scott did not directly distribute the workers' wages, this factor did not favor a finding of joint employment.[311] Miller was solely responsible for calculating and paying the workers' wages.[312] Miller distributed the wages to workers from his office near the grading shed; Long & Scott did not participate in this activity.[313]

f. Summary of the Five Regulatory Factors

After the court analyzed the five regulatory factors, it concluded that if these factors were considered in isolation there would be no finding of joint employment.[314] According to the court's analysis, all five factors went against joint employment.[315] However, the court continued its analysis by addressing each of the six additional factors proposed by the plaintiffs.[316] As the court examined each factor, it determined two issues: "whether the factor [was] relevant to this [particular] case; and if so, whether the factor supported a finding of joint employment."[317] Ultimately, the court held that, in this case, only two of the six factors were relevant.[318] Thus, the court created its own unique seven factor test for joint employment.

2. The Six Proposed Non-regulatory Factors

a. Investment in Equipment and Facilities

The plaintiffs argued that Long & Scott's significant investment in harvesting equipment indicated that Long & Scott was an employer of the farmworkers.[319] However, the Eleventh Circuit disregarded this factor, saying it was irrelevant to the issue of joint employment.[320] The court presumed that ownership of equipment and facilities would not indicate who the plaintiffs' employers were for the purposes of determining joint employment.[321] Instead,

308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 442–43.
313. *Id.*; Brief for Petitioners at 8, *Aimable.*
314. *Aimable*, 20 F.3d at 443. The court noted that the district court limited its analysis strictly to the five AWPA regulatory factors. *Id.* At the end of the opinion the court called this decision to limit the analysis to five factors "largely correct." *Id.* at 445.
315. *Id.* at 440–43.
316. *Id.* at 443. The court stated: "[B]ecause our review is de novo, we will examine independently each factor...." *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*

the court said that this factor only dictated the conclusion that the plaintiffs were employees rather than independent contractors, a fact not at issue in this case.[322] Despite the plaintiffs' pleadings that Long & Scott owned all of the significant harvesting equipment, the court insisted that Miller had a substantial investment in equipment as well.[323] According to the court, this did not indicate that Miller and Long & Scott were joint employers of the farmworkers.[324] Therefore, the court held that this factor would neither exonerate Long & Scott, nor demonstrate that the workers were economically dependent on the farm.[325] Hence, this factor was altogether excluded from the court's joint employment analysis.

b. The Workers' Opportunity for Profit and Loss

The plaintiffs argued and the defendants conceded that the farmworkers had no opportunity for profit and loss based on either their own initiative or skills.[326] Thus, the plaintiffs argued, the farmworkers were economically dependent on both Long & Scott and Miller.[327] Citing *Rutherford*, the Eleventh Circuit rejected this argument and held that the workers' opportunity for profit or loss is irrelevant in a case of joint employment.[328] Because the Court in *Rutherford* used the opportunity for profit or loss factor to determine whether the plaintiffs in that case were independent contractors, the court in *Aimable* seemed to assume that this factor must be used exclusively in cases where independent contractor/employee status is at issue.[329] The court did not cite any authority for its conclusion.[330] However, since the plaintiffs in *Aimable* were not alleged to be independent contractors, the Eleventh Circuit decided that the plaintiffs' indirect economic reliance on Long & Scott was to be excluded from consideration.

c. Permanency and Exclusivity of Employment

The plaintiff farmworkers used the permanency and exclusivity of employment factor in support of two arguments.[331] First, they argued that because Miller had worked exclusively for Long & Scott for twenty-five years, this indicated that his employees were also permanent employees of Long & Scott.[332] Further, and more persuasively, the plaintiffs reasoned that since the farmworkers picked exclusively at Long & Scott's farm, they were therefore employees of Long & Scott.[333]

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322. *Id.*
323. *Id.*; Brief for Petitioners at 8, *Aimable*.
324. *Aimable*, at 443.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); and Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976)). It is true that all of these cases used this factor to determine whether the plaintiffs in the respective cases were independent contractors or employees. However, none of these cases state or even imply support for the Eleventh Circuit's assumption that this factor is not applicable in a determination of joint employment.
330. *See Aimable*, 20 F.3d at 443. *See also supra* note 329.
331. *Aimable*, 20 F.3d at 443.
332. *Id.*
333. *Id.*

The Eleventh Circuit rejected the plaintiffs' arguments and declined to consider the permanency and exclusivity of employment factor in its analysis of the joint employment issue.[334] The court held that an analysis of this factor reinforced the conclusion that the farmworkers were not independent contractors, but it did not establish any proof of joint employment.[335] The court noted that the fact that Miller had worked for Long & Scott for twenty-five years had no bearing on the farmworkers' relationship with Long & Scott.[336] Additionally, the court concluded that though the plaintiffs' harvest work "had the hallmarks of employment," the plaintiffs seemed to be working solely for Miller, not Long & Scott.[337]

d. The Degree of Skill Required to Perform the Job

The plaintiffs emphasized that harvesting vegetables does not require any special skill or training.[338] Therefore, the plaintiffs argued that the farmworkers were dependent on both Miller and Long & Scott for set hourly or piece-rate wages.[339] Again, the court concluded that the skill analysis only indicated that the farmworkers were employees rather than independent contractors.[340] The court held that this factor did not determine who was the farmworkers' employer.[341] Therefore, the court excluded from the analysis any consideration of plaintiffs' skills or training.[342]

e. Ownership of Facilities Where Work Occurred

The ownership of the facilities where the work occurred is the first of the six factors which the court considered relevant to the issue of joint employment.[343] The plaintiffs argued and the defendants conceded that Long & Scott owned the property and facilities where the plaintiffs worked.[344] Therefore, the court could hardly avoid the conclusion that this factor favored a finding that Long & Scott was a joint employer of the farmworkers.[345]

f. Performance of a Specialty Job Integral to the Business

The court also considered the fact that the farmworkers performed a line-job integral to Long & Scott's business.[346] The court agreed with the plaintiffs that this indicated that Long & Scott was a joint employer of the workers.[347] That is, since the farmworkers had to harvest the vegetables in order for Long & Scott to sell them and make a profit in its business, it was clear that the farmworkers were an integral part of the Long & Scott operation.

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334. *Id.* at 444.
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *See id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*

Thus, the court concluded that this factor favored the plaintiffs.[348]

3. The Court's Final Analysis

Out of six factors proposed by the plaintiffs, the Eleventh Circuit considered only two in its analysis of the joint employment issue.[349] Additionally, the court considered the five AWPA regulatory factors.[350] As noted above, the court found that all five of the regulatory factors supported the conclusion that Miller was the sole employer of the plaintiffs.[351] However, the court found that two additional factors proposed by the plaintiffs favored a finding of joint employment.[352] Without citing any authority, the court abruptly stated that these two factors "bear little relative weight" on the analysis.[353] This was the extent of the court's explanation of its balancing test.

After making this observation, the court made its final statement: "when we examine these non-regulatory factors in light of the five regulatory factors, each of which demonstrates that appellants were economically dependent solely upon Miller, we conclude that Long & Scott was not appellants' joint employer."[354] Thus, the court disregarded four of the plaintiffs' six factors as irrelevant, assigned minimal weight to the two factors that did favor the plaintiffs, and concentrated solely on what is arguably a skewed analysis of the five AWPA regulatory factors.

C. Criticism of the Aimable Opinion

1. A Faulty Five Factor Analysis

Although two of the five AWPA regulatory factors clearly did not support a finding of joint employment,[355] the Eleventh Circuit's analysis of the other three factors is not as convincing. For example, the court concluded that the first two factors, the nature and degree of control of the workers and the degree of supervision, direct or indirect, of the work, did not support a finding of joint employment.[356] However, the court's limited notions of control and supervision severely undermine this analysis.

Almost fifty years ago, the Supreme Court rejected the common law control test in favor of the economic reality of dependence test when analyzing employment relationships for the purposes of the FLSA.[357] In doing so, the Court emphasized that the control and supervision factors involved in a proper analysis of employment status under the FLSA do not require proof of control

348. *Id.*
349. *Id.*
350. *Id.* at 440–43.
351. *Id.* at 443. *See supra* notes 292–313 and accompanying text.
352. 240 F.3d at 445.
353. *Id.*
354. *Id.*
355. The two factors which the plaintiffs conceded did not support a finding of joint employment were: 1) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and 2) preparation of payroll and payment of wages. *Id.* at 442. *See supra* notes 308 & 311 and accompanying text.
356. *See supra* notes 292–301 and accompanying text.
357. *See, e.g.*, United States v. Silk, 331 U.S. 704, 716 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). *See also supra* notes 107–13 and accompanying text.

or supervision in the direct, common law sense.[358] The Court reasoned that limited notions of control would not effectuate the purposes of remedial legislation.[359] Indeed, the Eleventh Circuit expressly acknowledged that "to determine whether an employer/employee relationship exists for purposes of federal welfare legislation, we look not to the common law definitions of those terms...but rather to the 'economic reality' of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer."[360] However, the court went on to limit both the control and supervision factors by requiring that Long & Scott make "*direct* employment decisions" and "take an *overly active* role in the oversight of the work" in order to be considered a joint employer of the plaintiffs.[361]

The court concluded that Miller "exercised absolute, unfettered, and sole control over appellants and their employment."[362] However, the court called into question the validity of this conclusion by also recognizing that: 1) Long & Scott retained sole control over planting decisions; 2) Long & Scott specifically directed Miller as to when and what to harvest; and 3) Long & Scott directed Miller as to the workers' specific activities.[363] Certainly, these decisions constitute a large part of the overall farming operation. However, the court dismissed these decisions and instead required proof of direct, common law notions of control.[364] Since Long & Scott did not make these types of decisions, the court found that Long & Scott did not control or supervise the workers.[365] Of course, this ignores the fact that during the entire harvesting season, the plaintiff farmworkers were ultimately carrying out Long & Scott's orders.[366]

Other courts have expressly rejected these limited notions of agricultural control.[367] The Seventh Circuit, in finding that a farmer was an employer of migrant cucumber pickers, noted: "the defendants' right to control applies to the entire [farming] operation, not just the details of harvesting. The defendants exercise pervasive control over the operation as a whole."[368] The Fifth Circuit emphasized that the nature of farming is that the farmer cannot be in the field at all times and therefore must depend on others to do the harvesting.[369] In finding both a crewleader and his workers to be employees of a grower, the Fifth Circuit in *Castillo v. Givens* further noted that although the defendant grower "did not supervise the minor regular tasks,...he did exercise control

358. *See, e.g., Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729.

359. *See, e.g., Silk*, 331 U.S. at 712; *Rutherford*, 331 U.S. at 726–27. *See also supra* notes 127–31 and accompanying text.

360. *Aimable*, 20 F.3d at 439 (citing *Rutherford*, 331 U.S. at 730).

361. *Id.* at 440–41 (emphasis added).

362. *Id.*

363. *Id.* at 440.

364. The court stated that proof of "direct employment decisions such as whom and how many employees to hire, whom to assign to specific tasks, and how to design the employees' management structure" were necessary to find joint employment. *Id.*

365. *Id.* at 440–41.

366. Long & Scott gave Miller instructions on how and when to harvest the fields; Miller in turn gave these instructions to the workers. *Id.*

367. *See, e.g.*, Department of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983).

368. 835 F.2d at 1536 (finding that migrant cucumber pickers were employees for purposes of FLSA).

369. 704 F.2d at 189 n.17 (finding farmworkers and crewleader to be employees of a cotton farm owner).

over the significant aspects of the farming operations."[370] Finally, in a dissenting opinion, Harrison L. Winter, the Chief Judge of the Fourth Circuit, stated that the fact that plaintiff farmworkers "carried out the wishes" of the defendant grower was sufficient to make that grower a joint employer.[371] Clearly, the plaintiffs in *Aimable* were carrying out the wishes of Long & Scott, whether or not Long & Scott issued orders directly.[372] By returning to limited notions of control and supervision, the Eleventh Circuit clouded its vision and overlooked this commonsense conclusion.

Further, the Eleventh Circuit was blind to the fact that Long & Scott indirectly controlled the workers' wages. The Fifth Circuit has made some apt observations in this area. In *Beliz v. W.H. McLeod & Sons Packing Co.*, a case with facts similar to those in *Aimable*, the court noted that the grower "unilaterally determined the amount paid per bin of produce picked and *to some degree controlled the amount paid per bucket to individual workers*" even though the crewleader set the workers' actual wages.[373]

As in *Aimable*, the grower in *Beliz* paid the crewleader a set rate per bucket of produce and the crewleader determined the workers' share.[374] However, unlike the Eleventh Circuit, the Fifth Circuit was not blind to the fact that the amount the grower pays the crewleader will indirectly affect how much the farmworkers get paid.[375] If the grower does not pay the crewleader enough for the crewleader to cover his costs and pay the workers minimum wage, the grower ultimately should be held jointly responsible for these FLSA and AWPA violations. The Eleventh Circuit's argument that Long & Scott could not control Miller's spending is facially attractive. However, it does not overcome the fact that what Long & Scott paid Miller indirectly determined what Miller could afford to pay the workers.

2. Arbitrary Rejection of Four Significant Factors

The Eleventh Circuit rejected four of the six non-regulatory factors proposed by the plaintiffs as not relevant to the issue of joint employment.[376] However, the court failed to cite any cases which hold that different factors are to be used depending on whether the issue is independent contractor/employee

370. *Id.* In *Castillo*, the grower determined which fields to hoe and gave instructions to the crewleader on which weeds the workers should chop. The crewleader instructed the workers accordingly. *Id.* These decisions, which the Fifth Circuit felt indicated control, are similar to the Long & Scott decisions which the Eleventh Circuit called indirect and insubstantial. *Aimable*, 20 F.3d at 440–41.

371. Howard v. Malcom, 852 F.2d 101, 108 (4th Cir. 1988) (Winter, C.J., concurring in part and dissenting in part) (holding that the crewleader was the sole employer for the purposes of AWPA).

372. In *Griffin & Brand*, the case specifically endorsed by Congress as the proper approach to joint employment questions, the Fifth Circuit stated: "The fact that appellant effected the supervision by speaking to the crew leaders, who in turn spoke to the harvest workers, rather than speaking directly to the harvest workers does not negate a degree of apparent on-the-job control over the harvest workers." Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973).

373. Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1328 (5th Cir. 1985) (emphasis added) (finding that the crewleader and the workers were employees of the grower for purposes of FLSA).

374. *Id.* at 1322.

375. *Id.* at 1329-30.

376. *See supra* notes 319–42 and accompanying text.

or joint/sole employer.[377] Although those cases which use the four factors rejected by the court in *Aimable*[378] are cases in which the issue was independent contractor or employee status, these cases do not address the issue of whether the factors also could be used to determine joint employment.[379]

Indeed, whether a court is deciding if joint employment exists, or if a worker is an independent contractor or an employee, the underlying question is the same: "What is the economic reality of the situation?"[380] Further, if a court is deciding an independent contractor/employee issue, the court is actually trying to determine if a plaintiff is an *employee*. Similarly, although the Eleventh Circuit would argue the contrary, the court in a joint employment issue is asking: "Is the plaintiff an *employee* of the alleged joint employer?" In all cases, the plaintiffs in joint employment disputes are already considered to be employees of at least one person (usually the crewleader) and not independent contractors.[381] However, it is the question of whether they are an *employee* of a second person (usually the grower) that is the issue. Therefore, in either type of case, courts are faced with an inquiry into whether the plaintiffs are *employees* of a defendant. Hence, it is illogical for the Eleventh Circuit to conclude that different factors apply depending on which type of case is being decided. It is more likely that, since the underlying questions are always the same, the six non-regulatory factors proposed by the plaintiffs in *Aimable* are helpful no matter what type of employment situation is alleged.

Moreover, since the existence of an independent contractor is not supposed to affect a joint employment determination,[382] the court was wrong to exclude the plaintiffs' four non-regulatory factors. The court seemed to use the fact that Miller was admittedly an independent contractor to frustrate the possibility that joint employment existed. For example, in considering the defendants' investment in equipment and facilities, the court stated: "If we were to apply this factor, however, it would not indicate who appellants' employer

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377. *See supra* note 349 and accompanying text.

378. The court rejected: 1) investment in equipment and facilities; 2) the opportunity for profit and loss; 3) permanency and exclusivity of employment; and 4) the degree of skill required to perform the job as irrelevant to a determination of joint employment. *Aimable*, 20 F.3d at 443–44.

379. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976).

380. *See, e.g.*, Department of Labor v. Lauritzen, 835 F.2d 1529, 1536–38 (7th Cir. 1987); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 & 1329 (5th Cir. 1985); Donovan v. Brandel, 736 F.2d 1114, 1117–20 (6th Cir. 1984); Castillo v. Givens, 704 F.2d 181, 189 (5th Cir. 1983); *Real*, 603 F.2d at 754; Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 237 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973); Alviso-Medrano v. Harloff, 868 F. Supp. 1367 (M.D. Fla. 1994); Leach v. Johnston, 812 F. Supp. 1198 (M.D. Fla. 1992); Aviles v. Kunkle, 765 F. Supp. 358, 363 (S.D. Tex. 1991); Maldonado v. Lucca, 629 F. Supp. 483, 487–88 (D.N.J. 1986); Haywood v. Barnes, 109 F.R.D. 568, 587 (E.D.N.C. 1986); Brock v. Lauritzen, 624 F. Supp. 966, 968 (E.D. Wis. 1985); Donovan v. Gillmor, 535 F. Supp. 154, 161–63 (N.D. Ohio 1982).

381. *See, e.g.*, Howard v. Malcom, 852 F.2d 101 (4th Cir. 1988); *Beliz*, 765 F.2d 1317; *Castillo*, 704 F.2d 181; *Griffin & Brand*, 471 F.2d 235; Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973); Charles v. Burton, 857 F. Supp. 1574 (M.D. Ga. 1994); *Alviso-Medrano*, 868 F. Supp. 1367; *Aviles*, 765 F. Supp. 358.

382. The undisputed employer's status as an independent contractor "does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer...." H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 7–8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553–54.

was, as both Miller and Long & Scott made significant investments in equipment and facilities."[383] However, the court exposed its faulty reasoning with this statement. Even assuming Miller had the significant investment in equipment that the court maintained he did,[384] this does not negate the existence of a joint employment relationship.[385] The court insisted that this factor would not indicate who was the employer.[386] However, if a joint employment relationship exists, it is inherently unnecessary to pick just one employer. If both parties actually had such a significant investment in equipment and facilities, then they were joint employers of the farmworkers who, according to the court, relied on Long & Scott and Miller for the necessary harvesting tools.[387] Therefore, this faulty reasoning seems like a crutch for the court to use to avoid a finding of joint employment. It appears that once the court found that this factor did not "exonerate Long & Scott," it decided to exclude this factor from consideration.[388]

When analyzing the other three factors the court so confidently rejected, it is obvious that Long & Scott was not completely disassociated from the workers and therefore was their joint employer.[389] First, Long & Scott clearly was the source of economic livelihood for the plaintiffs. The record established that the plaintiffs had no opportunity to affect their own profit or loss.[390] Similarly, nothing that Miller did would increase their compensation.[391] The plaintiffs were dependent on Long & Scott to do the planting so that there would in turn be a harvest, to tell Miller what fields the workers could harvest, and to pay Miller enough money to cover his costs and still pay the workers. Undoubtedly, the plaintiffs were also dependent on Miller not to abscond with their money and for the physical task of distributing wages. However, once again, the existence of Miller as an independent contractor cannot be allowed to negate the joint employment relationship.[392]

Moreover, the permanency and exclusivity of the employment relationships in this case cannot be dismissed as irrelevant. The economic reality is that the plaintiffs were at the beck and call of Long & Scott during the harvesting season. They worked for others only when Long & Scott did not have work.[393] Although the court characterized Miller as being in charge of who the plaintiffs worked for,[394] it is obvious that Long & Scott was ultimately the entity in charge. Miller took the plaintiffs back to the Long & Scott farm

383. *Aimable*, 20 F.3d at 443.

384. Plaintiffs maintained that Miller merely provided some hand tools. *See supra* notes 279 & 323 and accompanying text. The court counted Miller's investment in the labor camp although this is not directly related to the harvest activities. *Aimable*, 20 F.3d at 443.

385. Harrison L. Winter, Chief Judge of the Fourth Circuit, observed: "AWPA envisions situations where joint employers both possess substantial capital." Howard v. Malcom, 852 F.2d 101, 107 (4th Cir. 1988) (Winter, C.J., concurring in part and dissenting in part).

386. *Aimable*, 20 F.3d at 443.

387. *Id.*

388. *Id.*

389. The AWPA regulations caution, "[i]f the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a 'joint employment' relationship does not exist." 29 C.F.R. § 500.20(h)(4)(i).

390. *Aimable*, 20 F.3d at 443.

391. It was not as if Miller could exercise some type of managerial initiative to help the workers pick more vegetables to increase their compensation.

392. *See supra* note 382 and accompanying text.

393. *Aimable*, 20 F.3d at 437.

394. *Id.* at 440–41.

when Long & Scott called.[395] Long & Scott controlled when the plaintiffs worked on the Long & Scott farm and when they were allowed, for lack of work, to go with Miller to neighboring farms for a few days.[396] This is not to say that the fact that Miller fed these directions to the plaintiffs is of no consequence. However, it does establish that Miller was not the sole employer of the plaintiffs.

Further, the fact that Miller had a continuous twenty-five year relationship with Long & Scott makes it impossible to say that Long & Scott was completely disassociated from Miller and the farmworkers. There is no reason for this twenty-five year relationship to be disregarded just because Miller was an independent contractor. Again, the court was seeking to allow independent contractor status to negate the possibility of joint employment.[397]

As to the fourth non-regulatory factor rejected by the court, the skill and managerial initiative required for the harvest came almost entirely from Long & Scott.[398] The farmworkers needed little if any skill or training to pick and pack the vegetables.[399] Similarly, although the court did not acknowledge this, Miller exercised little skill in the harvesting process, other than overseeing the daily toil of the workers.[400] As the court admitted, it was Long & Scott who decided which fields would be harvested and when,[401] one of the most important and weighty decisions to be made during the harvest season. After all, if the vegetables were harvested too soon or too late, Long & Scott would risk losing its profits for the season. Clearly, Long & Scott must have considered this decision too important to leave to a crewleader with little education. Therefore, though Long & Scott probably required Miller to have more skills and training than the farmworkers, there is no doubt that the weighty decisions remained in the hands of Long & Scott.[402] Hence, both Miller and the farmworkers, in differing degrees, were dependent on Long & Scott because they lacked the skills and initiative to operate entirely on their own. This then should have alerted the court that a joint employment relationship must have existed.

Finally, in addition to rejecting four relevant factors, the court assigned "little relative weight" to the two non-regulatory factors it did consider relevant.[403] There is no authority that supports this type of arbitrary balancing. Indeed, the fact that the plaintiffs worked on Long & Scott's property and performed a job which was at the heart of Long & Scott's business[404] should

395. *Id.* at 437.
396. *Id.*; Brief for Petitioners at 5, *Aimable*.
397. *See supra* notes 382 & 385 and accompanying text.
398. *Aimable*, 20 F.3d at 440–41, 444.
399. *Id.* at 444.
400. *See id.* at 440–41.
401. *Id.* at 440.
402. *Id.* at 440–41.
403. *Id.* at 445.
404. After all, if the farmworkers did not harvest the vegetables, Long & Scott could not market the vegetables. Thus, Long & Scott would be out of business. This conclusion is nicely illustrated by the Seventh Circuit:

> It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business unless the employer's investment, planting, and cultivating activities are only to serve the purpose of raising ornamental pickle vines. That result would likely disappoint all good pickle lovers.

weigh heavily in favor of a joint employment finding. Other courts have considered these factors to be very important to the overall analysis.[405] This unexplained and arbitrary assignment of weight again suggests that the court was searching for a way to justify a holding that went against the bulk of the evidence.

3. Economic Reality

The court seemed to downplay the fact that the underlying issue in the test for joint employment is the "economic reality" of the situation.[406] Indeed, the court even sarcastically joked about the plaintiffs' economic reality argument. That is, when the plaintiffs argued that the workers were indirectly dependent on Long & Scott for their wages, the court responded, "[u]nfortunately for appellants, the laws that bind the Euclidian world do not apply with equal force in federal employment law."[407] Rather than engage in this lofty metaphorical reasoning, the court should simply have stepped back and taken the commonsense approach suggested in *Fegley v. Higgins*: "Evaluating a worker's economic reality is a fancy way of asking what the worker's job is like. A court need not rely on rote application of a balancing test in order to answer such a simple question."[408] If the Eleventh Circuit would have taken this straightforward approach, it might have seen that the plaintiffs' argument was a valid illustration of the workers' economic reality.[409] Instead, the court placed undue significance on who fixed the specific rate of pay and de-emphasized the economic connection between Long & Scott and the workers.

Growers like Long & Scott should not be allowed to avoid economic reality by placing the focus on contractual labels. Congress specifically directed that "it is economic reality, not contractual labels, nor isolated factors which is to determine employment relationships under this Act."[410] However, the Eleventh Circuit disregarded this mandate and, in the *Aimable* decision, specifically allowed Long & Scott to avoid economic reality. By repeatedly interjecting the fact that Miller was an independent contractor, the court seemed to imply that this somehow lessened the chance that joint employment existed. The court ignored significant findings that Long & Scott made the major planting and harvesting decisions, provided almost all of the equipment for

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Department of Labor v. Lauritzen, 835 F.2d 1529, 1537–38 (7th Cir. 1987).

405. *See, e.g., id.* at 1536–38; Castillo v. Givens, 704 F.2d 181, 191 (5th Cir. 1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973); Haywood v. Barnes, 109 F.R.D. 568, 587 (E.D.N.C. 1986).

406. "[I]t is the economic reality, not contractual labels, nor isolated factors which is to determine employment relationships under this Act." H.R. REP. NO. 97-885, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553.

407. *Aimable*, 20 F.3d at 442.

408. Fegley v. Higgins, 760 F. Supp. 617, 622 (E.D. Mich. 1991) (finding that a worker was an employee rather than an independent contractor for purposes of FLSA).

409. As the Fifth Circuit stated: "The [FLSA] is designed to protect individuals whose employment status is so dependent on the whims of the employer as to make them submissive to an employer's notion of fair compensation for their labor." Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1315 (5th Cir. 1976) (holding that laundry workers were employees rather than independent contractors for purposes of FLSA).

410. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553.

Miller and the workers, and gave orders, through Miller, for the workers to follow.[411] Collectively, these facts support the conclusion that joint employment was the economic reality in this case. However, once the court became entrapped in faulty reasoning, it failed to step back and look at the larger picture and ask: 'What was the workers' job like?'

4. Contrary to Legislative Intent

The Eleventh Circuit decision in *Aimable* runs contrary to legislative intent and completely wipes out the remedial purpose of the AWPA. Congress intended that "any attempt to evade the responsibilities imposed by this Act through spurious agreements...be rendered meaningless."[412] Further, it is only when "the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee..." that a joint employment relationship does not exist.[413]

Long & Scott was never wholly disassociated from the plaintiffs. Clearly, the plaintiffs were dependent on Long & Scott for the equipment with which they worked, the directives issued through Miller, and the money that went toward their wages. Hence, by failing to follow legislative intent, the Eleventh Circuit effectively denied the plaintiffs the remedy to which they were entitled.[414]

5. Unpredictable Results

A decision like that in *Aimable* encourages arbitrary decisions and creates confusion among those affected by the legislation. The *Aimable* decision was issued in May 1994. Already, it has been cited in support of several subsequent decisions.[415] Like the *Brandel* decision before it, *Aimable* is in the minority in terms of its faulty reasoning and illogical results when deciding the employment issue.[416] However, there is always a chance that this type of unjust

411. *Aimable*, 20 F.3d at 440–41, 443.

412. H.R. REP. NO. 97–885, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553.

413. 29 C.F.R. § 500.20(h)(4)(i) (1994).

414. Since crewleaders lack resources and are often transient, they generally are considered to be judgment-proof. If a crewleader is held to be the sole employer of migrant workers, the workers may never see the proceeds from that judgment. Indeed, Miller is currently in bankruptcy proceedings and will be unable to pay the judgment against him in *Aimable*. *In re:* John Miller, Jr., Rudeen Quince Miller, Debtors, No. 94–2166–8G3 (Bankr. M.D. Fla.); Brief Amici Curiae for Petitioners at 13, *Aimable*. *See supra* notes 88–89 and accompanying text.

415. *See* Charles v. Burton, 857 F. Supp. 1574, 1579–81 (M.D. Ga. 1994) (holding that a crewleader was the sole employer of migrant workers); Antenor v. D & S Farms, No. 90–0868–CIV–GRAHAM at 13–20 (S.D. Fla. 1994) (same); Alviso–Medrano v. Harloff, 868 F. Supp. 1367, 1370–74 (M.D. Fla. 1994) (holding that defendant grower was the joint employer of the plaintiffs).

416. The majority of the courts have found that migrant workers are either employees of the grower or employees of both the crewleader and the grower. *See, e.g.*, Department of Labor v. Lauritzen, 835 F.2d 1529, 1536–38 (7th Cir. 1987); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1328 & 1330 (5th Cir. 1985); Castillo v. Givens, 704 F.2d 181, 188 & 193 (5th Cir. 1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973), *cert. denied sub nom.* Griffin & Brand, Inc. v. Brennan, 414 U.S. 819 (1973); Hodgson v. Okada, 472 F.2d 965, 968–69 (10th Cir. 1973); Alviso–Medrano v. Harloff, 868 F. Supp. 1367, 1374 (M.D. Fla. 1994); Cavazos v. Foster, 822 F. Supp. 438, 445 (W.D. Mich. 1993); Leach v. Johnston, 812 F. Supp. 1198 (M.D. Fla. 1992); Aviles v. Kunkle, 765 F. Supp. 358 (S.D. Tex. 1991); Maldonado v. Lucca, 629 F. Supp. 483, 487–88 (D.N.J. 1986); Haywood v. Barnes, 109

decision will influence other jurisdictions and affect the ability of plaintiffs across the country to recover from wrongdoers.

Moreover, as Judge Easterbrook of the Seventh Circuit suggests, the unpredictable results achieved in minority cases like *Aimable* and *Brandel* have a severe effect on those who are subject to the legislation.[417] Easterbrook recommends a per se rule that migrant workers are the employees of growers precisely because he wants people to be able to foresee the results of their actions.[418] Specifically, Easterbrook argues that people can never be sure of their rights and responsibilities when liability is unpredictable.[419] Indeed, it is hard enough for farmworkers with little access to legal advocates, and even less cash, to bring suits against powerful growers.[420] But when a court such as *Aimable* makes the results so unpredictable and denies the workers any effective remedy for the wrongdoing suffered, it is unlikely that many workers will take advantage of the private right of action provided in the AWPA. Hence, any enforcement of AWPA provisions becomes minimal, given that the DOL rarely brings any enforcement actions due to its own lack of resources.[421]

V. SUGGESTED APPROACHES TO AWPA JOINT EMPLOYMENT LITIGATION

The situation of migrant farmworkers desperately needs more attention. In order for constructive changes to occur, the media and the legal community must tell the public about the outrageous injustices these workers endure.[422] Perhaps then the public outcry will provide the impetus for significant change.[423]

To effect the most change, the courts, or preferably Congress, should create a per se rule that migrant farmworkers are employees of agricultural businesses. A per se rule would make it impossible for large growers to use

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F.R.D. 568, 587 (E.D.N.C. 1986); Brock v. Lauritzen, 624 F. Supp. 966, 968–70 (E.D. Wis. 1985); Donovan v. Gillmor, 535 F. Supp. 154, 161–63 (N.D. Ohio 1982).

417. *Lauritzen*, 835 F.2d at 1539–44 (Easterbrook, J., concurring).

418. *Id.* at 1539, 1545.

419. *Id.*

420. *See* Patino, *supra* note 7, 49–50.

421. Moreover, employers often resist the DOL's attempts to investigate complaints. *See* Donovan v. Mehlenbacher, 652 F.2d 228, 229–30 (2d Cir. 1981) (farmer refused to answer the DOL subpoena); Matter of Hylton Hedman, Lab. L. Rep. (CCH) ¶ 32,296 (Feb. 25, 1994) (crewleader told worker not to give information to the DOL investigator); Brock v. Elsberry, Inc., 663 F. Supp. 359, 366 (M.D. Fla. 1987) (employer repeatedly refused to allow the DOL to conduct private investigative interviews).

422. Notably, Congress passed the Farm Labor Contractor Registration Act of 1963 after CBS aired Edward R. Murrow's shocking documentary, *Harvest of Shame*, the night after Thanksgiving in 1960 (CBS television broadcast, Nov. 30, 1960). This program was the first to draw national attention to the horrible abuses suffered by migrant farmworkers. The documentary helped garner public support for the movement to remedy the situation.

423. Edward R. Murrow obviously agreed with this idea when he made his closing remarks in *Harvest of Shame*:

> A hundred and fifty different attempts have been made in Congress to do something about the plight of the migrants. All except one has failed. The migrants have no lobby. Only an enlightened, aroused, and perhaps angered public opinion can do anything about the migrants. The people you have seen have the strength to harvest your fruit and vegetables. They do not have the strength to influence legislation. Maybe we do.

Harvest of Shame (CBS television broadcast, Nov. 30, 1960).

crewleaders to shield themselves from responsibility under the AWPA. In addition, other equally positive but less effective changes could include: 1) stiffer penalties for AWPA violations; 2) reduced judicial tolerance for repeat offenders like Miller, the crewleader in *Aimable*; and 3) stricter guidelines from Congress on the implementation of the "economic reality" balancing test.

A. Increased Attention to the Plight of Migrant Workers

Although Congress recognized more than thirty years ago the deplorable conditions under which migrant farmworkers labor,[424] the plight of migrant farmworkers has not received the attention given to other social issues. Migrant farmworkers are considered an unpopular cause.[425] For example, there have been few articles or casenotes written on the subject in the last twenty years.[426] Migrant workers have traditionally been an underrepresented group due to the lack of legal advocates who seek work in this area.[427] There have been only two notable television documentaries on the subject of migrant farmworkers in the past thirty-five years.[428] Additionally, many people are unaware that legislation like the AWPA exists to protect farmworkers or even that farmworkers are entitled to be paid the minimum wage.[429] Those people who are aware of statutory protections mistakenly think the migrant farmworkers' situation has dramatically improved over the years since the passage of the FLCRA.

When migrant workers are further slighted by the courts or by Congress, it goes unnoticed by the majority of the American public. For real change to occur, the public's attention must be drawn to the legal challenges that migrant farmworkers face today. Once the public is confronted with the widespread

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424. *See supra* notes 19–25 and accompanying text.

425. Some would argue that the current "anti-immigrant" sentiment contributes to the lack of public outcry about farmworker problems. The stereotypical image of a farmworker is an illegal alien from Mexico.

426. Research for this Note revealed the following: Todd Brower & John E. Sanchez, *The Duty of Fair Representation in Farm Labor Legislation: Cultivating the Seeds of Individual Rights*, 56 UMKC L. REV. 239 (1988); Beverly A. Clark, *The Iowa Ombudsman Project: An Innovative Response to Farm Worker Claims*, 68 N.D. L. REV. 509 (1992); Dingfelder, *supra* note 51; *Farmworker Law Developments*, 27 CLEARINGHOUSE REV. 1122 (1994); Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213 (1990); Linder, *supra* note 85; Marc Linder, *Farmworkers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX L. REV. 1335 (1987); Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL'Y 321 (1989); Marc Linder, *Petty-bourgeois Pickle Pickers: An Agricultural Labor-law Hoax Comes a Cropper*, 25 TULSA L.J. 195 (1989); *Migrant Legal Services: The Challenge of Effective Advocacy*, 26 CLEARINGHOUSE REV. 4 (special issue 1992); Patino, *supra* note 7; Quiesenbery, *supra* note 51; Pedersen, *supra* note 51; Daniel P. Santos, *Agricultural Labor Reform: Implications of the New Immigration Law and the 1989 Legislative Farm Worker Package*, 26 WILLAMETTE L. REV. 375 (1990); VanSickle, *supra* note 25; Vause, *supra* note 25; Juan Burgos, Comment, *Labor Law - The Migrant and Seasonal Agricultural Worker Protection Act Preempted by State Worker's Compensation Law*, 21 RUTGERS L.J. 197 (1989); Fischer, *supra* note 25; Glader, *supra* note 86; Tierce, *supra* note 87; Shirleen A. Vazquez, Note, *COTA v. Molinelli: An Unsuccessful Attempt to Level Economic Fields in Labor Relations*, 42 RUTGERS L. REV. 667 (1990).

427. Viviana Patino of Texas Rural Legal Aid emphasizes the need for farmworker advocates, saying workers are virtually powerless to improve their situation without effective advocates. Patino, *supra* note 7, at 49.

428. *See Harvest of Shame*, *supra* note 423; *New Harvest, Old Shame* (PBS Frontline television broadcast, Apr. 17, 1990).

429. Patino, *supra* note 7, at 45–46.

injustices suffered by farmworkers, public officials may feel the pressure to make changes.[430] However, if the plight of migrant farmworkers is forever left in the dark, there can be no hope for significant legal or legislative improvement.[431]

B. The Need for a Per Se Rule

The most significant and effective improvement would be the adoption of a per se rule that migrant farmworkers are employees of the growers and the agricultural businesses for which they work. Judge Easterbrook has said that "[m]igrant farm hands are 'employees' under the FLSA— without regard to the crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort. Once they know how the FLSA works, employers, workers, and Congress have their options."[432] This per se rule should begin in the courts as a signal to growers that judges will no longer be fooled by the veil of a mere contractual agreement with a crewleader. But to have the most force, a per se rule should be enacted by Congress as an amendment to the current AWPA regulatory test.

A per se rule would dramatically decrease litigation under the AWPA, and those subject to the legislation would know in advance their rights and responsibilities. Current litigation under the AWPA is extremely burdensome to the very farmworkers Congress meant to protect.[433] Farmworkers face a difficult and complex task in seeking to prove to the courts the "economic reality" of their situation.[434] Both sides expend valuable resources, and the courts are bogged down with the complex issues which inevitably arise in questions of employment status. Even worse, already resource-poor plaintiff farmworkers[435] often endure a long trial, only to come away without a remedy.[436] A per se rule would eliminate the bulk of the litigation and recognize that farmworkers are inextricably linked to the agricultural

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430. For example, a few years ago, public attention was drawn to the toxicity of pesticides being used on crops. Now, stringent regulations have been enacted which require that workers applying pesticides be told what they are using and that also require sprayers to observe "re-entry times," the length of time between spraying and the time when it is safe to return to the field. *See* Patino, *supra* note 7, at 47–48. Another example is the current uproar over the operations of the poultry industry. *See, e.g.*, John T. Holleman, *In Arkansas Which Comes First, The Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21 (1992); Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RES. L. REV. 33 (1995). The increased attention may soon encourage reform in this industry.

431. If Edward R. Murrow had not done *Harvest of Shame*, Congress might never have passed the Farm Labor Contractor Registration Act. *See supra* note 423 and accompanying text.

432. Department of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). Other courts have commended Judge Easterbrook's suggestion of a per se rule. *See* Cavazos v. Foster, 822 F. Supp. 438, 444–45 (W.D. Mich. 1993) ("The burden of litigating employment status should not be imposed on migrant workers and could be avoided if it was clear that the FLSA applied in all but the most exceptional of cases."); Fegley v. Higgins, 760 F. Supp. 617, 622 (E.D. Mich. 1991). Additionally, the per se rule approach has been suggested by Linder, *supra* note 85, at 473, and Glader, *supra* note 86, at 1487–88.

433. *See supra* note 85 and accompanying text.

434. *See supra* note 85 and accompanying text.

435. See *supra* note 7 for statistics on farmworkers' wages.

436. Either the court may hold that the defendant(s) did not violate the law, or the court may hold that the crewleader is the sole employer of the plaintiffs and therefore liable for the violations. Either way, the plaintiffs are effectively denied a remedy. *See supra* notes 86–89 and accompanying text.

businesses for which they work.[437]

Further, as suggested by Judge Easterbrook, a per se rule would delineate rights and responsibilities and allow for effective planning.[438] If growers know they are considered jointly liable for any violations of the AWPA, they will monitor their crewleaders more closely. No longer will it be less expensive for them to relegate the workers to crewleaders who repeatedly violate the law.[439] Farmworkers, too, will be assured of consistent application of the law. With a per se rule, farmworkers will not bring complex suits only to discover that a court has arbitrarily implemented a balancing test to favor the grower. Instead, the workers will be able to seek compensation for wrongdoing from a fixed-situs employer with resources to satisfy a judgment.[440]

C. Alternatives to a Per Se Rule

Unfortunately, Congress and the courts have so far refused to recognize the benefits of a per se rule. In fact, it is unlikely that a per se rule will be adopted any time soon. However, there are other effective though less powerful changes which could be implemented without the controversy of the per se suggestion. For example, Congress could amend the AWPA to impose stricter penalties on those who violate the law. It is obvious that the first-time penalties imposed against Miller, the crewleader in *Aimable*, were not sufficient to dissuade him from violating the law again.

Along the lines of stricter penalties, the courts should dole out harsher punishment to those like Miller who repeatedly violate the law. Miller reappeared in court many times before he was held liable for money damages.[441] Repeated injunctions obviously did not deter him. Further, it is unlikely that money damages would get paid anyway, given that Miller, like most crewleaders, is resource-poor.[442] Of course, this is why effective enforcement of the AWPA requires a per se rule that holds agricultural businesses liable for violations; only when growers are forced to pay money for the crewleaders' abuses will they have the incentive to stop the crewleaders from violating the law. Given the fact that no per se rule yet exists, courts should impose prison sentences on those crewleaders who refuse to comply with the AWPA provisions.[443] The injunctions and money damages issued to date clearly have had little deterrent effect.

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437. Some critics of a per se rule may be concerned that it will burden the small farmer with unnecessary regulation. However, as Viviana Patino of Texas Rural Legal Aid points out, "[T]he farmers at issue here are not owners of small amounts of acreage facing the threat of bankruptcy. Rather,...[the problem is] mega-agribusiness, principally associations of large growers and their distributors, commonly known as packing sheds. Packing sheds move the crops from the field to the market." Patino, *supra* note 7, at 44. Indeed, small farmers and family businesses are exempt from complying with the AWPA. *See* 29 U.S.C.A. § 1803.

438. Department of Labor v. Lauritzen, 835 F.2d 1529, 1539–45 (7th Cir. 1987) (Easterbrook, J., concurring).

439. Miller, the crewleader defendant in *Aimable*, had been convicted of numerous violations. *See supra* note 252.

440. One of the advantages of having growers share in liability for a judgment is that growers cannot disappear like transient crewleaders who have nothing to tie them down and keep them from disappearing.

441. *See supra* note 252 and accompanying text.

442. *See supra* notes 88–89, 414 and accompanying text.

443. Prison time is an option for courts under the enforcement provisions of the AWPA if a person willfully and knowingly violates the Act. *See* 29 U.S.C.A. § 1851.

Finally, in the absence of a per se rule, Congress should amend the AWPA to include stricter guidelines on the implementation of the test for "economic reality." Courts have failed to consistently implement Congressional intent and have arbitrarily applied the balancing test to reach illogical conclusions. Without a per se rule, it is vitally necessary for Congress to give the courts more guidance and to close the loopholes opened by opinions like *Brandel* and *Aimable*. Congress could start by listing the exclusive factors to be used in determining the joint employment issues; the test is open-ended when the courts can bring in other factors at random in addition to the five regulatory factors.[444] Moreover, Congress should mandate exactly what type of evidence can be considered relevant to each factor. This is the only way to ensure more consistent, predictable applications of the "economic reality" balancing test.

CONCLUSION

The AWPA provides many necessary protections to migrant workers. However, these protections are only available if the farmworkers are found to be "employees." When courts like the Eleventh Circuit in *Aimable* ignore economic reality and find that migrant farmworkers are not employees of the growers on whose land they work, it is as if the AWPA does not exist. If courts do not hold growers liable for AWPA violations, the migrant workers have almost no hope of recovering the damages to which they are entitled. Courts and Congress must provide an incentive for growers to comply with the Act by making them pay for violations. *Aimable* demonstrates that without this type of monetary incentive, unprincipled crewleaders will continue to abuse the workers and the law while growers look the other way.

444. The courts are not limited to the five factors specifically listed in the AWPA regulations.

> The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, *but are not limited to*, the following:
> (A) The nature and degree of control of the workers;
> (B) The degree of supervision, direct or indirect, of the work;
> (C) The power to determine the pay rates or the methods of payment of the workers;
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
> (E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii) (emphasis added).