LEADERSHIP CENTER FOR ATTORNEY GENERAL STUDIES

Joint Employer Liability

Use of The Joint Employer Doctrine to Advance the Enforcement Battle Against Exploitative Employment Practices

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I. Introduction

The fissuring of the workplace through subcontracting and the use of subcontract labor providers, (labor brokers and temp agencies) have complicated the enforcement of basic federal and state tax and employment laws. More and more those enforcing workplace laws have to weave through a thicket of inquiries to discover who is the employer and determine if that entity is sufficiently capitalized to make employees whole. Moreover, law-breaking subcontractors and labor brokers are easily replaced leaving upper-tier employers free to proceed with a business model that evades any meaningful accountability. Thankfully, the joint employer doctrine can be an effective tool for combating that business model.

State attorneys general play a vital role in cutting through the thicket and holding those accountable who deny workers the wages and benefits they have earned. This paper will describe the problem of the fissuring workplace, its harm to employees, and how state attorneys general can combat efforts to evade responsibility by law breaking employers through use of the joint employer doctrine. There are several different pathways to pursue joint employer liability. They are the Fair Labor Standards Act's economic realities analysis, common law, workers' compensation standards, the ABC test, and the pursuit of regulation and legislative changes. This paper will explore all these pathways for use by state attorneys general to provide meaningful relief to workers victimized by the fissuring workplace.

Joint employer liability accomplishes two important objectives. First, it can ensure recovery of backpay, penalties, and other costs and damages from an employer that is not judgment proof. Additionally, joint employer liability encourages self-policing by deterring employers from subcontracting to employers who offer lower costs by violating labor standards and employment-tax laws. To be effective, both objectives need to be pursued.

II. The Fissuring Workplace.

A. The Construction Industry Experience.[i]

An increasing number of construction industry employers are using labor brokers to supply their labor. Many labor brokers commit tax fraud, wage theft, and workers' compensation premium fraud by intentionally misclassifying employees as independent contractors or, more often, by paying employees off the books. Here is what construction industry employers have been saying about it:

> In my industry, misclassification is not about making tough calls applying complicated laws to ambiguous facts. Rather, it is a choice simply to disregard wage and hour laws, workers' compensation laws, unemployment insurance regulations, and other basic responsibilities of being an employer. This is done for the purpose of gaining an advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risk that honest entrepreneurs must accept. Business owners using the misclassification model do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.[ii]
>
> "We have so much pressure to cut costs," said Mike Nobles, a Tennessee based labor broker, "[T]he owners of the buildings—they want to wink at it and ignore it, and then if anything goes wrong, they want to blame it on somebody like me."[iii]
>
> Andy Anderson, of Linden Steel: "The only way I can compete is get on the same playing field as those guys."[iv]

B. How A Fissuring Workplace Operates.

It is important to know how the construction industry has fissured to understand why joint-employer liability is important. David Weil described in his ground-breaking book *The Fissured Workplace* how those who profit from production have separated themselves from burdens of production by inserting layers of subcontractors between themselves and the workforce.[v] That has been happening in the construction industry since the 1970's. Gone are the days when a general contractor employed almost everyone on a construction site from excavation to raising a structure, enclosing the building, interior build out, and roofing. Now general contractors hire specialty subcontractors, or owner-developers use construction managers to supervise specialty subcontractors who contract directly to the owner.

Fissuring can make economic sense. It allows individual businesses to become specialists.[vi] Owner-developers become specialists in acquiring funding, purchasing property, marketing and planning the look of the structure. Construction managers are very good at making that vision become a reality by making sure the specialty subcontractors live up to their contracts with the owner developer. Specialty subcontractors become masters at excavating, pile driving, concrete work, installing walls and ceilings, floor covering, electrical systems, heating, air conditioning and installing curtain walls, and windows.

But the darker side of fissuring has taken hold. Specialty subcontractors further fissure their own means of production by abdicating responsibility or hiring a skilled and trained workforce. This results in deepening the fissure by using labor brokers whose sole job is to provide bodies--workers to perform the work for which the subcontractor is responsible. Specialty subcontractors use labor brokers not only for labor but to lower their labor costs. That is accomplished by cheating on employment-tax payments, overtime pay, and workers' compensation premiums. The mechanisms used by the labor broker include misclassification of employees as independent contractors or off-the-books payments. When and if legal action is taken, the labor brokers are low-hanging fruit that can be readily replaced by the subcontractor. Or, the labor broker simply changes its business identity, or adopts a shell company identity, and continues its practices working for the same subcontractor. This fraud model is vindicated every time law enforcement fails to hold an upper-tier contractor accountable.

A plethora of federal and state violations can accompany misclassification and off-the-books payments. Those include wage theft, tax fraud, workers' compensation premium fraud, labor trafficking, child labor, immigration, mail and wire fraud, falsification of currency transaction reports, unfair competition, false claims, and racketeering.

A study commissioned by the Attorney General's Office of the District of Columbia found that contractors who break the law skim 16.7 to 48.1 percent off their labor costs.[vii] This creates an incentive to break the law, because the competitive construction market favors lower bids.

Lawlessness in the construction industry has become so alarming that it has caught the attention of the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). FinCEN has issued a notice to banks and other financial institutions alerting them to fraud schemes in the industry and reminding them of their obligations to file suspicious activity reports.[viii] In its notice, FinCEN wrote:

> The Financial Crimes Enforcement Network (FinCEN) is issuing this Notice to call financial institutions' attention to what law enforcement has identified as a concerning increase in state and federal payroll tax evasion and workers' compensation insurance fraud in the U.S. residential and commercial real estate construction industries.
>
> Every year across the United States, state and federal tax authorities lose hundreds of millions of dollars to these schemes, which are perpetrated by illicit actors primarily through banks

and check cashers. As described in this Notice, many payroll tax evasion and workers' compensation fraud schemes involve networks of individuals and the use of shell companies and fraudulent documents. These schemes further affect the local and national construction job markets and put legitimate construction contractors and their employees at a competitive disadvantage.[ix]

Additionally, the U.S. Department of the Treasury's *2024 National Money Laundering Risk Assessment* has identified the construction industry as prone to tax and workers' compensation premium fraud along with human trafficking.[x]

C. The Scope of The Problem.

Misclassification of employees as independent contractors and off-the-books payments pose serious threats to law-abiding employers, their employees, and state revenues.

Research on this growing and pervasive problem in the construction industry shows real costs. A report on construction-employer fraud released by The Century Foundation in 2023 disclosed that up to 19 percent, or 2.1 million, construction workers in the United States who should be treated as employees are not.[xi] Construction workers lose close to $1.9 billion of overtime pay annually.[xii] Approximately $791 million of unemployment contributions are not made to state funds, and workers' compensation carriers lose $5 billion in premiums.[xiii] Federal income tax losses amount to $2.5 billion annually and state income tax losses are about $973 million.[xiv] Moreover, adding insult to injury, the scofflaws foist $5.1 billion of federal employment taxes they should pay onto the backs of workers and their families.[xv] All told (unpaid overtime, workers' compensation premiums and state and federal taxes) scofflaw construction employers evade a staggering $12.8 billion in labor costs by operating illegally.[xvi] The Century Foundation report also detailed the losses in all fifty states. In Arizona, for example, the scofflaws evade $194.8 million in labor costs.[xvii] In Colorado the losses are $213.1 million, Connecticut $225.1 million, Florida $717.3 million, Georgia $570.9 million, Maryland $154.5 million, Massachusetts $274.8 million, Tennessee $250.7 million, Texas $1.1 billion, and Washington $172.8 million.[xviii] The economists who authored the study added sobering comments emphasizing that they "possibly—if not likely—*undercount* the extent of worker misclassification in the construction industry," because of the characteristics of the data, the undercounting of certain undocumented immigrants, and conservative assumptions.[xix]

And there is more. The University of California Berkeley Labor Center issued a report in January 2022 on the number of construction worker families in the U.S. enrolled in safety net programs—adult Medicaid, children's Medicaid, the earned income tax credit, Temporary Assistance for Needy Families and the Supplemental Nutrition Assistance Program.[xx] Shockingly, 39 percent of construction worker families are enrolled in at least one safety net program, costing state and

federal taxpayers $28 billion a year.[xxi] That compares to 31 percent of all working families.[xxii] Additionally, 31 percent of construction workers do not have health insurance compared to 10 percent of all workers.[xxiii] The authors of the report attributed the high degree of reliance on public assistance to a number of factors. Chief among them were low pay, wage theft, misclassification as independent contractors, and off-the-books compensation. [xxiv]

Meaningful law enforcement is needed to create an effective deterrent because of the market incentive to cheat, the layering of subcontractors and labor brokers, and the absence of upper-tier contractor accountability. Entities higher up in the contract chain need to be held accountable. If contractors are held jointly liable for their subcontractors' or labor brokers' violations, and damages are more than just a cost of doing business, then contractors would be incentivized to abandon illegal practices and restore self-policing.

State attorneys general do not have to wait for statutory authority to impose joint and several liability.[xxv] There is no prohibition on have more than one employer at the same moment. States can adopt joint employer doctrines through statutory interpretation of their wage and hour laws, application of the common law, regulation, and legislation.

III. Joint Employment Under the Federal Fair Labor Standards Act.

The federal Fair Labor Standards Act (FLSA) has an authoritative and long standing, joint-employer doctrine, making it a good starting point for our discussion. The development of the joint-employer doctrine under the FLSA is particularly instructive and useful. Because the FLSA has served as a model for many state wage and hour laws, thus making the adoption of a joint-employer doctrine under state wage and hour law much less of a heavy lift. It should be noted, though, that there is no requirement to exclusively rely on the FLSA. State attorneys general should consult their state wage and hour statutes to construct a joint-employer doctrine that is rooted in their states' experience and legislative intent, especially if it can be concluded that state law provides broader protections than the FLSA.[xxvi] This is important because, as discussed later, the new Trump DOL is expected to make finding employment status and joint employer liability more difficult under the FLSA. Additionally, it is not out of the question that the current conservative majority on the Supreme Court could overrule precedent and agree with the Trump administration.

The FLSA is the principle federal law governing wage and hour standards. It establishes minimum wage, overtime, record keeping requirements, and prohibits child labor. Like many other employment laws, its purpose is remedial.[xxvii] To that end, Congress gave it very broad definitions meant to capture employment relationships that would escape the more narrow common-law agency test.[xxviii] To "employ" under the FLSA is to "suffer or permit to work."[xxix] Continuing with its broad definitions, an "employee" is "any individual employed by an employer."[xxx] An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee."[xxxi] These broad definitions were adopted from state labor laws against child labor,

and were "designed to reach businesses that used middlemen to illegally hire and supervise children."[xxxii] And this gets to the heart of the FLSA-it is a remedial statute, as the Supreme Court hammered home in *Tenn. Coal, Iron & Railroad Col. v. Muscoda Local No. 123*:

> But these provisions, like the other portions of the [FLSA], are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade, but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect.[xxxiii]

Accordingly, its protections, like the protections in state wage and hour laws, should be broadly applied.

The question of whether one or more entities jointly employ a worker begins with an analysis of whether each entity "employs"—in other words is the worker an employee. To determine whether a worker is protected as an employee, courts follow a "economic reality" analysis which considers, depending upon the federal circuit, such factors as whether the workers are performing work that is an integral part of the employer's business, whether the worker faces a profit or loss, how does the worker's investment compare to the employer's, does the work require special skill and initiative, is the relationship between the worker and employer long term, what is the degree of employer control over the means and methods of production, who fixes the fee for the service, who has the authority to hire and fire.[xxxiv] The US Supreme Court relied on many of these factors in the seminal joint employment case of *Rutherford Food Corp. v. McComb*, concluding boners in a meat processing plant who worked there through a subcontracting arrangement were employees of the plant owner, Kaiser Packing Company.[xxxv] As the Court cautioned, however, no one factor is dispositive, and the answer depends on looking to the "circumstances of the whole activity."[xxxvi]

Every federal circuit has a FLSA economic realities test that it uses for its joint-employer doctrine. For instance, in *Zheng v. Liberty Apparel Co., Inc.* the Second Circuit, relying on *Rutherford,* adopted a six-factor totality of the circumstances approach.[xxxvii] The relevant factors chosen by the court were:

(1) whether the purported joint employer's premises and equipment were used;
(2) whether the employer "had a business that could or did shift as a unit from one putative joint employer to another;"
(3) was the work performed "a discrete line-job that was integral to" the purported joint employer's "process of production;"
(4) "whether responsibility under the contracts could pass from one subcontractor to another without material changes:"
(5) the degree of the purported joint employer or its agent's supervision of the work performed by the employees; and
(6) whether the employees worked "exclusively or predominantly" for the purported joint employer.[xxxviii]

The Court stated that the totality of the circumstances had to be considered, and that other factors could be relevant in "assessment of the economic realities."[xxxix] Also, in considering the circumstances, industry custom may be relevant in determining whether the subcontracting to complete the task in question is common or a "mere subterfuge to avoid complying with labor laws."[xl] This suggestion of an "intent" element proved to be controversial, and it was later rejected by the Second Circuit in *Barfield v. New York Health and Hospitals Corp.*[xli]

The Ninth Circuit in the 1983 case *Bonnette v. California Health and Welfare Agency*[xlii] established a narrow analysis requiring consideration of the totality of the circumstances focusing on four non-exclusive factors. An entity is a joint employer if it:

> (1) has the power to hire and fire the employees;
>
> (2) supervises and controls the employees' work schedules or conditions of employment;
>
> (3) determines the rate and method of payment; and
>
> (4) maintains employment records.[xliii]

Indeed, the narrow *Bonnette* analysis was later expanded by the Ninth Circuit in *Torres-Lopez v. May*.[xliv] The additional relevant factors cited by the Court included:

> (1) whether the work was a "specialty job on the production line;"
>
> (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes,"
>
> (3) whether the "premises and equipment" of the employer are used for the work;
>
> (4) whether the employees had a "business organization that could or did shift as a unit from one [worksite] to another,"
>
> (5) whether the work was "piecework" and not work that required "initiative, judgment or foresight;
>
> (6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill,"
>
> (7) whether there was "permanence [in] the working relationship;" and
>
> (8) whether "the service rendered is an integral part of the alleged employer's business,"[xlv]

Because most state wage and hour law definitions are similar to those in the FLSA, this roadmap of joint employment under the FLSA drawn by the Supreme Court and circuit courts is transferable to state wage and hour laws through statutory interpretation. State attorneys general, though, are

not constrained to the federal joint-employer factors in their circuits—they can diverge from their circuits arguing that their state wage and hour laws offer broader protection or call for other factors more likely to find joint employment.[xlvi]

IV. State Attorneys General Can Use FLSA Jurisprudence to Fashion a Joint Employer Doctrine Under State Law.

State courts can and have relied on their federal circuit courts' FLSA joint employer decisions as guidance in determining joint employer liability under their state wage and hour laws. Decisions from New York, Washington, and Maryland are good examples of how the FLSA joint employer doctrine has been applied to protect workers under state law.

A. New York's Application of the Economic Realities Analysis.

In New York, the state labor code definitions of "employee", "employer", and "employed" are similarly broad as in the FLSA. New York defines an "employee" in its wage payment statutes as "any person employed for hire by an employer in any employment."[xlvii] An "employer" is "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or services."[xlviii] "Employed" is not defined in the wage statutes but it is in the catch-all definition section for the entire labor code. '" Employed"' includes permitted or suffered to work."[xlix] This definition is almost identical to the definition of "employ" in the FLSA. Significantly, the Court of Appeals of New York, in a case involving wage orders, recognized that the New York Department of Labor "harmonizes with the federal approach."[l]

In *Matter of Ovadia v. Office of Industrial Board of Appeals* the Court of Appeals of New York considered whether the employees of a masonry contractor, Well Built, were also employed by the general contractor, HOD, under the state's labor law.[li] The Court concluded they were not joint employers, reversing the decision of the Industrial Board of Appeals. However, in doing, so the Court recognized the broad definitions in its labor law and the economic realities and joint employer analyses found in *Zheng*.[lii] Citing the requirement to consider the totality of the circumstances in *Zheng*, the Court determined that the mere furnishing of the work site and materials by a general contractor in the construction industry, as well as working for the term of the contract, is insufficient for there to be a joint employer relationship. The *Ovada* decision added that in the case there was an absence of direction and instructions (a *Zheng* factor) to the masons by the general contractor.[liii] The Court stated:

> Because the Board's factual findings indicate nothing more than the usual contractor/subcontractor relationship existed between HOD and Well Built during the three-month period that Bruten was on the job, we need not resort to federal precedent to

> resolve this issue. In any event, even were we to apply the *Zheng* test, we would hold that HOD was not a joint employer of Well Built's employees.[liv]

Thus, the Court's dispute with the Board was not in using the *Zheng* analysis but with the Board's application of its factors and failure to take into consideration the totality of the circumstances.[lv]

In the subsequent lower-court case of *Cornejo v. Eden Palace, Inc., et.al* the Supreme Court recognized the New York Department of Labor's reliance on the Second Circuit's application of the FLSA economic realities test.[lvi] Additionally, citing *Ovadia* and *Zheng,* the court wrote that an entity "may be deemed the employer, or joint or special employer of the employees of its independent contractor, where it assumes the role of the employer of such workforce."[lvii] The court cited *Ovadia* and *Zheng,* again, for the proposition that independent contractor relationships may have economic justification, but they cannot be used as a subterfuge to evade "applicable labor laws."[lviii] It must be mentioned that the courts' noting of industry practices and "subterfuge" do not mean that customs trump the analysis or that plaintiffs must prove intent. As the court in *Barfield* wrote, custom that is a subterfuge for evading the law cannot be tolerated.[lix]

These New York cases make it clear that the *Zheng* joint employer factors and *Barfield* can be used to determine joint employer liability under New York's wage payment statute. This ability begins with the similarities between the New York and FLSA definitions.

B. Washington's Use of the FLSA Joint Employer Analysis.

Washington has adopted the FLSA joint employer analysis found in the Ninth Circuit case *Torres-Lopez.* In *Becerra v. Expert Janitorial, LLC* the plaintiff alleged that they were not paid overtime or the minimum wage as required by the state's minimum wage act.[lx] They claimed Expert Janitorial, LLC and Fred Meyer Stores, Inc., were joint employers.[lxi]

The definitions in Washington's wage and hour law are similar to those found in the FLSA. The state's minimum wage law defines "employee" as including "any individual employed by an employer…."[lxii] '"Employ" includes to permit to work….'[lxiii] '"Employer" "includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee….'[lxiv] The court noted that the similarities carried weight in its decision recognizing a joint employer doctrine:

> The MWA [Minimum Wage Act] is based on the federal Fair Labor Standards Act (FLSA)…and we look to FLSA jurisprudence in interpreting it. While this court has never specifically held that the "joint employer" doctrine is a viable theory under the MWA, consistent with the interpretations of the FLSA, liability under the minimum wage laws may extend to "joint employers" even when there is no formal employment relationship.[lxv]

The court also wrote that the remedial nature of the MWA required it to be "liberally construed."[lxvi]

The trial court had applied the joint employer criteria found in *Bonnette v. California Health and Welfare Agency* and concluded in a summary judgment decision that a joint employer relationship did not exist.[lxvii] The appellate court reversed, "concluding that the trial court had erred in limiting its analysis to the *Bonnette* factors, that many factors did weigh in favor of finding Expert [Janitorial] was a joint employer…."[lxviii] The Washington Supreme Court agreed, writing that the trial court record did not support its decision, and remanded the case to the trial court for further proceedings on why it considered certain factors irrelevant.

The Court's decision concluded that the *Bonnette* joint-employer factors were too limited, and instead opted to rely on the more expansive factors found in *Torres-Lopez*:

> The parties agree that we use an "economic reality" test to determine whether a joint employment relationship exists under minimum wage statutes. We find the framework articulated by the Ninth Circuit in *Torres-Lopez*, 111 F.3d 633, to be the most helpful.[lxix]

The *Torres-Lopez* case "articulated 13 non-exclusive factors" in the Circuit's economic reality test in determining employment.[lxx] Accordingly, the Washington Supreme Court adopted a joint-employer doctrine for its wage and hour law relying on the thirteen factors in *Torres-Lopez.*

C. Maryland Adopts an FLSA Joint Employer Doctrine.

Maryland, like Washington, has adopted a federal joint employer doctrine, but not the one in the Fourth Circuit.[lxxi]

Newell v. Runnells was a case before Maryland's Court of Appeals.[lxxii] Runnells and other former employees of the State's Attorney's Office brought a lawsuit against the State's Attorney, Newell, and the County Commissioners of Caroline County claiming unlawful termination and failure to pay overtime wages.[lxxiii] The overtime claim was brought under the FLSA and Maryland's wage and hour law.[lxxiv]

Maryland's wage and hour law defines an "employer" as including "a person who acts directly or indirectly in the interest of another employer with an employee."[lxxv] The court noted the similarity of the definition with the one found in the FLSA.[lxxvi] Additionally, citing federal authority, the court wrote:

> Assessing whether an entity is a joint employer, in this context, turns on the "economic realities" of the relationship between the employee and the alleged employer.[lxxvii]

When it came to deciding what factors to use to determine joint employment, the court looked to the Second Circuit case of *Barfield.*[lxxviii]

Citing language in *Zheng* about the need for flexibility in the economic realities examination, *Barfield* set out three areas of consideration: (1) examining "the degree of formal control exercise

over a worker;" (2) distinguishing between independent contractors and employees; and (3) assessing "whether an entity that lacked formal control nevertheless exercised functional control over a worker."[lxxix] For the test of the degree of "formal control" the court cited *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984); for distinguishing between employees and independent contractors *Brock v. Superior Care, Inc.*, 840 F2d 1054, 1058-59 (2d Cir. 1988); and for functional control *Zheng*, 355 F.3d at 72.[lxxx]

The *Newell* court chose to apply the four-factor formal control analysis from *Carter* to determine whether the defendants were joint employers, because it fit the case's factual circumstances.[lxxxi] Those factors test whether the alleged employer:

> (1) had the power to hire and fire the employees,
>
> (2) supervised and controlled employee work schedules or conditions of employment,
>
> (3) determined the rate and method of payment, and
>
> (4) maintained employment records. [Citation omitted.][lxxxii]

The court applied the analysis to both the FLSA and Maryland wage and hour law claims.[lxxxiii]

These examples of state courts relying on the FLSA joint employer doctrine provide helpful guidance on how to employ FLSA joint employer standards to existing state wage and hour laws. The flexibility shown by state courts informs state attorneys general how they can possibly go further than the federal circuits. For instance, the four joint employer factors in *Bonnette* are conservative in finding joint employment. However, the "non-exclusive" and "circumstances of the whole activity" language in the decision leaves open an argument to include other factors. Additionally, as discussed in the sections that follow, state attorneys general can use the FLSA joint employer doctrine as a starting point. Other state statutes, with their unique legislative history, state court precedent, and common law principles may allow for a broader application of the joint employer doctrine.

It is important for states attorneys general to prepare arguments that their state statutes provide broader protections, , because we expect the second Trump DOL to revive the first administration's independent contractor and joint employer rules.[lxxxiv] Those rules made it easier for employers to classify workers as independent contractors[lxxxv] and evade joint employer accountability. While those rules are interpretive, and thus carry less weight, it is not out of the question that they will be adopted by a circuit court with a subsequent appeal to the Supreme Court that might upend decades of precedent. Accordingly, it is wise not to entirely rely on FLSA joint employer jurisprudence.

V. Common Law Principles Will Advance Joint Employer Enforcement and the Battle Against Exploitative Employment Practices.

The common law provides an avenue to address the problems of the fissuring workplace. This section will explore the state attorneys general's ability to utilize common law principles to hold joint employers accountable for wage theft and employee misclassification. This is applicable when a state statute relies on common law definitions of employment. Compared to the FLSA doctrine, though, the common law relies on the more conservative control analysis and is thus less likely to find joint employment.

A. The Restatement of Law.

The Restatements of Employment Law and Agency have joint employer doctrines that can be utilized to address worker misclassification and wage theft.

1. Restatement of Law, Employment Law.

The recent publication of the Restatement of Employment Law has a joint employer doctrine that can be useful for state attorneys general. According to §1.04, Employees of Two or More Employers:

> (a) An individual is an employee of two or more separate employers if (i) the individual renders services to each of the employers on a separate basis during a given day, week, or other time period and (ii) during such time period is subject solely to that employer's control or supervision as provided in § 1.01(a)(3).[lxxxvi]
>
> (b) An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services as provided in § 1.01(a)(3).

Section 1.01(a)(3) provides that an individual is an employee if:

> the employer **controls** *the manner and means* by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson. (Emphasis added.)

Clearly, control is a central factor in determining whether joint employment exists. Comment (a) to §1.04 helpfully explains:

> Individuals may work for more than one employer at a time. A service provider may act to serve the interests of more than one employer; more than one employer may consent to receive such services; and more than one employer may have control over the service provider's performance that effectively prevents him or her from providing the services as an independent businessperson. Subsection (a) refers to situations where individuals provide services to two or more employers in a given

> time period. Subsection (b) refers to situations where individuals provide services to more than one employer that, at least in combination, exercise control as provided in § 1.01(a)(3). The latter situations are often referred to as "joint employment."[lxxxvii] Control of the manner and means by which services rendered is the hallmark of joint employment under the Restatement of Employment Law.

Many of the situations encountered in fissured industries like construction will fall under §1.04(b).

The application of these principles are found in illustration # 6 in support of the Restatement of Employment Law, § 1.04. It provides the following hypothetical:

> A, B, and C work at premises and on sewing machines rented by P. Almost all of this work is final-assembly work for garments to be delivered to R. R supplies the cut fabric as well as other materials for these garments. R sends supervisors to P's premises to insure that all work is done according to R's specifications. R's contract with P requires P to complete garments within time periods set by R. R also compensates P for the work done on the garments based on its calculation of P's expenditures. P has hired A, B, and C to do R's work, has power to discharge them, and sets their compensation.
>
> A, B, and C are employees of R as well as of P. Because A, B, and C work almost exclusively on R's garments, R effectively determines the compensation of A, B, and C when it sets the payment to P for assembled garments. R also effectively controls the working time and conditions of A, B, and C by requiring that the work be done in accord with its schedule and by sending supervisors to P's premises to ensure that work is done according to its specifications.

Another example of joint employment is a labor broker that hires and pays construction workers exclusively for a contractor. Meanwhile, the contractor directs where they are sited, provides the building materials, equipment, training, and daily supervision and direction of tasks. The Restatement of Employment Law provides a pathway to demonstrate joint employment liability by focusing the inquiry on the control exercised by the contractor over the workers hired by the labor broker establishing a joint employment relationship.[lxxxviii] The issue of control is also the focus of demonstrating joint employer liability under the common law principles of agency.

2. Restatement of Law, Agency.

Another text that looms large in the development of joint employer liability under the common law is the Restatement 2d of Agency § 220. This section defines a “servant” or employee as:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.[lxxxix]

It is true that the Restatement of Agency assigns vicarious liability on the "masters" (or employers) of "servants" (or employees) in tort litigation, but it has also been heavily relied upon in determining employment status under employment laws.[xc] A basic utilization in a joint employer case is applying the restatement to a direct employer and to the purported joint employer. If both entities pass as employing the workers, then there is joint employment.

An in-depth discussion on developing a joint employer doctrine using common law principles, and the use of the Restatement (Second) of Agency, can be found in the National Labor Relations Act's jurisprudence. This history of joint employment litigation under the NLRA highlights an important, albeit erroneous, argument raised by opponents of joint employment. It centers on whether reserved but unexercised control and indirect control are acceptable factors in determining joint employment. Contrary to the arguments by opponents, such as in the franchise and gig industries, the common law permits a finding of joint employment where there is evidence of indirect or reserved control.[xci]

3. Application of Common Law Principles for Joint Employment Under the National Labor Relations Act

The courts and National Labor Relations Board ("NLRB" or "Board") have utilized common law principles to establish joint employment under the NLRA. Once again, the issue of control is central to the analysis in finding joint employment when relying on the common-law analysis. The Supreme Court in its 1964 decision *Boire v. Greyhound* recognized that a putative joint employer under the National Labor Relations Act ("NLRA") must "possess[ ] sufficient control over the work of the employees to qualify as a joint employer."[xcii] Subsequent to *Boire v. Greyhound*, the Third Circuit Court of Appeals in 1982 in *Browning-Ferris Industries of Penn., Inc. v. NLRB*

spelled out a standard that two entities are joint employers where each "exert significant control over the same employees" such that "they share or co-determine those matters governing essential terms and conditions of employment."[xciii] That standard was adopted by the Board, but subsequent conservative dominated Boards added qualifiers. For instance, control had to be actual, not reserved, and direct and immediate, thus discounting reserved and indirect control.[xciv] The Board in the Obama administration defenestrated those qualifiers, resulting in the appeal of *Browning-Ferris Industries of California v. NLRB*, to the D.C. Circuit.[xcv]

Browning-Ferris Industries of California v. NLRB involved a challenge to the NLRB's determination that a recycling operator was a joint employer along with a staffing agency that provided sorters, cleaners, and housekeepers to the business. There was evidence that the staffing agency had sole responsibility for counseling, disciplining, and evaluating the employees. Yet, Browning Ferris had the right to ensure personnel work free from the effects of alcohol and drugs, the ability to reject any specific worker, limit wages, and identify shifts and hours. There was testimony that Browning Ferris also instructed workers on how to perform their jobs and identified incidents to the staffing agency that needed discipline.[xcvi]

The DC Circuit looked to the common law to determine whether joint employment existed. It held that the NLRB "…correctly determined that the common law inquiry is not woodenly confided to indicia of direct and immediate control; an employer's indirect control over employees can be relevant consideration." However, the NLRB "…failed to confine indirect control over the essential terms and conditions of the workers' employment."[xcvii] In doing so, the DC Circuit cited the Restatement 2nd of Agency, § 226 in support of its position that "unexercised control is relevant to identifying two distinct employers…[and] that consideration logically applies to identifying simultaneous joint employers as well."[xcviii]

As noted above, there has been significant controversy over whether indirect and reserved control unencumbered qualify as factors to establish joint employment under the NLRA. A fair reading of *Browning Ferris* demonstrates that the common law does take into account reserved and indirect control. This is vital where employers control a workforce through intermediary labor brokers. This focus on the NLRA's joint employment doctrine demonstrates that state attorneys general can hold joint employers accountable for misclassification in a fissuring workplace by utilizing established common law principles and analyzing the level of control that a business may exercise. The existence of reserved, even if unexercised, and indirect control also aligns with the common law. Utilization of evidence demonstrating reserved and indirect control to puncture the labor broker and other worker-exploitation schemes in fissured industries can establish the joint employer relationship under the common law.

VI. Worker's Compensation and Joint Employer Doctrine.

Many states have joint employer doctrines in their workers' compensation laws. Third parties to an injury do not enjoy immunity from an injured employee's tort lawsuit.[xcix] Cases arise when an injured employee brings a lawsuit against a third party, and the defendant claims it is a joint employer to benefit from a state's workers' compensation law's immunity from tort damages. Another instance is when an employer, who is liable for an employee's injury under the worker's

compensation laws claims there was another employer also liable in order to apportion liability. Some states, like Delaware, have statutes that mandate the apportionment of compensation payments when the worker "is in the joint service of 2 [sic] or more employers…."[c] State attorneys general can look to such theories in advancing joint employer liability for wage theft claims in their respective states, especially if the employment definitions in their workers' compensation and wage codes are similar. In doing so, the treatise by A. Larson, *The Law of Workmen's Compensation (*Larson) is an authoritative source.

An illustration of two worker's compensation joint employer theories accounted in Larson's, lent employee and dual employment, are found in the Arizona case of *Growers Co. v. Industrial Comm.*[ci] The appellant, Growers Co. ("GC"), supplied labor to Growers Transplanting, Inc ("GTI").[cii] GC was seeking the reversal of an administrative law judge's opinion that a seriously injured worker was solely its employee and not a "lent," joint," or "dual" employee.[ciii] If successful, GC would shift liability to GCI under the lent employee doctrine or shared liability under the others.

A. Lent employee.

The court in *Growers* cited the lent employee doctrine established by the state supreme court which in turn relied on Larson. The court wrote:

> [The] factors to be considered in determining when a lent employee has become the employee of a special employer so that the special employer is liable for workers' compensation benefits:
>
> "(a)the employee has made a contract of hire, express or implied, with the special employer:
>
> "(b)the work being done is essentially that of the special employer; and
>
> "(c)the special employer has the right to control the details of the work."[civ]

B. Dual employment.

For the factors establishing joint or dual employment, the court, again, turned to Larson:

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

> Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of injury.[cv]

On all counts, after reviewing the facts in the case, GC did not prevail and the administrative law judge's decision was affirmed.

On close inspection, the Larson's standard is similar to the joint employer standard in the Restatement of the Law, Employment Law §1.04. "Joint employment" under Larson fits §1.04(b) of the Restatement and "dual employment" §1.04(a).

Accordingly, state attorneys general can use their workers' compensation jurisprudence as precedent for constructing a joint employer standard in other state codes. In doing so, though, the importance of how reserved and indirect control are defined and analyzed should not be ignored.

VII. Joint Employment Under the ABC Test

The "ABC" test is most common in state employment security codes. It is, though, broadly applied in states such as California, Connecticut, Massachusetts, and New Jersey. The test is favored strongly by labor advocates because it creates a presumption of employee status that can only be countered if the purported employer can prove that each of three factors do not apply. An example is New Jersey's unemployment code's definition of "employment:"

> Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter…unless and until it is shown to the satisfaction of the division that:
>
> (A)Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of services and in fact:
>
> (B)Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C)Such individual is customarily engaged in an independently established trade, occupation, profession or business.[cvi]

There is no case law in any of the ABC states that have used it to establish joint employer liability. The courts that considered developing a joint employer standard from the ABC test have rejected the attempt. The courts have ruled that the ABC test solely determines if an individual is an employee or independent contractor, and that the FLSA joint employer test, or another, is more appropriate. These decisions, though, seem to rest in the courts' objections to the breadth of the ABC test.

The New Jersey Supreme Court in *Hargrove v. Sleepy's, LLC* (2015) was asked by The Third Circuit Court of Appeals to decide which test should be used to determine employee or independent contractor status under the state's wage payment law ("WPL") and wage and hour law ("WHL").[cvii] The Court ruled that the ABC test found in its unemployment code applied, and not a hybrid test, the economic realities test, nor the common-law agency test.[cviii] The remedial purpose of the WPL and WHL, and deference to the state labor department's interpretation of the ABC analysis weighed heavily in the court's decision.[cix] However, the decision in *Hargrove* set the stage for the New Jersey courts to not extend the ABC analysis in joint employer liability cases. In *Perez v. Access Bio, Inc.*(2019) the New Jersey Superior Court Appellate Division decided the issue of what joint employer analysis would be used with the WPL and WHL.[cx] The plaintiffs in the case appealed the lower court's denial of their petition for class certification and an order granting summary judgement in favor of defendant Access Bio, Inc.[cxi] Plaintiffs who were hired by a temporary staffing service were alleging that Access Bio was a joint employer.[cxii] Citing *Hargrove*, plaintiffs asserted that the ABC test should be used to determine joint employment and not the FLSA joint employer analysis in the Third Circuit Court of Appeals case of *In Re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig* (2012).[cxiii] The New Jersey appellate court took a narrow view of *Hargrove* and wrote that the crux of the case was solely which test would be applied to determine whether or not a worker was an employee under WPL and WHL, and that test was the ABC test.[cxiv] Joint employment was not the issue in *Hargrove*, and employment status was not an issue in the case at hand.[cxv] Consequently, the court agreed with the decision below that *Enterprise* controlled in defining joint employer status.[cxvi]

The Massachusetts Supreme Court came to the same narrow conclusion in *Jinks v. Credico (USA), LLC* (2021).[cxvii] Plaintiffs in the case worked directly for DFW Consultants, Inc. and alleged that DFW and its client Credico were joint employers under the state's wage and hour law.[cxviii] Plaintiffs asserted that the court use the ABC test in ch. 149, §148B(a) to determine joint employment.[cxix] The statute provides:

> For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[cxx]

Additionally, the statute calls for civil and criminal penalties for an employer's failure to properly classify an individual as an employee.[cxxi]

Chapter 149 of the Massachusetts code covers many workplace issues, including discrimination, safety, non-compete agreement, employment under governments contracts, and labor disputes.[cxxii] Chapter 151 covers minimum wages and overtime pay.[cxxiii] The plaintiffs in *Jinks* alleged that Credico and DFW had misclassified them as independent contractors in violation of ch. 149, §148B, and consequently were owed back pay pursuant to the state's minimum wage and overtime laws.[cxxiv] The trial court disagreed.

The Massachusetts Supreme Court affirmed the lower court decision, ruling that the ABC test determines who is and who is not an employee. However, the court concluded that since the Massachusetts wage laws were based on the FLSA, the FLSA joint employer test in the First Circuit Court of Appeals case of *Baystate Alternative Staffing , Inc. v. Herman* (1998)[cxxv] was controlling.[cxxvi] The decision ignored the legislature's amendment of state wage law by ch. 149, §148B.

California also uses an ABC test. In California's Industrial Commission in wage order no. 14, Cal. Code Regs., tit. 8, § 11140, subd. 2(C), (F) "employ" means:

> (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship.[cxxvii]

Similar to New Jersey, the California Supreme Court seemed initially poised to adopt the ABC analysis to determine whether there is joint employer liability for wage theft. As discussed below, the application of the ABC test to joint employer liability has not been upheld.

In *Dynamex Operations W. v. Superior Court* (2018) the California Supreme Court ruled that the ABC analysis controls whether workers are independent contractors or employees under state wage order law.[cxxviii] A focus in the discussion was whether the appellant's assertion that the "suffer or permit" language in the wage order only applied to joint employer cases and not to classification of a worker as an employee or independent contractor.[cxxix] Citing their earlier case of *Martinez v. Combs*, 49 Cal. 4th 35 (2010), the Court wrote:

> Thus, *Martinez* demonstrates that the suffer or permit to work standard does not apply only to the joint employer context, but also can apply to the question whether, for purposes of the obligations imposed by a wage order, a worker who is not an "admitted employee" of a distinct primary employer should nonetheless be considered an employee of an entity that has "suffered or permitted" the worker to work in its business.[cxxx]

In other words, the Court concluded that the suffer or permit to work language applied to classification *and* joint employer determinations.

The Court did not apply the economic realities test even though the FLSA and state law use the same "suffer or permit" language. The justices reasoned that they could offer broader protections than the FLSA, because its wage order language predated the FLSA, and providing broader

protections was supported by the legislature's intent.[cxxxi] The Court thus adopted the ABC test to define "suffer or permit."[cxxxii] The Court interpreted the ABC standard as:

> (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[cxxxiii]

Meanwhile, *Henderson v. Equilon Enterprises, LLC (2019)* was working its way through the California courts.[cxxxiv] Billy R. Henderson was employed as a manager by Danville Petroleum, Inc. which operated Shell-owned gas stations.[cxxxv] He brought suit alleging non-payment of wages, and violations of record keeping and the Business and Professions Code.[cxxxvi] He claimed that Danville and Shell were joint employers.[cxxxvii] Rather than use the ABC test to determine joint employment, the appellate court ignored *Dynamex*, and turned to the Supreme Court's case of *Martinez v. Combs*, 49 Cal. 4th 35 (2010) to determine joint employment.[cxxxviii] The court cited numerous reasons for not applying the ABC test. Chief among them was that the court in *Dynamex* intended the ABC test to only be used in determining employee or independent contractor status.[cxxxix] The court also painted with a broad brush distinguishing factual differences between classification and joint employer cases that did not justify using the ABC standard. With quotes from *Dynamex*, the court wrote:

> "In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled."
>
> Those policy concerns are not present in the instant appeal, or more broadly, in wage and hour claims arising under a joint employer theory of liability. In a joint employer claim, the worker is an admitted employee of a primary employer, and is subject to the protection of applicable labor laws and wage orders. The district question posed in such claims is whether "another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order." Joint employer claims raise different concerns, such as when the primary employer is unwilling or no longer able to satisfy claims of unpaid wages and workers must look to

> another business entity that may be separately liable as their employer.[cxl] (Citations omitted.)

This justification requires intentional acts or the inability of the direct employer to pay a wage claim before applying joint employer liability. Additionally, the court was only willing to apply the ABC test where employment status is not admitted. This constricted interpretation of *Dynamex* fails to recognize that employees can be misclassified as independent contractors while under the joint control of another employer, and it ignores the deterrent purpose of joint-employer liability. The reasoning thus leaves open the question of whether the ABC test can ever be applied in such a case. The court does its best to close that door.

The reluctance of the *Henderson* court to apply the ABC test to joint employer liability also rested with the factors themselves:

> Further underscoring our conclusion that the *Dynamex* ABC test was not intended to apply to joint employer claims is that parts B and C of the ABC test do not fit analytically with such claims.[cxli]

Regarding the inapplicability of the B factor, the court wrote:

> As an existing employee, he or she already performs work that furthers the interest of the primary employer and is protected under wage and hour laws. Thus, asking whether that employee's work is "outside the usual course of business" of a secondary employer makes little sense if one wants to determine whether the secondary employer has suffered or permitted the employee to work for them….As a practical matter, applying Part B to claims of joint employer liability might result in the end of many service contracts or other joint venture agreements between two business entities that happen to be in the same line of work….We do not believe that was the intended effect of *Dynamex.*[cxlii] (Citations omitted.)

Here the court discounted the Supreme Court's conclusion in *Dynamex* that the ABC test defines "suffered and permitted."[cxliii]

Next, the court continued with why the C factor does not apply:

> The basic premise of a joint employer claim is that the plaintiff is already employed by a primary employer and is seeking to establish that another business entity is separately responsible for obligations imposed under the wage order and other requirements. The primary thrust of Part C, on the other hand, is to determine whether the plaintiff is an independent contractor who has chosen the burdens and benefit of *self-employment*….A literal application of Part C in the context of joint employment questions would result in the absurdity that a secondary business entity is deemed a joint employer merely *because* the plaintiff is already employed by the primary employer. We conclude the *Dynamex* ABC test does not apply in the joint employment context, and the governing standard is found in *Martinez.*[cxliv]

One can only conclude from the court's rationale that it has a fundamental disagreement with the breadth of the ABC test and sought to limit its application. *Henderson* contradicts the Supreme Court's determination in *Dynamex* that the suffer or permit standard, hence the ABC test, applies in joint employer cases. A question thus arises for the California Supreme Court of whether it truly intended to only apply the ABC test defining "suffer or permit" in classification disputes and not in joint employer cases, especially where a worker is an "admitted employee."

The use of the ABC test, despite these decisions, in joint employer doctrines should not be foreclosed. All state and federal statute definitions of "employ" or "employee" determine employee or independent contractor status. Those statutes, as we have seen, figure prominently in establishing joint employer doctrines. Other than a court's policy disagreements, the rational against using the ABC test as the basis of a joint employer standard is thin because they are premised on an artificial distinction that a joint employer lacks the requisite culpability.

VIII. Joint Employment through Regulation and Legislation.

Joint employer liability can be created by regulation or statute. State attorneys general can assist their departments of labor in drafting a regulation or in drafting and supporting legislation.

A. Regulation

An example of a state regulation can be found in Illinois. The Illinois Minimum Wage Law gives the Director of the Department of Labor authority to create regulations to:

> make and revise administrative regulations, including definitions of terms, as he deems appropriate to carry out the purposes of this Act, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage established by the Act.[cxlv]

The Director did just that in defining "joint employers:"

> a) Two or more employers may be associated with each other in relation to an individual employee in such a way that they jointly employ that individual under the Illinois Minimum Wage Law (the "Act"). If the facts establish that the worker is employed jointly by two or more employers, all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers shall be jointly and severally liable for any violation of the Act.
>
> b) The following factors provide guidance on whether a joint employment relationship exists in a particular case:
>
> 1) The employee's work is to the benefit of the alleged joint employer;
>
> 2) The work performed by the employee is an integral part of the alleged joint employer's business or businesses;

3) The alleged joint employer has direct or indirect control or influence over the employee's terms or conditions of employment, including the employee's schedule and the quality of the employee's work;

4) The alleged joint employer owns or leases the premises where the work is performed or provides tools or materials used by employees to perform the work;

5) The alleged joint employer has direct or indirect control over the other joint employer's or employers' operations through contractual obligations, shared joint management, direct or indirect ownership interest, or economic dependence.

c) Whether a joint employment relationship exists depends on all the facts of the particular case. The inquiry should consist of looking at the actual relationship between the employee and the employers, including the employers' ability to exercise control over the employee either directly or indirectly. No one factor is dispositive in the determination of joint employment. For example, a joint employment relationship may still exist when only two of the five factors in subsection (b) indicate the existence of a joint employment relationship.

d) If all the relevant facts based on the five factors establish that two or more employers are acting in a manner that is substantially independent of each other, and are completely disassociated with respect to the employment of a particular employee who, during the same workweek, performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer or employers in determining its own responsibilities under the Act.[cxlvi]

It should be noted that, depending upon state law, express authority may not be needed to create a regulation. State attorneys general can consult with labor departments in their states and assist in drafting joint employer regulations.

B. Legislation

There are multiple objectives of joint employer liability. Those include ensuring the recovery of back pay from a defendant that is not judgment proof. Others are deterrent and encouraging self-policing within industries. A variation of joint employer liability is vicarious and joint and several liability. It is very well known that the construction industry has a serious wage theft problem.[cxlvii] In response, nine states and the District of Columbia as of the writing of this paper have enacted laws that create vicarious or joint and several liability for general contractors or construction managers for the wage theft of any subcontractor at any tier on their job sites.[cxlviii] Those jurisdictions are, as of the publishing of this paper:

California, Lab. Code §218.7,
District of Columbia, §32-1303(5),
Hawaii, §388-11.5,
Illinois, 820 ILCS 115/13.5,

Maryland, Lab. & Empl. §3-507.2,
Minnesota, §181.165,
Nevada, §608.150,
New Jersey, §34:11-67.1,
New York, Lab. Law §198-E
Oregon S.B. 426, 83rd Leg. Asssemb. Reg. Sess. (Or. 20254)(enrolled), and
Virginia, §11-4.6.C.1-4.

The statutes do not require any evidence of joint control of the workforce or other factors. What is needed is privity of contract reaching from the upper-tier contractor to the subcontractor or a subcontractor's labor broker who failed to pay a worker.[cxlix] The District of Columbia's attorney general's office has made extensive use of its joint and several liability law with much success.[cl]

Upper-tier contractors facing damages because of a subcontractor's failure to pay wages, can either be reimbursed through the statute or contract. Experience has shown that the upper-tier contractors use this leverage when noticed of a wage dispute or after a complaint has been filed. Union representatives in states where these laws are being used report that wage claims are settled more quickly with less compromise on the amounts.[cli] Additionally, in the majority of settlements the subcontractor directly employing the wage claimant are paying the back wages and not the upper-tier contractor. Because of these state laws, contractors are being advised to more closely vet their subcontractors.[clii] In other words, they are working.

IX. Realizing the Goals of the Joint Employer Doctrine.

Too often law enforcement agencies disrupt and do not dismantle worker exploitation schemes. This is where the joint employer doctrine can play an important role in civil enforcement, but only if the two goals of the doctrine—recovery of backpay and deterrence—are pursued.

Law enforcement agencies typically go through a three-step analysis when confronted with potential joint employer liability. Step one is determining whether the worker is an employee or an independent contractor. In this step, a common law, economic realities or the ABC analysis will be applied depending upon the relevant statute. Next, if the worker is an employee, who are the employers? This is where the joint employer analysis can be applied. Lastly, are all employers covered by the law and liable for the associated remedies? It is this analysis under the third step that realizes the two goals of the joint employment liability doctrine. However, many law enforcement agencies, due to lack of resources or capacity, often stop pursuing joint employers when they identify a single employer who can pay back wages to the workers. Law enforcement agencies and the courts need to go further to realize the deterrent purpose of joint employer liability. In the construction industry example, stopping accountability at the labor broker level validates the exploitation model and leaves the specialty subcontractor free to hire another law-breaking labor provider. Not going beyond the specialty subcontractor leaves the owner or general

contractor free to find another specialty subcontractor who does not mind skirting the law to win a bid.

Applying the joint employer doctrine to its full potential requires a strategic enforcement approach and dedicated resources.[cliii] Understandably, those resources cannot be utilized for every case, but they certainly can be used in impact cases with significant market players that will capture the attention of others in an industry.

X. Conclusion

We set out on this paper to outline the guideposts for state attorneys general establishing joint employer doctrines. The resources herein can assist in doing so under foundational employment definitions found in employment standards and employment tax laws—the economic realities, common law, and the ABC analysis. We recognize that this is easier said than done. But it is necessary to push back against employers in fissured industries who are divorcing themselves from any accountability for the exploitation of workers by their subcontractors. This is a problem that has dire consequences for workers and their families, state revenues, and responsible employers. Efforts at reversing the market forces that currently favor lawbreakers cannot succeed unless accountability flows upwards.

In closing, it is important to be reminded of why we do this work with these fitting words from the U.S. Supreme Court:

> We are not here dealing with mere chattels or articles of trade, but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.[cliv]

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[i] This paper will rely heavily on conditions in the construction industry because there is an abundance of research on illegal employment practices and their impact in the industry. The conditions described, though, also exist in many other industries, including janitorial, home health care, transportation, the building of communication towers, and hospitality. Despite the focus on construction, the authors are certain that what is described here is readily transferable to protect working families in other industries. Much of the research on the construction industry can be found at StopTaxFraud.net, a web site maintained by the United Brotherhood of Carpenters and Joiners of America https://stoptaxfraud.net/.

[ii] *Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Before the Workforce Protections Subcommittee, House Education and Labor Committee, 116th Congress* (2019) (Statement of Matt Townsend, President of the Signatory Wall and Ceiling Contractors Alliance).

[iii] Mike Riley, Labor Brokers Cut Costs, Corners: Fast-Growing Firms Exploit Immigrants to Feed Construction Industry, Denver Post, February 16, 2003.

[iv] David Schecter, *Contractors slash bids by avoiding taxes, state lacks enforcement,* WFFA.com, July 12, 2011.

[v] David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It,* Harvard University Press, 2-4 (2014).

[vi] Id. at 10-11.

[vii] Karl Racine, Attorney General for the District of Columbia, Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry, economic analysis by Dale Belman and Aaron Sojourner, 1, 2 and 15 (May 22, 2019), available at https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf.

[viii] FinCEN Notice: FinCEN Calls Attention to Payroll Tax Evasion and Workers' Compensation Fraud in the Construction Sector, FIN-2023-NTC1, 1 (August 15, 2023), available at https://www.fincen.gov/sites/default/files/shared/FinCEN_Notice_Payroll_Tax_Evasion_and_Workers_Comp_508%20FINAL.pdf ("FinCEN Notice").

[ix] *Id.* at 1.

[x] *2024 National Money Laundering Risk Assessment,* U.S. Department of the Treasury, 38 and 40-41- (February 2024) available at https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf. Other industries cited for human trafficking include hospitality, agriculture, healthcare, manufacturing, commercial cleaning, peddling and begging, food service, beauty salons, domestic work, fairs and carnivals, escort, illicit massage, and health and beauty. *Id.* at 37.
[xi] Laura Gutierrez, Rull Ormiston, Dale Belman and Jody Calemine, *Up to 2.1 Million U.S. Construction Workers are Illegally Misclassified or Paid off the Books*, The Century Foundation (November 12, 2023), available at https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books/.
[xii] *Id* at 9.
[xiii] *Id.*
[xiv] *Id*.
[xv] *Id.*
[xvi] *Id*.
[xvii] *Id.* at 9, link to table, https://docs.google.com/spreadsheets/d/102H18Tg90o279WGeoHS2AILZRJosAURO/edit#gid=1340986834.
[xviii] *Id.*
[xix] *Id.* at 2 and 7. For this reason, the author is using the upper bounds of the losses detailed in the report.
[xx] Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the US Construction Industry,* UC Berkeley Labor Center (January 2022), available at https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/.
[xxi] *Id* at 1.
[xxii] *Id.*
[xxiii] *Id.*
[xxiv] *Id* at 1, 2-3 and 6.[xxv] A number of states and the District of Columbia have responded by adopting joint and several liability laws that hold general contractors or construction managers responsible for the wage theft of subcontractors at any tier. Cal. Lab. Code §218.7 (2024), D.C. Code §32-1303(5) (2024), Haw. Rev. Stat. §388-11.5 (2024), 820 Ill. Comp. Stat. 115/13.5 (2024), Md. Code Lab. & Empl. §3-507.2 (2024), Minn. Stat. §181.165 (2024), Nev. Rev. Stat. §608.150 (2024), N.J. Rev. Stat. §34:11-67.1 (2024), N.Y. Lab. Law §198-E (Consol. 2024), and Va. Code §11-4.6 (2024). New Hampshire has a joint and several liability law covering all industries that dates back to the nineteenth century. N.H. Rev. Stat. § 275:46 (2024)(it is not clear from the text of the statute that it would apply beyond a first-tier subcontractor). Still, most of those laws only cover the construction industry, and most states do not impose joint and several liability in any industry.
[xxvi] As will be seen, much of the state case law is underdeveloped, which is a reason for this paper. But, there is a possibility that state labor departments in their administrative law (see the discussion on New York that follows) already use a joint employer analyses. Attorneys general should consult with their labor departments.
[xxvii] See, *Tennessee Coal, Iron Co. v. Muscoda Local No 123, et al.,* 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944) ("But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose.").
[xxviii] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325-26, 112 S.Ct. 1344, 1117 L.Ed.2d 581 (1992), explaining *Rutherford Food Corp v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).
[xxix] 29 U.S.C. §203(g).
[xxx] 29 U.S.C. §203(e)(1).
[xxxi] 29 U.S.C. §203(d).
[xxxii] *Antenor v. D&S Farms*, 88 F.3d 925, 929 n. 5 (11th Cir. 1996) citing *Rutherford*, 331 U.S. at 728 n. 7.
[xxxiii] *Tenn. Coal, Iron & Railroad Co* , *321 U.S.* at 598.

[xxxiv] See, e.g. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) and Rutherford 31 U.S. at 730 (factors used by the courts).

[xxxv] *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 724-25, 729-30 (1947). The United States Department of Labor ("USDOL") under the Trump administration issued a rule that rescinded and replaced a 1958 joint employer rule. 84 Fed. Reg. 14043 (2019). The Trump administration rule made finding joint employment more difficult. The Trump rule was challenged by State Attorneys General in a case filed in the Southern District of New York. *State of New York, et. al. v. Scalia,* 490 F.Supp.3d 748 (S.D.N.Y. 2020). (This is an excellent decision to read for a summary of the historical development and rational behind the FLSA joint employer doctrine.) The court granted, in part, the plaintiff's summary judgment motion, concluding that the portion of the rule addressing vertical joint employment violated the Administrative Procedure Act by conflicting with the FLSA and precedent. *Id.* at 757 and 795-796. The case was appealed to the Second Circuit. The USDOL, during the Biden administration, subsequently rescinded the rule, resulting in the Second Circuit dismissing the appeal as moot and vacating the judgment and order of the district court. *State of New York , et. al. v. Walsh*, Nos. 20-3806; 20-3815 at 2 (2d Cir. Oct. 29, 2021). Consequently, there is no longer an FLSA joint employer rule.

[xxxvi] *Id.* at 730. After *Rutherford*, in 1958, the USDOL issued a regulation defining joint employment under the FLSA at 29 C.F.R, §791.2.

[xxxvii] *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 72 (2nd Dirl. 2003).

[xxxviii] *Id.*

[xxxix] *Id.* at 71-72.

[xl] *Id.* at 73.

[xli] *Barfield v. New York Health and Hospitals Corp*., 537 F3.3d 132, 146 (2nd Cir. 2008).

[xlii] *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983).

[xliii] *Id.*

[xliv] *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997).

[xlv] *Id.*

[xlvi] *See* discussion *infra* at 27 regarding *Dynamex Operations W. v. Superior Court,* 4 Cal. 5th 903 (2018).

[xlvii] N.Y. Labor Law §190(2) (Consol. 2024).

[xlviii] N.Y. Labor Law §190(3) (Consol. 2024).

[xlix] N.Y. Labor Law §2(7) (Consol. 2024).

[l] *Andryeyeva v. N.Y. Health Care, Inc.,* 33 N.Y. 3d 152, 180 (2019).

[li] *Matter of Ovadia v. Office of Industrial Board of Appeals,* 19 N.Y.3d 138, 141 (2012).

[lii] *Id.* at 142-144.

[liii] *Id.* at 144-145 and 146 n. 6. Citing *Zheng*, the Court also found relevant that there was no evidence the defendants subcontracted the work to evade compliance with state labor laws. *Id.*

[liv] *Id.* at 145. The Court also recognized that there may have been a period of time where the general contractor was a joint employer because of the degree of control it was exercising over the employees of the masonry contractor. *Id.*

[lv] *Id. See*, also, *Cornejo v. Eden Palace, Inc., et.al,* 1010 N.Y. Slip. Op. 31618, 22 n. 3. (N.Y. Sup. Ct. May 27, 2020).

[lvi] *Id.* at 6-7.

[lvii] *Id.* at 8, citing *Zheng*, *355 F.3d* at 71-72 and *Ovadia,* 19 N.Y.3d at 145.

[lviii] *Id.,* citing *Zheng*, 355 F.3d at 72-74 and *Ovadia*19 N.Y.3d at 145 n. 6.

[lix] *Barfield,* 537 F.2d at 146.

[lx] *Becerra v. Expert Janitorial, LLC*, 181 Wash.2d 186, 332 P.3d 415, 417 (2014).

[lxi] *Id.,* 332 P.3d at 417.

[lxii] Wash. Rev. Code §49.46.010(3) (2024) (Effective until June 6, 2024). The definition has exclusions that are not relevant in *Becerra. Becerra*, 332 P.3d at 420.

[lxiii] Wash. Rev. Code §49.46.010(2) (2024).
[lxiv] Wash Rev. Code §49.46.010(3) (2024).
[lxv] *Becerra*, 332 P.3d at 417.
[lxvi] *Id.* at 420.
[lxvii] *Id.* at 419.
[lxviii] *Id.* at 422.
[lxix] Id. at 420-421..
[lxx] *Becerra*, 332 P.3d at 421.
[lxxi] In contrast, the federal district court in Maryland has applied the Fourth Circuit's joint-employer analysis to Maryland wage-law claims. See, e.g., *Prasch v. Bottoms Up Gentlemen's Club, LLC,* No. 23-CV-00634-LKG, 2024 WL 2977855, at *6 (D.MD. June 13, 2024) (applying the Fourth Circuit's six-factor joint employer analysis found in *Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125 (4th Cir. 2017) to a Maryland wage law claim).
[lxxii] *Newell v. Runnells*, 407 Md. 578, 967 A.2d 729 (2009).
[lxxiii] *Id.* at 967 A.2d at 736.
[lxxiv] *Id.* at 744.
[lxxv] Md. Code Lab. & Empl. §3-401(b)(2024).
[lxxvi] *Newell*, 967 A.2d at 771.
[lxxvii] *Id.* at 771-772
[lxxviii] *Id.* at 772.
[lxxix] *Barfield,* 537 F.2d at 143.
[lxxx] *Id.*
[lxxxi] *Newell*, 967 A. 2d at 772.
[lxxxii] *Id.*
[lxxxiii] *Id.* at 773-775.

[lxxxiv] *See*, Anne Batter, et. al., *The Employer Report: Navigating U.S. and Global Employment Law,* accessed March 14, 2025 at https://www.theemployerreport.com/2024/11/back-to-business-trumps-second-term-and-the-four-major-shifts-us-employers-should-expect/#:~:text=The%20Trump%2Dera%20FLSA%20joint,be%20deemed%20a%20joint%20employer.
[lxxxv]The Biden Administration FLSA independent contractor rule has been challenged in many jurisdictions. The Eastern District of Texas case of *Coalition for Workforce Innovation, et. al. v. Julie Su, No. 21-cv-00130* is being held in abeyance waiting for the Trump DOL to decide if it is going to continue defending the Biden era rule. It is likely the Trump DOL will cease defending the rule and rescind it, or they will agree in settlement to a nationwide injunction.
[lxxxvi] Restatement of the Law, Employment Law §1.04 (LEXIS 2024).
[lxxxvii] *Id.* at §1.04, comm. (a).

[lxxxviii] There are circumstances where employers agree to share sequentially the services of an employee. Those situations would be covered by §1.04(a).
[lxxxix] Restatement (Second) of Agency §220 (Am. Law Inst. 1958).
[xc] See, e.g., *Darden,* 503 U.S. at 322-323 (utilizing common law to define employee under ERISA laws); and, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) ("The obvious purpose of this amendment [to the National Labor Relations Act definition of employer] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.")
[xci] As recognized in the Restatement (Second) of Agency § 220(2)(a), "the extent of control, which by agreement, the master *may exercise* over the details of work" is a factor in determining whether an individual is an employee or independent contractor. (Emphasis added.)
[xcii] *Boire v. Greyhound Corp.,* 376 U.S. 473, 481, 84 S.Ct. 894 (1964). The emphasis over "essential terms and conditions" is a peculiarity of NLRA jurisprudence that focuses on items required to be negotiated in

collective bargaining. *See, Browning-Ferris Industries of Cal., Inc. v. NLRB,* 911 F.3d 1195, 1205 (D.C. 2018), and *Browning-Ferris Industries of Cal., Inc.* 362 NLRB 1599, 1600, n. 5 (2015).
[xciii] *Browning-Ferris Industries of Penn., Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982).
[xciv] *See, NLRB v. CNN America, Inc.,* 865 F.3d 740, 748-749 (D.C. Cir. 2017).
[xcv] *Browning-Ferris Industries of Cal., Inc. v. NLRB,* 911 F.3d 1195 (D.C. 2018).
[xcvi] *Id.*, at 1202-1204.
[xcvii] *Id.*, at 1209.
[xcviii] *Id.*, at 1211.
The subsequent Trump-administration Board circumvented the adverse D.C. Circuit ruling, and used its rulemaking authority to reinstate the qualifiers ("2020 Rule") which in turn was rescinded and replaced by the Biden-administration Board's in a 2023 Rule ("2023 Rule"). See 88 Fed. Reg. 73946, 73946-73966 (Oct. 27, 2023). This rule was subsequently withdrawn following an adverse decision in *United States Chamber of Commerce v. NLRB, Docket No. 6:23-cv-00553 (E.D. Tex. 2024).* It is important to note that the court *did not* strike down the rule because of the inclusion of reserved and indirect control factors. We can anticipate the Borad in the second Trump administration to return to the 2020 Rule. Such is the ping pong of NLRB jurisprudence.
[xcix] This stands in contrast to an employer who in exchange for responsibility of under worker's compensation laws remain immune from tort claims.
[c] Del. Code Ann. tit. 19 §2354(a)(2024). Application of the apportionment statute can be found in *A. Mazzetti & Sons, Inc. v. Ruffin,* 437 A.2d 1120, 1123-24 (1981). The court noted that "joint service" is synonymous with joint or dual employment. *Id.* at 1123.
[ci] *Growers Co. v. Industrial Comm*., 173 Ariz. 309; 842 P.2d 1322 (Ariz. App. 1992).
[cii] *Id.* at 311.
[ciii] *Id.* at 311 and 312-313
[civ] *Id.* at 312, citing *Word v. Motorola, Inc.*, 135 Ariz. 517, 520, 662 P.2d 1024 (1983) quoting IC A. Larson, *The Law of Workmen's Compensation* §48.00 (1982).
[cv] *Growers*, 173 Ariz. at 313.
[cvi] N.J. Rev. Stat. §43:21-19(i)(6) (2024). Some states have similar presumption of employee status tests without the (B) factor, *see, e.g*., Pa. Uncons. Stat. §753(l)(2)(B) (2024).
[cvii] *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 295 (2015).
[cviii] *Id.*
[cix] *Id.* at 313-314.
[cx] *Perez v. Access Bio, Inc.*, No. A-3071-16T4, 2019 N.J. Super. Unpub. LEXIS 1637 (N.J. Super. Ct. App. Div. 2019).
[cxi] *Id.* at 1.
[cxii] *Id.* at 7.
[cxiii] *In Re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462 (3d Cir. 2012).
[cxiv] *Id.* at 14-17.
[cxv] *Id.*
[cxvi] *Id.* at 17. The same outcome was reached in the U.S. District Court of New Jersey case of *Echavarria v. Williams Sonoma, Inc.*, Civ. No. 15-6441, 2016 U.S. Dist. LEXIS 33980, 8-13 (D. N.J. 2016) (unpub).
[cxvii] *Jinks v. Credico (USA), LLC*, 488 Mass. 691 (2021).
[cxviii] *Id.* at 692.
[cxix] *Id.*
[cxx] Mass. Gen. Laws ch. 149, §148B(a) (2024).
[cxxi] Mass. Gen. Laws ch. 149, §148B(d) (2024).
[cxxii] Mass. Gen. Laws ch. 149 (2024).
[cxxiii] Mass. Gen. Laws ch. 151 (2024).
[cxxiv] *Jinks,* 488 Mass. at 694-694.
[cxxv] *Baystate Alternative Staffing , Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998).
[cxxvi] *Jinks,* 488 Mass. at 702-703.

[cxxvii] *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010).
[cxxviii] *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 915, 955-957 (2018).
[cxxix] *Martinez,* 49 Cal. 4th at 943.
[cxxx] *Dynamex,* 4 Cal. 5that 944, *see also*, n. 17.
[cxxxi] *Id.* at 955.
[cxxxii] *Id.* at 955.
[cxxxiii] *Martinez,* 49 Cal. 4th at 956-957.
[cxxxiv] *Henderson v. Equilon Enterprises, LLC,* 40 Cal.App.5th 1111, (2019).
[cxxxv] *Id.* at 1114-1115.
[cxxxvi] *Id.*
[cxxxvii] *Id.*
[cxxxviii] *Id.* at 1128 and 1130.
[cxxxix] *Id.* at 1126.
[cxl] *Id.* at 1128.
[cxli] *Id.* at 1129.
[cxlii] *Id.*
[cxliii] *Dynamex,* 4 Cal. 5th at 955.
[cxliv] *Henderson, 40* Cal.App.5th at 1129-1130.
[cxlv] 820 ILCS 105/10 (a)(2024).
[cxlvi] 56 Ill. Adm. Code §210.115(2024).
[cxlvii] *See,* Zachary Phillips, *How contractors can guard against wage theft on their jobsites,* August 27, 2024, available at https://www.constructiondive.com/news/wage-theft-construction-contracts-unions-labor/725028.
[cxlviii] Other helpful statutes are those that create a cause of action for the failure to properly classify an individual as an employee. An example is Pennsylvania 43 P.S. § 933.3 *et seq,* commonly knows as "Act 72." Those statutes establish an important policy objective of legislatures against misclassifying employees as independent contractors or paying employees "off-the-books."
[cxlix] The exception is Virginia, where the upper-tier contractor must "know or should have known that the subcontractor was not paying his employees…." Va. Code §11-4.6.C.4.
[cl] *See, e.g.,* Complaint at paras. 83, 84, 105, and 106, *District of Columbia v. Dynamic Contracting, Inc., Gilbane Building Co., Consigli Constr. Col, Inc., et.al,* Civ. Action No.: 2021 CA 003768 B (2021); and Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Announces construction Company Must Pay Over $1 Million to Resolve Workers' Rights Lawsuit, Including to Impacted Workers* (April 6, 2020), available at https://oag.dc.gov/release/ag-racine-announces-construction-company-must-pay.
[cli] Reports received by author of this paper Matthew Capece of the United Brotherhood of Carpenters and Joiners of America.
[clii] Phillips, *supra* note 147.

[cliii] *See,* Janice Fine, Jenn Round, *The Labor Standards Enforcement Toolbox,* Rutgers-New Brunswick School of Management and Labor Relations, accessed June 23, 2025, https://smlr.rutgers.edu/wjl-ru/beyond-bill/toolbox.

[cliv] *Tenn. Coal, Iron & Railroad Co, 321 U.S.* at 598.