South Carolina Law Review

Volume 70
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 12

Summer 2019

Joint Employment under the FLSA, The Fourth Circuit's Decision to Be Different

Carl H. Petkoff

JOINT EMPLOYMENT UNDER THE FLSA: THE FOURTH CIRCUIT'S DECISION TO BE DIFFERENT

Carl H. Petkoff*

---

* J.D. Candidate, May 2020, University of South Carolina School of Law. I would like to thank University of South Carolina School of Law Professor Martin C. McWilliams, Jr. for his support and helpful feedback throughout this project. I also would like to express my appreciation to Ms. Molly Cherry, a Member of Nexsen Pruet, LLC, for sharing her perspective on the Fourth Circuit's decision in *Salinas v. Commercial Interiors, Inc.* Finally, I would like to thank the editorial board of the *South Carolina Law Review* for their many hours spent reviewing this Note, as well as the members of my family who have continuously supported me during this process. The views expressed in this Note are my own as are any errors, mistakes or omissions.

I. INTRODUCTION

During the Great Depression, Congress enacted the Fair Labor Standards Act (FLSA) to establish nationwide standards for minimum wages, overtime pay, employment-related recordkeeping, and child labor.[1] Still in existence today, the FLSA applies to full-time and part-time employees who work in the private sector as well as those who work in federal, state, and local governments.[2] Although this eighty-year-old statute appears straightforward on its face, a particular interpretation of the FLSA—the so-called "joint employment doctrine"—continues to cause difficulty for employers, employees, and courts around the country.

The FLSA does not mention the term "joint employment." Rather, the joint employment doctrine has largely evolved through various interpretations of law by the Department of Labor (DOL)[3] and federal courts.[4] Because an employee may have more than one employer under the FLSA, two employers can be jointly and severally liable to an employee for violations of the Act where both employers collectively exercise the requisite control over the particular employee.[5] How much control is necessary, and how should this doctrine be applied? Federal courts have struggled with these questions. Federal circuit courts have been unable to adopt a single standard for addressing joint employment under the FLSA, resulting in a lack of uniformity across the country. This is particularly challenging for employers that seek to maintain the operation of a single business model within the United States.

In a 2017 decision, the United States Court of Appeals for the Fourth Circuit adopted a new test for determining joint employment under the FLSA.[6] Breaking away from decades of precedent, *Salinas v. Commercial Interiors* laid out a seemingly low threshold for finding two putative employers jointly and severally liable for violations of the FLSA.[7] Although only a handful of decisions have applied the Fourth Circuit's new test, legal scholars—as well as businesses nationwide—are concerned about potential

---

1. U.S. DEP'T OF LABOR WAGE AND HOUR DIVISION, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 2 (2016), https://www.dol.gov/whd/regs/compliance/wh1282.pdf.
2. *Id.* at i.
3. 29 C.F.R. § 791.1 (2018).
4. *E.g.*, Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017).
5. *Id.* at 133 (quoting 29 C.F.R. § 791.2(a) (2018)).
6. *Id.* at 140.
7. *Id.* at 141–42.

liabilities that may result from this expansive interpretation of joint employment.[8]

The Fourth Circuit's joint employment test under the FLSA threatens traditional business practices because its low threshold results in unpredictability for business decision making and increases the risk of significant liabilities for businesses.[9] Part II of this Note discusses the history of the FLSA, including its enactment by Congress, the origin of the joint employment doctrine, and why it remains important today. Part III discusses how courts, particularly federal circuit courts, have applied different tests to decide this critical employment and labor law issue, including the Fourth Circuit's recent test from *Salinas*. Finally, Part IV discusses potential flaws with the Fourth Circuit's new test and how it may have detrimental effects on business practices across the country, while specifically focusing on impacts within the states located in the Fourth Circuit.

II. BACKGROUND

A. Congress Enacts the FLSA

Advances in manufacturing processes in the United States during the 1920s caused many Americans to move from rural to urban areas, resulting in a substantial increase in employment levels.[10] An increase in both workers seeking employment and production efficiency led to employers possessing more bargaining power over the terms of workers' employment.[11] Initially, some states enacted legislation to combat the bargaining inequality and its resulting consequences; however, by the mid-1930s, many people believed that a federal law was necessary to address the growing problem.[12]

By 1933, employment levels had dropped substantially in the United States, further increasing employers' bargaining power over terms of

---

8. *See, e.g.*, Nancy Van der Veer Holt, B. Patrice Clair & Jacquelyn L. Thompson, *Fourth Circuit Creates New Joint Employment Test Under the Fair Labor Standards Acts*, FORDHARRISON (Feb. 23, 2017), https://www.fordharrison.com/fourth-circuit-creates-new-joint-employment-test-under-the-fair-labor-standards-act.

9. *Id.*

10. Sarah L. Santos, Note, *The Fair Labor Standards Act—Where the Fourth Circuit Went Wrong in* Shaliehsabou v. Hebrew Home of Greater Washington*: Judicial Expansion of Fair Labor Standards Act Exemptions to Include Ministerial Employees*, 28 W. NEW ENG. L. REV. 369, 372 (2006) (citing Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 97–98 (2000)).

11. *Id.*

12. *Id.* at 373 (citing Harris, *supra* note 10, at 20).

employment.[13] That year, President Franklin Roosevelt persuaded Congress to adopt the National Industrial Recovery Act (NIRA), which delegated administrative authority to the National Recovery Administration (NRA).[14] The NRA enforced fair-trade codes by suspending antitrust laws, which resulted in less competition for jobs and higher wages for workers.[15] In an effort to promote the purposes of the Act, President Roosevelt encouraged businesses to adopt Reemployment Agreements which set limits on workweek hours and established a minimum wage.[16] The NRA gave employers who signed these agreements a marketing incentive, designating them as "Blue Eagle" businesses.[17] The NRA encouraged Americans to buy products only from these businesses,[18] and it even ran advertisements that encouraged consumers to boycott products made by businesses that refused to sign Reemployment Agreements.[19]

Two years later, the United States Supreme Court dealt the NIRA a devastating blow.[20] In *A.L.A Schechter Poultry Corp. v. United States*,[21] the court invalidated both the NIRA's restrictive trade practices and its labor provisions, reasoning that the NIRA "was an unconstitutional delegation of government power to private interests."[22] In *Morehead v. N.Y. ex rel Tipaldo*,[23] the Supreme Court took additional measures, ruling that both federal and state governments were barred from enacting minimum wage statutes.[24]

Despite consistent opposition by the Supreme Court, President Roosevelt was determined to enact legislation that would improve the lives of working people and survive judicial scrutiny.[25] As the United States economy was beginning to recover from the Great Depression, President Roosevelt nominated Frances Perkins to become the Secretary of Labor.[26] Perkins

---

13. *See* Harris, *supra* note 10, at 99.

14. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2245 (1998).

15. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22 (1978).

16. *Id.* at 22–23.

17. *Id.* at 23.

18. *Id.*

19. Malamud, *supra* note 14, at 2256.

20. Grossman, *supra* note 15, at 23.

21. 295 U.S. 495 (1935).

22. *Id.*; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 542.

23. 298 U.S. 587 (1936).

24. *Morehead*, 298 U.S. at 610–11; Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, 123 MONTHLY LAB. REV. 32, 34 (2000).

25. Samuel, *supra* note 24, at 34.

26. Grossman, *supra* note 15, at 24.

agreed to accept the nomination on the condition that the President would allow her to advocate for a national law incorporating minimum wage, overtime pay, and abolishing child labor.[27] When the President agreed, Perkins then asked him, "Have you considered that to launch such a program . . . might be considered unconstitutional?"[28] Roosevelt replied, "[w]ell, we can work out something when the time comes."[29]

Secretary Perkins then drafted a bill that would use the federal government's purchasing power to promote compliance with labor standards.[30] The purpose of the bill was to require employers with government contracts "to conform to certain labor conditions in the performance of the contracts."[31] Specifically, to receive government contracts, companies were required to agree to pay a minimum wage, enforce a forty-hour week, and adhere to child labor standards established in the statute.[32] President Roosevelt and Secretary Perkins were disheartened when they discovered that many government contracts actually encouraged the exploitation of unfair labor practices.[33] To address this situation, President Roosevelt advocated for—and Congress approved—the Public Contracts Act of 1936.[34] Unlike the decision in *Schechter Corp.*, the Supreme Court held that the Public Contracts Act was not "an exercise by Congress of regulatory power over private business or employment."[35] Although limited by judicial scrutiny and narrow interpretations, the Public Contracts Act established a framework for future legislation aimed at curbing unfair labor practices across all industries.[36]

After successfully adopting labor standards for federal government contracts, Roosevelt and Perkins focused their efforts on obtaining legislation to establish labor standards for the private sector.[37] An early version of the proposed FLSA only applied to hours worked and wages earned by employees.[38] Roosevelt craftily inserted a provision to establish child labor standards, which was popular in Congress.[39] The provision used the

---

27. *Id.*
28. *Id.* (citing FRANCES PERKINS, THE ROOSEVELT I KNEW 152 (1946)).
29. *Id.* (citing FRANCES PERKINS, THE ROOSEVELT I KNEW 152 (1946)).
30. *Id.*
31. Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940) (quoting H.R. REP. NO. 74-2946 (1936)).
32. Grossman, *supra* note 15, at 24 (requiring businesses to employ only boys over the age of sixteen and girls over the age of eighteen).
33. *Id.*
34. *Id.*; *see also* 41 U.S.C. § 6501, et seq. (originally at 41 U.S.C. 35, et seq.).
35. *Perkins*, 310 U.S. at 128.
36. Grossman, *supra* note 15, at 24.
37. Samuel, *supra* note 24, at 34.
38. Grossman, *supra* note 15, at 25.
39. *Id.*

Commerce Clause in Article I, section 8 of the United States Constitution as the authority to ban the sale of goods traveling across state lines that were produced by children under the age of sixteen; Roosevelt used this authority as the basis to get the entire act, including the wage and hour provisions, through Congress.[40]

In essence, the bill provided for a minimum wage of forty-cents per hour, a maximum workweek of forty hours, and a minimum working age of sixteen for most industries.[41] Workers in agriculture, transportation, retail, and public employees were exempt from the FLSA.[42] From July of 1937 until June of 1938, both houses of Congress engaged in a number of "legislative battles," including seventy-two proposed amendments to the Administration's bill.[43] A significant area of conflict was whether the FLSA should have "a fixed universal standard" or create a labor board to "establish standards on an industry basis."[44] After many compromises on a variety of issues, Congress passed the bill and President Roosevelt signed the FLSA into law on June 25, 1938.[45] The final Act established an initial minimum wage of twenty-five cents an hour, increasing to forty-cents an hour within seven years.[46] Similarly, the Act fixed the maximum number of hours in a workweek without overtime pay at forty-four, which would decrease to forty hours within three years.[47]

B. Origin of Joint Employment Under the FLSA

Just one year after the FLSA was enacted, the DOL introduced the concept of joint employment in response to employers attempting to avoid complying with the law.[48] These employers were called "wage chiselers."[49] Wage chiselers circumvented compliance by creating separate businesses—although separate only in name—to assign their employees' hours worked that would otherwise constitute overtime.[50] The DOL realized the negative effects

40. *See id.* (outlining President Roosevelt's effective message to Congress).
41. *Id.*
42. Samuel, *supra* note 24, at 36.
43. Grossman, *supra* note 15, at 28.
44. Samuel, *supra* note 24, at 36.
45. Grossman, *supra* note 15, at 28.
46. *Id.*
47. *Id.*
48. Jason Schwartz & Ryan Stewart, *FLSA Turns 80: The Divide over Joint Employment Status*, LAW360 (June 18, 2018, 12:49 PM), https://www.law360.com/articles/1048614/flsa-turns-80-the-divide-over-joint-employment-status.
49. *Id.*
50. *Id.*

that wage chiselers had on the overarching purpose of the FLSA and began to establish administrative interpretations to guide courts in combatting the issue.[51]

In 1958, the DOL adopted section 791.2 in the Code of Federal Regulations.[52] This section clarified that one individual may be employed by more than one employer under the FLSA,[53] and the United States Supreme Court has agreed with this interpretation.[54] Additionally, section 791.2 included the following guideline explaining what constitutes joint employment:

> A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently 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 his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), 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.[55]

Although section 791.2 provides courts some guidance when interpreting the Act, the regulation's vague language and vast factual differences across joint employment disputes have resulted in courts struggling to formulate a workable test for determining joint employer liability.

Another reason that this topic remains unsettled is clear: the FLSA does not define "Joint Employment."[56] In fact, the term is never mentioned in the statute.[57]

---

51. *Id.*
52. 29 C.F.R. § 791.2 (2018).
53. *Id.* § 791.2(a).
54. Falk v. Brennan, 414 U.S. 190, 195 (1973) (quoting 29 U.S.C. § 203(d) (2018)).
55. 29 C.F.R. § 791.2(a).
56. *Id.*
57. 29 U.S.C. §§ 201–19 (2018); Schwartz & Stewart, *supra* note 48.

C. *Why Does Joint Employment Matter?*

There are two reasons why joint employment liability under the FLSA is important to business decision-making in the twenty-first century. First, the joint employment doctrine considers a worker's two or more joint employers as a "single employer" for purposes of deciding whether the single employer adhered to the FLSA wage and overtime requirements.[58] For example, suppose employee Z works twenty-five hours in a week for company X and another twenty-five hours in the same week for company Y. Under this scenario, assuming X and Y are separate employers, each company will owe Z her hourly rate for twenty-five hours of work. On the other hand, if a court determines that X and Y are Z's joint employer, then Z's hours will be aggregated, and Z will have worked fifty hours for the single employer (X and Y). As a result, under these facts, Z will likely receive more pay because the FLSA requires overtime compensation for most employees working over forty hours in a week.

Second, the joint employment doctrine is important because it "holds joint employers jointly and severally liable for any violations of the FLSA."[59] To illustrate, in the above hypothetical scenario where X and Y are joint employers, if X becomes insolvent, then Y can be held fully liable for payment of Z's fifty hours of wages.

III. COURT INTERPRETATIONS OF JOINT EMPLOYMENT UNDER THE FLSA

A. *Court Interpretations Before Salinas*

Prior to *Salinas*, federal courts predominantly analyzed joint employment based on some variation of one of two tests—or a combination of the two.[60] The first test applies common law agency principles to make joint employment determinations, while the second test—known as the "economic realities test"—focuses on an employee's economic dependence on a putative joint employer.[61] Although different factors and points of emphasis are evaluated under each test, the ultimate goal of both tests is to determine how

58. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 134 (4th Cir. 2017) (citing Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 305, 307, 310 (4th Cir. 2006)).

59. *Id.* (citing Schultz, 466 F.3d at 310); 29 C.F.R. § 791.2(a).

60. Br. for American Hotel & Lodging Ass'n & Asian American Hotel Owners Ass'n et al. as Amici Curiae Supporting Pet'rs at 6, DIRECTV, LLC v. Hall, 138 S. Ct. 635 (July 6, 2017) (No. 16-1449) [hereinafter Brief I].

61. *Id.*

much control a putative employer must have over the direct employer's employee to establish joint employment.[62]

Acknowledging that the FLSA's definition of "employ" is extremely vague,[63] some courts have relied on common law agency principles for determining joint employment relationships.[64] The FLSA defines "employ" as "to suffer or permit to work."[65] Because of this recognizably broad and ambiguous definition, courts have looked to restatements of the laws for guidance.[66] Under the *Restatement (First) of Agency*, "[a] servant is a person employed to perform service for another in his affairs and who . . . is subject to the other's control or right to control."[67] In *Zheng v. Liberty Apparel Co.*, the Second Circuit held that a traditional agency relationship will warrant joint employer liability; however, circumstances outside of an agency relationship may also result in liability.[68]

Perhaps the more common approach, or at least a larger portion of the mixed tests used by different courts, is the economic realities test.[69] The economic realities test incorporates both agency principles and factors pertaining to the worker's financial dependence.[70] The key inquiry under this standard is "whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself."[71] In a joint employment dispute, this inquiry focuses on whether a worker is economically dependent on a putative joint employer.[72]

The economic realities test was originally derived from the Ninth Circuit's four-factor test in *Bonnette v. California Health and Welfare Agency*.[73] The *Bonnette* factors included: "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."[74]

---

62. *Id.*

63. Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (quoting 29 U.S.C. § 203(g) (2018)); United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945).

64. *Id.*

65. 29 U.S.C. § 203(g).

66. *Zheng*, 355 F.3d at 69.

67. RESTATEMENT (FIRST) OF AGENCY § 220(1) (1993).

68. *Zheng*, 355 F.3d at 69.

69. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

70. *See id.*

71. Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984) (internal citations omitted) (citing Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981)).

72. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 136 (4th Cir. 2017) (quoting Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1176–77 (11th Cir. 2012)).

73. *Bonnette*, 704 F.2d at 1470.

74. *Id.*

Although these factors resemble agency principles, many courts have adopted the *Bonnette* factors and also added factors of their own to clarify the economic realities aspect of joint employment. In sum, most courts use a combination of the two tests in joint employment disputes, while analyzing the relationship between the worker and the putative joint employer.[75]

1. First Circuit

For purposes of joint employment under the FLSA, the First Circuit adheres to the four-factor test from *Bonnette*.[76] In *Baystate Alternative Staffing v. Herman*, the court rejected a joint employment analysis solely grounded in common law definitions, and instead focused the analysis on "the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer."[77] The court held that the *Bonnette* factors "provide a useful framework" for making such determinations.[78]

2. Second Circuit

The Second Circuit focuses its inquiry on the putative employer's "functional control" over the employee.[79] The court adopted a six-factor test, derived from *Zheng v. Liberty Apparel Co.*, which considers: (1) whether the putative employer owns the work premises and equipment; (2) whether the nature of the business allows shifting "as a unit from one putative joint employer to another;" (3) whether the worker performed a specific job that was an integral part of the putative employer's production process; (4) whether job functions under particular contracts could pass from one employer to another without material effects; (5) how much supervision the putative employer exerted over the worker; and (6) whether the work was performed "exclusively or predominantly" for the putative employer.[80]

---

75. Brief I, *supra* note 60, at 8.

76. Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998); *Bonnette*, 704 F.2d at 1470.

77. *Baystate*, 163 F.3d at 675.

78. *Id.*

79. Grenawalt v. AT&T Mobility, LLC, 642 Fed. Appx. 36, 38 (2d Cir. 2016) (quoting Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003)).

80. *Id.*

3. Third Circuit

In analyzing joint employment under the FLSA, the Third Circuit uses a variation of the economic realities test.[81] In addition to the four-factor *Bonnette* test, the Third Circuit considers whether the putative employer is routinely involved in employee discipline.[82] Otherwise, this circuit appears to apply the general analysis set out by the *Bonnette* court.[83]

4. Fourth Circuit

Before *Salinas*, the Fourth Circuit adopted a two-step test for joint employment under the FLSA in *Schultz v. Capital International Security, Inc.*[84] Under the *Schultz* framework, courts first decided whether to treat two entities as joint employers.[85] For this step, *Schultz* identified the DOL regulation discussed in section II.B. as a basis for answering the inquiry; however, the court did not specify particular factors to be considered.[86] For the second step, courts in this circuit analyze whether the putative worker was "an employee or independent contractor of the combined entity, if they were joint employers, or each entity, if they are separate employers."[87] In answering this second question, *Schultz* established the following six factors:

> (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.[88]

---

81. Brief I, *supra* note 60, at 11 (citing *In re* Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012)).

82. *In re* Enter., 683 F.3d at 469.

83. *Id.* at 470.

84. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 305–07 (4th Cir. 2006).

85. *Id.* at 305–06.

86. *Id.*

87. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 140 (4th Cir. 2017) (citing *Schultz*, 466 F.3d at 305–07).

88. *Schultz*, 466 F.3d at 304–05.

These factors appear to be a variation of the economic realities test.[89] As discussed in section III.B., *Salinas* adopted the general two-step framework from *Schultz*, as well as the six factors used in considering the second prong.[90] However, unlike in *Schultz*, the court in *Salinas* created new factors for the first prong and changed the focal point of the entire analysis.[91]

5. Fifth Circuit

Much like the First Circuit, the Fifth Circuit strictly applies the *Bonnette* factors;[92] however, in *Orozco v. Plackis*, the court noted that an individual need not establish all four factors in every case.[93] Additionally, the Court focused its analysis by quoting an earlier Fifth Circuit decision which stated that "[t]he dominant theme in the case law is that those who have operating control over employees within companies may be individually liable for FLSA violations committed by the companies."[94] Ultimately, the *Orozco* court held that in joint employment disputes under the FLSA, the economic realities test applies.[95]

6. Sixth Circuit

The Sixth Circuit has not addressed joint employment under the FLSA; therefore, the law in this circuit is unsettled.[96] However, a district court in the circuit used three of the four *Bonnette* factors in deciding a related dispute, simply omitting the factor dealing with recordkeeping.[97] Consequently, it appears that the Sixth Circuit may follow an abridged version of the economic realities test.[98]

---

89. *See id.* at 305.
90. *Salinas*, 848 F.3d at 139, 141–42.
91. *Id.* at 150.
92. Brief I, *supra* note 60, at 12 (citing Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014)).
93. *Orozco*, 757 F.3d at 448 (citing Gray v. Powers, 673 F.3d 352, 357 (5th Cir. 2012)).
94. *Id.* (quoting Martin v. Spring Break '83 Prods., LLC, 688 F.3d 247, 251 (5th Cir. 2012)).
95. *Id.* (citing *Gray*, 673 F.3d at 354).
96. Bacon v. Subway Sandwiches & Salads, LLC, No. 3:14–CV–192–PLR–HBG, 2015 U.S. Dist. LEXIS 19572, at *8 (E.D. Tenn. Feb. 19, 2015).
97. *Id.* (citing Politron v. Worldwide Domestic Serv., LLC., No. 3-11-0028, 2011 U.S. Dist. LEXIS 52999, at *4 (M.D. Tenn. May 17, 2011)).
98. *See id.* (citing *Politron*, at *4).

7. Seventh Circuit

In *Moldenhauer v. Tazewell-Pekin Consolidated Communications Center*,[99] the Seventh Circuit addressed joint employment in the Family and Medical Leave Act (FMLA) context.[100] The court noted that it makes sense for the FLSA joint employment standard to apply in the FMLA context because the text of the FMLA mirrors that of the FLSA.[101] However, the court did not adopt any specific factors and generally held that "for a joint-employer relationship to exist, each alleged employer must exercise control over the working conditions of the employee, although the ultimate determination will vary depending on the specific facts of each case."[102] This interpretation may be consistent with the common law agency approach.

8. Eighth Circuit

The Eighth Circuit has not adopted a test for determining joint employment under the FLSA.[103] Nevertheless, a district court decision indicates that the circuit court may follow an abridged version of the *Bonnette* test, and by simply omitting the fourth factor from consideration, the circuit's approach is almost identical to that taken by the district court in the Sixth Circuit.[104]

9. Ninth Circuit

The Ninth Circuit uses a test that incorporates both the *Bonnette* factors and the Second Circuit's six factors for determining joint employment under the FLSA; this test consists of thirteen factors.[105] The first five factors resemble the four factors from *Bonnette*, which the Ninth Circuit identified as "regulatory factors."[106] Six of the final eight factors are almost identical to the Second Circuit's factors, which the court refers to as "non-regulatory

---

99. 536 F.3d 640 (7th Cir. 2008).

100. *Id.* at 641.

101. *Id.* at 644.

102. *Id.*

103. Brief I, *supra* note 60, at 14.

104. Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 961 (8th Cir. 2015) (reasoning that the plaintiffs' complaint did not state facts consistent with economic realities of employment, "such as their alleged employers' right to control the nature and quality of their work, the employers' right to hire or fire, or the source of compensation for their work").

105. *See* Torres-Lopez v. May, 111 F.3d 633, 639–40 (9th Cir. 1997); *see also* Brief I, *supra* note 60, at 14–15.

106. *See Torres-Lopez*, 111 F.3d at 639–40.

factors."[107] The final two factors are derived from *Real v. Driscoll Strawberry Associates, Inc.*[108] These two factors consider "'whether the service rendered requires a specific skill'" and "whether the employee has an 'opportunity for profit or loss depending upon [the alleged employee's] managerial skill.'"[109] In essence, this test is a combination of the economic realities test and common law agency principles, which consider the amount of control exercised by the putative employer.

10. Tenth Circuit

The Tenth Circuit has not identified a specific test for determining joint employment under the FLSA.[110] Nonetheless, a district court within the circuit has applied a test incorporating both the *Bonnette* factors and common law agency principles.[111] In justifying application of the *Bonnette* factors, the United States District Court for the District of Colorado reasoned that the Tenth Circuit has applied the economic realities test in similar joint employment disputes, outside of the FLSA.[112]

11. Eleventh Circuit

The Eleventh Circuit uses an eight-factor test, which incorporates the economic realities test from *Bonnette*, two control factors from the Second Circuit, and one additional factor.[113] The two control factors are whether the putative employer owns the work facility and whether the putative employee performs a specialized job that is essential to the employer's business.[114] Finally, the Eleventh Circuit also considers "the amount of investment in equipment and facilities by the land owner versus the contractor."[115]

---

107. *See id.* at 640.

108. *Id.* at 640 (citing Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979)).

109. *Id.* (citation omitted).

110. Brief I, *supra* note 60, at 15.

111. *See* Coldwell v. RiteCorp Envtl. Prop. Sols., No. 16-ccv-01998-NYW, 2017 U.S. Dist. LEXIS 68252, at *14–16 (D. Colo. May 4, 2017).

112. *Id.* at *12–13.

113. *See* Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276, 1294 (11th Cir. 2016); *see also* Brief I, *supra* note 60, at 15–16.

114. *See Garcia-Celestino*, 898 F.3d at 1294.

115. *Id.*

12. D.C. Circuit

The D.C. Circuit has also not adopted a specific test for FLSA joint employment.[116] However, much like the other circuits without a concrete test, a district court within the circuit has applied a test combining the *Bonnette* factors and the Second Circuit's factors.[117] Therefore, the D.C. Circuit may be inclined to adopt a test incorporating both the economic realities test and common law agency principles.

B. Salinas v. Commercial Interiors

In 2017, the United States Court of Appeals for the Fourth Circuit established a new joint employment test after hearing arguments in *Salinas v. Commercial Interiors*.[118] In hindsight, *Salinas* represents a significant departure from how courts interpret joint employment relationships and employer liability, rejecting the basic framework applied in every other circuit. The analytical change can best be explained by two common law doctrines: vertical and horizontal joint employment.[119] Vertical joint employment, the approach taken by every circuit addressing the issue before *Salinas*, focuses the overall inquiry on whether the worker is economically dependent on the putative joint employer.[120] Alternatively, horizontal joint employment, adopted by the Fourth Circuit in *Salinas*, focuses the overall inquiry not on the worker's relationship with one employer, but on the relationship between the two putative joint employers.[121]

The facts in *Salinas* were typical of those seen in many joint employment disputes, involving an assertion that a general contractor is liable under the FLSA for wages due to a subcontractor's employees.[122] J.I. General Contractors, Inc. (J.I.), the subcontractor, directly employed each of the four plaintiffs as drywall installation workers.[123] Commercial Interiors, Inc. (Commercial), the general contractor, dealt primarily in "interior finishing services, including drywall installation, carpentry, framing, and hardware

116. *See* Ivanov v. Sunset Pools Mgmt., Inc., 567 F. Supp. 2d 189, 194–95 (D.D.C. 2008); Brief I, *supra* note 60, at 16.

117. *See Ivanov*, 567 F. Supp. 2d at 194–95.

118. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 140 (4th Cir. 2017).

119. Murphy v. Heartshare Human Servs. of N.Y., 254 F. Supp. 3d 392, 396 (E.D.N.Y. 2017).

120. *See id.* (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter 2016 WL 284582, at *4 (Jan. 20, 2016)).

121. *See id.* at 397.

122. *Salinas*, 848 F.3d at 129.

123. *Id.* at 130.

installation."[124] At the time of the litigation, J.I. was defunct; but, when operating, J.I. and its employees primarily worked for Commercial Interiors.[125] The complaint alleged that Commercial and J.I. jointly employed the plaintiffs, so both employers were jointly and severally liable for FLSA violations, and hours worked for each employer should be aggregated to calculate the plaintiffs' damages under the statute.[126] The United States District Court for the District of Maryland granted Commercial's summary judgment motion, holding the plaintiffs were not jointly employed by Commercial because J.I. and Commercial had a legitimate business relationship, and neither employer attempted to avoid FLSA compliance.[127]

In reversing the lower court's decision, the Fourth Circuit created a new test for joint employment under the FLSA.[128] Although *Salinas* reaffirmed the broad two-step framework from *Schultz*,[129] the *Salinas* test completely changed the focal point of joint employment analysis.[130] Specifically, the key distinction between *Schultz* and *Salinas* is that the court in *Schultz*—like every other related decision—utilized the economic realities test, focusing on the worker's economic dependence on the single putative employer.[131] In contrast, the *Salinas* court focused the entire analysis on answering one fundamental question: whether two or more employers are "'not completely disassociated' with regard to their codetermination of the key terms and conditions of a worker's employment."[132] Simply put, *Salinas* instructs courts primarily to focus on the relationship between the two putative joint employers, even where a worker is not an employee of either putative employer.[133]

Moreover, the *Salinas* court laid out six factors for courts to consider in analyzing the first prong of the two-step framework:

---

124. *Id.* at 129.

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.* at 140.

129. The first prong of the test states that joint employment exists when "two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment." *Id.* at 129–30 (citing Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 305–07 (4th Cir. 2006)). The second prong stipulates that "the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." *Id.* at 30.

130. *See id.* at 140–41.

131. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 305 (4th Cir. 2006) (citing Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)).

132. *Salinas*, 848 F.3d at 143.

133. *Id.* at 142–43.

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means; (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment; (3) The degree of permanency and duration of the relationship between the putative joint employers; (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.[134]

The court noted these six factors are not an exclusive list of all relevant inquiries and "[t]he ultimate determination of joint employment must be based upon the circumstances of the whole activity."[135] Additionally, the court emphasized one factor alone can support a finding that two putative employers are "not completely disassociated."[136] In analyzing the second prong, the court held the ultimate determination is whether the joint employers' *combined* influence renders the worker an employee or independent contractor.[137] To answer this question, the court adopted the six factors laid out in *Schultz*.[138]

In its twenty-six-page opinion, the Fourth Circuit completed an in-depth analysis, explaining why the Ninth Circuit's *Bonnette* factors—including those applied by the *Salinas* district court—provided a flawed interpretation of FLSA joint employment and why their new approach was justified.[139] The Fourth Circuit's explicit rejection of the *Bonnette* factors, and all FLSA joint

134. *Id.* at 141–42.
135. *Id.* at 142 (quoting *Schultz*, 466 F.3d at 306).
136. *Id.*
137. *See id.* at 150.
138. *Id.* (citing *Schultz*, 466 F.3d at 304–05).
139. *See id.* at 129–30.

employer tests derived from *Bonnette*, can be summarized in three points.[140] First, the court states that *Bonnette* incorrectly relies on common law agency principles because Congress intended for FLSA protection to reach workers who may not otherwise qualify as employees "under a strict application of traditional agency law principles."[141] Second, and arguably most significant, *Bonnette* focuses on vertical joint employment rather than horizontal joint employment.[142] Relying on the 1958 DOL regulation discussed in section II.B., the court reasoned that focusing on the worker's relationship with the putative employer does not solve the ultimate issue of whether the putative employer is "'not completely disassociated' from employment by the *other employer*[]."[143] Finally, the *Salinas* court states that *Bonnette* inadequately views "joint employment as a question of economic dependency."[144] The court reasoned although the *Bonnette* factors properly distinguish an employment relationship from an independent contractor relationship, they do not cover key situations in which two employers are "not completely disassociated" from each other; therefore, they do not cover some situations where liability is justified under the FLSA.[145]

After rejecting *Bonnette* and adopting its new test, the *Salinas* court pointed to thirteen specific facts in the record which supported its conclusion that J.I. and Commercial jointly employed the plaintiffs.[146] In determining joint employment under the FLSA, the court found the first factor favored the plaintiffs because "Commercial and J.I. jointly directed, supervised, and controlled Plaintiffs."[147] Specifically, Commercial required the plaintiffs to attend mandatory meetings, where they received feedback and various types of training, including work quality and safety procedures.[148] Commercial also required both J.I. supervisors and the plaintiffs to wear branded clothing with a Commercial logo.[149]

Regarding the second factor, the court reasoned although J.I. predominantly hired and fired its workers, Commercial decided the plaintiffs' work schedules and determined when working overtime hours was appropriate.[150] The court then simultaneously analyzed the third and fourth

140. *See id.* at 139.
141. *Id.* at 136 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)).
142. *See id.* at 139.
143. *Id.* at 137 (quoting 29 C.F.R. § 791.2(a) (2018)).
144. *Id.* at 139.
145. *Id.*
146. *Id.* at 145–46.
147. *Id.* at 146.
148. *Id.*
149. *Id.* at 147.
150. *Id.*

factors, considering the permanency of the relationship between J.I. and Commercial as well as Commercial's control over J.I.[151] The court pointed to evidence of the "longstanding business relationship" between the two companies and the fact that J.I. contracted almost exclusively with Commercial.[152]

The fifth factor also favored joint employment because Commercial controlled every jobsite where the plaintiffs worked.[153] Commercial also instructed the plaintiffs "to sign in and out of the jobsite with Commercial foremen[.]"[154] The final factor favored joint employment because Commercial provided the plaintiffs with all job tools and equipment required for drywall installation.[155] Although J.I. controlled most aspects of the plaintiffs' payroll, Commercial also kept records of the hours that the plaintiffs worked.[156]

After determining that Commercial and J.I. were "not completely disassociated" regarding the plaintiffs' employment, the court moved to the second prong of the *Schultz* analysis.[157] Considering Commercial and J.I. a single employer, the court then held the plaintiffs were employees of the lone employer as opposed to independent contractors.[158] The court was very concise in analyzing the second prong, briefly referencing the *Schultz* factors and the economic dependence threshold.[159] In short, the court reasoned the plaintiffs' economic dependence on J.I. was apparent because their employment by J.I. was not disputed, and therefore, "they were necessarily economically dependent on Commercial and J.I. in the aggregate."[160]

In sum, the *Salinas* decision completely changed how courts, at least those within the Fourth Circuit, interpret joint employment under the FLSA.[161] Shifting the focal point of analysis to the relationship between the putative employers will likely have continued effects on how businesses operate within the Fourth Circuit, particularly on the ways businesses organize to perform their work efficiently while also complying with the FLSA.

---

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 150.
158. *Id.* at 151.
159. *See id.* at 150–51.
160. *Id.* at 150.
161. *See id.* at 137.

IV. *SALINAS:* EFFECTS ON BUSINESS PRACTICES

The Fourth Circuit's new joint employment test under the FLSA may be harmful to business practices both within the circuit—and across the country—because its low threshold leads to unpredictable outcomes, creates a lack of uniformity across federal circuits, and threatens to undermine many traditional business relationships. Because *Salinas* was decided recently, perhaps the greatest impacts from this new test are still unclear; however, countless businesses are concerned their traditional relationships and practices may create new liability and financial risks. The foreseeable business practices in jeopardy include franchise, independent contracting, and third-party arrangements.[162] These types of relationships are often present across large and small businesses in almost every industry, including: warehousing, logistics, staffing agencies, construction, hospitality, and telecommunications.[163] Businesses utilize these arrangements to minimize costs and maximize efficiency and flexibility, which in turn not only benefits the company, but employees and consumers as well.[164]

A. Unpredictability

Courts have long recognized the obvious value of predictable outcomes for businesses making both long-term investment and everyday operational decisions.[165] Although the court in *Salinas* asserts that its new test clears up confusion in joint employment under the FLSA,[166] the test arguably leads to more confusion, and in turn, unpredictability because of its low threshold for liability. Specifically, the test's first prong questions: "whether two or more entities are 'not completely disassociated' with respect to a worker's employment."[167] This language implies that a single fact—one which links two putative employers to a worker's employment—constitutes sufficient evidence to establish joint employer liability. For example, suppose a food distributor hires a third-party cleaning service to clean its warehouse after each shift and only asks that the cleaning service arrive during a two-hour time window to avoid conflicts with their distribution schedule. Under a literal

162. Br. for Equal Employment Advisory Council as Amici Curiae Supporting Pet'rs at 15–17, DIRECTV, LLC v. Hall, 138 S. Ct. 635 (July 2017) (No. 16-1449).

163. *Id.* at 16.

164. *Id.*

165. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions.").

166. *See Salinas*, 848 F.3d at 140.

167. *Id.* at 142.

interpretation of the first prong's language, the food distributor risks joint employer liability for specifying when the cleaning contractor performs its work.

Conversely, regarding the first prong, the court states in its opinion " . . . or, put differently, [the putative employers] share or codetermine the *essential terms and conditions* of a worker's employment."[168] Under this interpretation, where "terms" and "conditions" are both used in a plural context, the court seems to imply that multiple facts pointing towards joint employment are required to link two putative joint employers together. Applying this language to the food distributor example, providing a two-hour window for the cleaner contractors to work may not be enough to establish liability because the food distributor is simply requiring one condition of the cleaners. The court attempts to reconcile these two conflicting points by elaborating on how future courts should apply the first prong, stating one factor in favor of joint employment may be enough in one particular case but not in a different case.[169]

Although the court attempts to clarify these two interpretations, future courts in the Fourth Circuit will inevitably have a difficult time applying this vague test. Consequently, businesses located in the Fourth Circuit are left with a confusing and unpredictable standard for complying with the FLSA. Because both current and projected costs affect almost every business decision, businesses forming new contractual agreements will have a more difficult time not only negotiating prices for goods and/or services, but also deciding whether entering into such a business agreement is worth the risk of additional liability under the FLSA. Specifically, at the outset of these relationships, businesses will have a difficult time predicting whether the particular contract terms will establish joint employment under the FLSA.

Moreover, the unpredictable aspects of this test—and how they affect business decisions—is only enhanced by the shifting political climate in Washington, D.C. During the Obama administration, the DOL issued two administrative interpretations regarding joint employment, which were seen by many as "employee-friendly."[170] The first administrative interpretation,

---

168. *Id.* at 139 (emphasis added).

169. *See id.* at 142 n.10 (reiterating that joint employment analysis is "highly factual" and "while one factor supported by significant facts pointing to two or more entities' codetermination of the key terms and conditions of a worker's employment may be sufficient to establish that the entities are joint employers, another factor with weaker factual support may not be").

170. Michael Cardman, *DOL Withdraws Guidance on Joint Employment and Independent Contractors*, XPERTHR (June 14, 2017), https://www.xperthr.com/news/dol-withdraws-guidance-on-joint-employment-and-independent-contractors/26468/?keywords=joint+employment.

issued in 2015, used the "economic dependence" approach to determine whether an individual was an employee or independent contractor; many saw this as creating a presumption of employment even where an apparent independent contractor relationship existed.[171] In 2016, the DOL introduced a second interpretation, perhaps even more detrimental to businesses, which stated that joint employment often exists when businesses use third-party management companies, staffing agencies, and independent contractors.[172]

First, it is important to note that both of these administrative interpretations were issued by the DOL while litigation in *Salinas* was occurring. Second, these interpretations may have had at least some effect on the test adopted by the *Salinas* court.[173] That being said, approximately four months after *Salinas* was decided, the DOL withdrew both administrative interpretations.[174] Furthering the political effect argument, both of these DOL interpretations were withdrawn just months after President Trump took office.[175] Finally, although administrative interpretations do not bind courts or change existing case law, the withdrawal of these proposed interpretations may provide at least some guidance as to the direction DOL policy on joint employment is headed, especially if the Trump administration continues for a second term.[176]

The shifting political climate leads to unpredictability for how joint employment cases will be decided in the future—and consequently—may force businesses to forgo longer contractual relationships in favor of shorter relationships. For example, suppose a general contractor in the construction industry has a choice of a five or ten-year contractual agreement with a subcontractor performing electrical work. The general contractor obviously would like to ensure that the subcontractor provides quality work, but in the current state, the general contractor may risk joint employer liability if it engages in too much quality control oversight. Therefore, instead of becoming directly involved in the quality control of the subcontractor's work, the general contractor may be forced to pay the subcontractor more money to ensure the subcontractor employs its own quality control expert. As a result, the general contractor may seek a shorter contract term with the hope that new

171. *Id.*

172. *Id.*

173. *See id.* ("The interpretations had repackaged existing case law and regulations . . . .").

174. U.S. Dep't of Labor, Wage & Hour Div., Administrator Interpretations Letter—Fair Labor Standards Act, https://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm#foot (last visited May 8, 2019) [hereinafter Administrator Interpretations Letter].

175. Ryan Teague Beckwith, *The Year in Trump: Memorable Moments from the President's First Year in Office*, TIME (Jan. 11, 2018), http://time.com/5097411/donald-trump-first-year-office-timeline.

176. *See* Administrator Interpretations Letter, *supra* note 174.

DOL policies will result in a more business-friendly environment in the near future. If such a result occurs, the general contractor, by entering into a shorter five-year contract with the subcontractor, would be able to avoid the extra oversight costs for the last five years of the originally planned ten-year contract.

B. Uniformity

Moreover, the *Salinas* standard impairs large corporations' ability to operate uniformly, both inside and outside of the Fourth Circuit, because this decision leads to a circuit split regarding joint employment. Large corporations often set companywide policies and procedures because business structures often make it "impractical or impossible . . . to adopt different contractual arrangements in different circuits."[177] Consequently, in order for large corporations to comply with the *Salinas* standard and maintain companywide procedures, they may be forced to adopt procedures to comply with the joint employment standard set by the Fourth Circuit.

On the same day as the *Salinas* decision, the Fourth Circuit applied its new test to a similar FLSA joint employment case, which illustrated how *Salinas* threatens uniformity in employment practices for large businesses.[178] In *Hall v. DIRECTV, LLC*, the Fourth Circuit reversed a district court's grant of summary judgment in favor of the defendant company.[179] DIRECTV, the largest satellite television provider in the nation, routinely contracted with intermediary entities, or subcontractors, for installation services.[180] These subcontractors then directly hired technicians across the country to install DIRECTV's products for its customers.[181] The plaintiffs, who worked as installation technicians for DIRECTV's subcontractors, brought a joint employment suit under the FLSA, claiming that they did not receive overtime pay despite working in excess of forty hours weekly.[182]

Applying the *Salinas* factors, the court held in favor of the plaintiffs, reasoning that DIRECTV "dictated nearly every aspect of [the] Plaintiffs' work through its agreements with the various providers that directly employed [the] technicians."[183] This case shows the indirect and negative effects that

---

177. Br. of U.S. Chamber of Commerce, HR Policy Ass'n et al. in Supp. of Pet'rs at 12, DIRECTV, LLC v. Hall, 138 S. Ct. 635 (July 6, 2017) (No. 16-1449) [hereinafter Brief II].

178. *See* Hall v. DIRECTV, LLC, 846 F.3d 757, 767–69 (4th Cir. 2017).

179. *Id.* at 779.

180. *Id.* at 761.

181. *Id.*

182. *Id.* at 763.

183. *Id.* at 762.

Salinas may have on uniformity in large companies.[184] Specifically, companies that operate throughout the United States may be forced to comply with the Fourth Circuit's new joint employment standard to maintain consistent companywide policies and procedures.[185]

C. Traditional Business Relationships

Traditional business relationships, such as franchise, independent contracting, and third-party arrangements, face the toughest challenges in light of the *Salinas* decision; the court even recognized how their decision will undermine many of these relationships.[186] *Salinas* extended potential joint employer liability under the FLSA to disputes involving independent contractor relationships, which detrimentally affects businesses located and/or operating within the Fourth Circuit. These disputes, where neither putative employer actually employs a worker, have traditionally not been a threat to businesses because joint employer liability formerly required a finding that a worker was an employee of at least one of the entities.

The Fourth Circuit's decision to change the common law joint employment test—initially focusing on whether the relationship between the putative joint employers renders the worker an employee rather than an independent contractor—is likely based on a flawed interpretation of 29 C.F.R. § 791.2. The court states that "any joint employment inquiry must begin with the Department of Labor's regulations, which distinguish between 'separate' employment—when two persons or entities are 'entirely independent' with respect to a *worker's employment*—and 'joint' employment—when the two persons or entities are 'not completely disassociated.'"[187] In this excerpt, the court uses the phrase "a worker's employment" in order to reason that an employee-employer relationship has not already been established; however, this is in stark contrast to what the regulation actually states. In fact, the regulation does not use the word 'worker' at all and refers to the hypothetical individual as an 'employee' throughout.[188] Therefore, by implying that under the regulation, an employee-employer relationship may not already exist between the individual and at

184. *See* Brief II, *supra* note 177, at 12–13.
185. *Id.*
186. *See* Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 143–44 (4th Cir. 2017).
187. *Id.* at 141 (quoting 29 C.F.R. § 791.2(a) (2018) (emphasis added)).
188. *See* 29 C.F.R § 791.2.

least one of the employers, the court incorrectly extended joint employment liability to independent contracting relationships.[189]

Extending liability to independent contracting relationships will increase costs for businesses in one of two ways. First, businesses may elect to continue these relationships, risking joint employment liability under the FLSA and costs associated with such litigation. Alternatively, businesses may elect to avoid liability by hiring employees for jobs previously performed by independent contractors. The latter option will decrease efficiency and flexibility for businesses because many independent contracting relationships involve temporary and project-specific tasks. Businesses may also incur more costs associated with the recruiting, hiring, and paying of benefits to full-time employees. Finally, allowing independent contractors to bring a joint employment claim under the FLSA may increase litigation costs for businesses having to defend their relationships with another putative joint employer.

Franchising is another traditional business relationship that appears to be jeopardized by *Salinas*. A customary franchise scheme "operates under a marketing plan or system as designed and prescribed by the franchisor."[190] In order for the franchisee to take advantage of the franchisor's successful business model, the franchisee needs guidance to adhere to that model.[191] Thus, almost all franchising relationships require the franchisor to have at least some degree of control over the franchisee.[192]

The Fourth Circuit's low threshold for joint employment liability under the FLSA, specifically the court's "not completely disassociated" language,[193] threatens franchise relationships because of the inherent control aspect of these relationships. Franchisors are left with a difficult strategic decision. They can either risk joint employment liability by controlling the franchisee or risk diminution of their brand by exerting minimal control.[194] If franchisors elect to risk liability, franchisees may see a spike in "franchise fees/royalties and insurance premiums."[195] On the other hand, if they elect to limit control,

---

189. *See* Murphy v. Heartshare Human Servs. of N.Y., 254 F. Supp. 3d 392, 397–98 (E.D.N.Y. 2017) (interpreting the 1958 DOL regulation to require an employee-employer relationship before two entities can be held liable).

190. *Joint Employer Liability: How Many Employees Does an Employer Have?*, AM. BAR ASS'N (Apr. 21, 2016, 1:00 PM), https://www.americanbar.org/content/dam/aba/administrative/labor_law/cle_materials/LL1604JEL_Materials.authcheckdam.pdf.

191. *Id.*

192. *See id.*

193. *See* Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 139 (4th Cir. 2017).

194. *Joint Employer Liability: How Many Employees Does An Employer Have?*, *supra* note 190.

195. *Id.*

the entire franchise model may fail, the company's brand may diminish, and the overall value of the company may decrease.[196] Thus, the *Salinas* decision has exacerbated concerns over the effects that it will have on the traditional franchise model, particularly franchise relationships within the Fourth Circuit.

V. CONCLUSION

In short, the Fourth Circuit's expansive joint employer test—adopted in *Salinas v. Commercial Interiors*—will completely change how courts within the Fourth Circuit decide these disputes, departing from a common approach adopted by every other circuit in the United States. The *Salinas* court adopted a horizontal joint employment approach by focusing the overall inquiry on the relationship between the putative joint employers instead of the relationship between a worker and one putative employer.[197] This analytical change—along with the court's reliance on the "not completely disassociated" language from the DOL regulation—appears to establish an unprecedently low standard, and may hurt business practices both within and outside of the Fourth Circuit. *Salinas* hurts business practices because its low and unclear threshold leads to unpredictably for business decision-making and threatens to destabilize many traditional business relationships throughout the states of the Fourth Circuit.

196. *See id.*
197. *See Salinas*, 848 F.3d at 140–42.