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## Keeping FLSA's Promises: The Third Circuit Extends the Law's Reach to More Joint Employers, Successors, and Supervisors in *Thompson v. Real Estate Mortgage Network*

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KEEPING FLSA'S PROMISES: THE THIRD CIRCUIT EXTENDS THE  
LAW'S REACH TO MORE JOINT EMPLOYERS, SUCCESSORS, AND  
SUPERVISORS IN *THOMPSON v. REAL ESTATE MORTGAGE NETWORK*

JOHN M. D'ELIA\*

"Sometimes I'd work 60, even 90 days in a row . . . They never paid overtime."<sup>1</sup>

- Guadalupe Rangel  
Mira Loma, California

I. INTRODUCTION

Guadalupe Rangel spent most of his waking hours unloading products for the largest private employer in the world—Walmart.<sup>2</sup> Mr. Rangel worked up to eleven hours per day and often seven days per week for months on end.<sup>3</sup> The family that owns Walmart boasts a cumulative wealth greater than that of 42% of American households combined.<sup>4</sup> Mr. Rangel, on the other hand, alleged he never received overtime pay after putting in seventy-hour work weeks unloading Walmart products.<sup>5</sup> At the warehouse where Mr. Rangel worked, Walmart dictated the work done, determined workers' schedules, set accuracy and productivity standards, oversaw training programs, supervised workers, maintained staffing reports, and created budgets for labor costs.<sup>6</sup> However, on paper, Walmart was not Mr. Rangel's employer.<sup>7</sup> A company called Schneider

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\* J.D. Candidate, 2016, Villanova University School of Law; B.A. 2011, George Washington University. This Casebrief is dedicated to Anthony J. D'Elia and his unyielding hope in the labor and civil rights movements. Additionally, this Casebrief would not have been possible without the love and support of my parents, John and Patricia D'Elia.

1. Steven Greenhouse, *More Workers Are Claiming 'Wage Theft'*, N.Y. TIMES, Aug. 31, 2014, <http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html> [<https://perma.cc/52HK-LQL5?type=source>] (quoting Mr. Rangel's account of alleged overtime violations at Schneider Logistics warehouse where workers unloaded products to be sold at Walmart stores).

2. *See id.* (describing Mr. Rangel's account of his work schedule and responsibilities).

3. *See id.*

4. *See* Josh Bivens, *Another Measure of the Staggering Wage Gaps in the United States: Comparing Walton Family Wealth to Typical Households by Race and Ethnicity*, ECON. POL'Y INST. (Oct. 13, 2014, 10:00 AM), <http://www.epi.org/blog/measure-staggering-wage-gaps-united-states/> [<http://perma.cc/3HE4-FWFH>] (discussing wealth concentration in U.S. economy by relying on data from Federal Reserve's Survey of Consumer Finances and Forbes 400 and comparing Walton family wealth to combined wealth of U.S. households by race and ethnicity).

5. *See* Greenhouse, *supra* note 1 (noting Mr. Rangel's allegations of "wage theft" brought on by working up to eleven hours per day and sometimes seventy hours per week).

6. *See* Memorandum of Points & Auths. in Support of Plaintiffs' Motion for Leave to File Third Am. Comp. at 9–10, *Carrillo v. Schneider Logistics, Inc.*, No. CV 11–8557 CAS (DTBx) (C.D. Cal. Nov. 30, 2012) (arguing Walmart is joint employer of warehouse workers at Schneider Logistics and thus is jointly and severally liable for wage and hour violations).

7. *See id.* (describing direct employment of workers by Schneider Logistics while

Logistics, Inc. directly employed Mr. Rangel, and its warehouse's only client was Walmart.<sup>8</sup>

Generally, the Fair Labor Standards Act (FLSA) entitles employees to receive “time and a half” pay (one and one-half the regular rate of pay) for any hours they work in excess of forty per week, and employees can sue employers who fail to compensate them for their overtime work.<sup>9</sup> In the Ninth Circuit, where Mr. Rangel's case unfolded, courts apply a test outlined in *Bonnette v. California Health & Welfare Agency*<sup>10</sup> to determine whether a company is a “joint employer” of workers by virtue of its control over employment matters.<sup>11</sup> This “*Bonnette*” test empowers aggrieved workers to sue companies other than their immediate employer for wage and hour violations when such companies have significant influence, even *indirect* influence, over workers.<sup>12</sup> Imposing such liability empowers workers to vindicate their workplace rights in reality; often companies without a formal employment relationship with employees exert tremendous power over working conditions and precipitate FLSA violations.<sup>13</sup> When Mr. Rangel and other plaintiffs sued Schneider and Walmart, the companies settled with the plaintiffs for \$21 million dollars, which covered 1,800 Schneider warehouse workers.<sup>14</sup>

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Walmart exerts considerable authority over workers' terms and conditions of employment).

8. *See id.* at 9–10.

9. *See* 29 U.S.C. § 207(a)(1) (2012) (requiring employers to compensate employees at one and one-half rate of pay for any hours worked in excess of forty per week).

10. 704 F.2d 1465 (9th Cir. 1983).

11. *See id.* at 1470 (articulating Ninth Circuit's test for determining whether company is joint employer of workers liable for FLSA violations, emphasizing hiring and firing authority, supervisory authority, authority to control schedules and employment, power to set rate and method of payment, and maintenance of employment records), *disapproved by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

12. *See id.* at 1469–70 (stressing breadth of FLSA's definition of “employer”—which includes individuals acting indirectly in interest of employers—and quoting regulations by Department of Labor, which enforces FLSA, that provide hypothetical examples of indirect employment relationships that meet FLSA's liberal definition, including company that controls another company that immediately employs workers).

13. *See, e.g.,* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 145 (2d Cir. 2008) (finding hospital was joint employer of nurse despite that nurse was directly employed and paid by third party agencies because “(1) [the nurse] worked on [the hospital's] premises using [its] equipment; (2) no referral agency shifted its employees as a unit from one hospital to another, but instead each assigned health care workers, including [the nurse], to the same facility whenever possible to ensure continuity of care; (3) [the nurse] performed work integral to [the hospital's] operation; (4) [the nurse's] work responsibilities at [the hospital] remained the same regardless of which agency referred her for a particular assignment; (5) [the hospital] effectively controlled the on-site terms and conditions of [the nurse's] employment; and (6) [the nurse] worked exclusively for [the hospital]”), *abrogation recognized by* Adorno v. Port Auth. of N.Y. & N.J., 685 F. Supp. 2d 507 (S.D.N.Y. 2010). The hospital in *Barfield* had the power to hire and fire nurses referred by agencies, although “ultimate” authority rested with the agencies. *See id.* at 144. Similarly, the court observed that the hospital exercised some influence over pay, because it effectively determined employees' hours and capped their pay when it set the hourly rates referral agencies would receive. *See id.* at 144–45.

14. *See* Ricardo Lopez, *Workers Reach \$21-Million Settlement Against Wal-Mart, Warehouses*, L.A. TIMES, May 14, 2014, <http://www.latimes.com/business/la-fi-wal-mart->

In *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*<sup>15</sup> (*Enterprise*), the Third Circuit adopted aspects of the *Bonnette* test to ensure plaintiffs like Mr. Rangel may hold indirect employers accountable for wage theft.<sup>16</sup> As a result, companies exercising both direct and indirect control over workers may be deemed joint employers liable to workers for violations of the FLSA.<sup>17</sup>

In 2014, the Third Circuit reaffirmed its *Enterprise* test in *Thompson v. Real Estate Mortgage Network*.<sup>18</sup> Additionally, the *Thompson* court adopted new FLSA tests with respect to successor and supervisor liability, which will similarly expand the universe of entities responsible for FLSA violations.<sup>19</sup> *Thompson* extended the FLSA's reach in the Third Circuit to cover more employers, a positive development that comports with the text and underlying policies of the FLSA.<sup>20</sup> *Thompson* also has important implications in light of the unprecedented growth in subcontracting and other multi-layered

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warehouse-workers-20140515-story.html [http://perma.cc/ENM6-FCNZ] (describing settlement between defendants Walmart and Schneider Logistics and plaintiff-warehouse workers); see also Carrillo v. Schneider Logistics, Inc., No. CV 11-8557 CAS (DTBx), 2013 WL 140214, at \*6 (C.D. Cal. Jan. 7, 2013) (granting plaintiffs' motion for leave to amend complaint to include Walmart as defendant). Walmart argued that it should not be deemed a joint employer under the *Bonnette* test, but the judge found this argument "more properly addressed on a motion to dismiss." See *id.* at \*5.

15. 683 F.3d 462 (3d Cir. 2012).

16. See generally *id.* at 469–70 (articulating test for joint employment and acknowledging that its test is "melding" of *Bonnette* test from Ninth Circuit and test developed by Western District of Pennsylvania in *Lewis v. Vollmer*, No. 05–1632, 2008 WL 355607 (W.D. Pa. Feb. 7, 2008), which found joint employment only under more limited circumstances involving only direct control over employment matters in context of Title VII and Age Discrimination in Employment Act claims).

17. See *id.* at 469 (articulating a standard to determine whether a company is joint employer under FLSA, considering "1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes"). The *Enterprise* court stressed that this list is not exhaustive and other indicia of significant control may also be considered. See *id.*

18. 748 F.3d 142, 148–49 (3d Cir. 2014) (applying *Enterprise* test to mortgage underwriter's claim that two real estate companies were joint employers and thus jointly and severally liable for FLSA violations she suffered).

19. See *id.* at 152–54 (adopting broad federal common law standard for successor liability in context of FLSA claims and extending prior test for supervisor liability under Family and Medical Leave Act (FMLA) to FLSA claims). For a further discussion on both of these standards, see *infra* notes 108–30 and accompanying text.

20. Compare, e.g., *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 815 (1981) (delineating traditional, narrow New Jersey state law standard for successor liability), with *Thompson*, 748 F.3d at 150–52 (delineating and adopting federal common law standard for successor liability in context of FLSA claims, which extends liability to more successors than state law standard to further important "employment-related policies"). See also 29 U.S.C. § 202 (2012) (declaring far-reaching United States industrial policy to eliminate burdens and obstructions to commerce posed by standard terms and conditions of employment); *id.* § 203(d) (defining "employer" to include employers exerting indirect control over employees).

employment relationships because it will subject more of these relationships to FLSA's protections.<sup>21</sup>

Part II of this Casebrief provides background information on the substantive provisions and policy purposes of the FLSA.<sup>22</sup> Additionally, Part II traces the development of case law in the Third Circuit regarding the FLSA's application to corporations and individuals outside the immediate employment relationship.<sup>23</sup> Part III explores the facts, procedural history, and holding of *Thompson*.<sup>24</sup> Part IV concludes that *Thompson* appropriately extended the FLSA's reach to subject more employers to liability for wage theft consistent with the statutory text and underlying policies.<sup>25</sup> Part V provides advice to practitioners representing employees and employers in the Third Circuit after *Thompson*.<sup>26</sup> Part VI states a brief conclusion.<sup>27</sup>

## II. BACKGROUND

Congress enacted the FLSA in the wake of the Great Depression to improve labor standards by establishing minimum wage and overtime pay requirements.<sup>28</sup> These policies were intended to spur macroeconomic change and ensure workers fair pay.<sup>29</sup> Courts have interpreted the FLSA to apply to an evolving range of "employers" since its enactment, including joint employers, successors, and individual supervisors.<sup>30</sup>

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21. See, e.g., CATHERINE RUCKELSHAUS ET AL., NAT'L EMP'T LAW PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 19 (2014), available at <http://www.nelp.org/page/-/Justice/2014/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf?nocdn=1> [<http://perma.cc/27KS-AXLD>] (reporting staffing industry "doubl[ed] as a share of overall employment" during 1990s and in 2013, accounted for 3.4 million jobs or 2.5% of all U.S. employment); see also Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA (June 27, 2013, 7:00 AM), <http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed> [<http://perma.cc/A3FZ-BEK3>] (reporting American Staffing Association estimation that staffing jobs account for up to 10% of all U.S. employment).

22. For a background discussion of the FLSA, see *infra* notes 31–42 and accompanying text.

23. For a discussion of Supreme Court and Third Circuit case law on the FLSA's definition of employer, see *infra* notes 43–83 and accompanying text.

24. For a detailed explanation of the Third Circuit's decision in *Thompson*, see *infra* notes 84–130 and accompanying text.

25. For a critical analysis of the Third Circuit's holding in *Thompson*, see *infra* notes 131–78 and accompanying text.

26. For practical advice for practitioners, see *infra* notes 182–206 and accompanying text.

27. For a conclusion of this Casebrief, see *infra* notes 207–10 and accompanying text.

28. For a discussion of the history of FLSA, see *infra* notes 31–42 and accompanying text.

29. For a discussion of FLSA's industrial policy aims, see *infra* notes 36–42 and accompanying text.

30. For a discussion of judicial interpretation of FLSA to apply to various employer entities, see *infra* notes 43–83 and accompanying text.

A. *FLSA: Groundbreaking Labor Protections and Far-Reaching Industrial Policy*

The FLSA is a landmark piece of New Deal legislation enacted by Congress in 1938.<sup>31</sup> For the first time, the law established a federal minimum wage and mandated overtime compensation.<sup>32</sup> The FLSA's overtime provisions require employers to pay covered employees "time and a half" for hours worked in excess of forty hours per week.<sup>33</sup> The FLSA provides a private cause of action to employees who suffer a statutory violation.<sup>34</sup> Employees can recover unpaid compensation in addition to an equivalent amount in liquidated damages, attorneys' fees, and costs.<sup>35</sup>

The FLSA not only reflected the New Deal Congress's determination to protect workers from "sweatshop" conditions, but also represented groundbreaking industrial policy calculated to bring about macroeconomic changes.<sup>36</sup> Congress saw the minimum wage as a means of eliminating unfair business competition rooted in substandard wages.<sup>37</sup> In Congress's view, that

31. See 29 U.S.C. § 201 (2012) (crediting FLSA as enacted on June 25, 1938).

32. See *id.* §§ 206–212 (establishing minimum wage, maximum hours, and abolishing child labor). Currently, the minimum wage rate required by FLSA is \$7.25 per hour. See *id.* § 206(a) ("Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages . . . not less than . . . \$7.25 an hour . . .").

33. See *id.* § 207(a)(1) ("[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.").

34. See *id.* § 216 ("Any employer who violates the provisions of [the minimum wage or overtime provisions] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.").

35. See *id.* (providing courts shall "in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action").

36. See *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. DEP'T LABOR, <http://www.dol.gov/whd/homecare/faq.htm> [<http://perma.cc/YR7A-A9A4>] (last visited Nov. 25, 2015) (describing Congress's goals in enacting FLSA: "to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40").

37. See 81 CONG. REC. 4983 (1937) (statement of Pres. Roosevelt) (calling Congress to pass legislation "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work"). President Roosevelt's message to Congress "served as the inspiration" for the enactment of the FLSA. See *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 n.8 (1987) (emphasizing importance of presidential message); see also 29 U.S.C. § 202 (declaring it to be U.S. policy to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[,] which "constitutes an unfair method of competition in commerce[,] and has the effect of "burdening and obstructing commerce").

sort of competition harmed more efficient firms that derived their profits from innovation and superior products or services by permitting inefficient firms to survive by eroding workers' wages.<sup>38</sup> Additionally, Congress sought to stimulate growth and support markets for the products of industry by driving up workers' wages, and thus their purchasing power as consumers.<sup>39</sup>

To complement the FLSA's minimum wage policy, Congress enacted the overtime compensation requirement for two purposes.<sup>40</sup> Congress sought both to protect workers from exploitative "overwork" and to reduce unemployment.<sup>41</sup> By making "overwork" costly for employers, Congress hoped to spread work hours across more employees and thus increase the employment rate.<sup>42</sup>

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38. See *Amendment of the Fair Labor Standards Act: Hearings Before a Subcomm. of the S. Comm. on Educ. & Labor on S. 1349*, 79th Cong. 847 (1945) (testimony of Chester Bowles, Adm'r, Office of Price Admin.) (describing Congress's rationale for establishing minimum wage: "[T]he Congress decided that it is against the public interest for business to operate on the sweat of exploited workers. Any employer so inefficient that he could stay in business only by paying sweatshop wages—like the employer who could stay in business only by operating an unsafe plant—was told that he did not belong in business."); see also Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 157 (1990) (contending minimum wage promotes "macroeconomic productivity" by "interfering" with low-wage labor markets that "disguise inefficiency, creating large profit margins that are due not to efficient production but to extreme exploitation"). Professor Linder further contends that this results in "forc[ing] out of business" inefficient, "low-productivity" firms that fail to become efficient or "modernize." See *id.* According to Professor Linder, the minimum wage may also be conceptualized as a corrective for a "market failure." See *id.* at 151 (internal quotations omitted). Firms employing workers at substandard wage rates had at least partially shifted the "minimum social cost of maintaining a worker" onto workers themselves or the public at large. See *id.*; see also 81 CONG. REC. 4983 (1937) (statement of Pres. Roosevelt) ("Enlightened business is learning that competition ought not to cause bad social consequences, which inevitably react upon the profits of business itself."). The FLSA forces firms to "internalize" these costs. Linder, *supra*, at 151.

39. See 81 CONG. REC. 4983 (1937) (statement of Pres. Roosevelt) (urging Congress to "take further steps to reduce the lag in the purchasing power of industrial workers and to strengthen and stabilize the markets for the farmers' products"); see also 82 CONG. REC. 11 (1937) (statement of Pres. Roosevelt) (calling on Congress to pass legislation "to maintain wage income and the purchasing power of the Nation against recessive factors in the general industrial situation" including "[t]he exploitation of child labor and the undercutting of wages and the stretching of the hours of the poorest-paid workers in periods of business recession[,] which "have a serious [detrimental] effect on buying power").

40. See 81 CONG. REC. 4983–84 (1937) (statement of Pres. Roosevelt) (urging Congress to reduce excessive work hours in industry, which President Roosevelt hoped would spread employment).

41. See *id.* at 4984 (criticizing practice of "stretching workers' hours" and "overwork" and stating "[r]easonable and flexible use of the long-established right of government to set and to change working hours can, I hope, decrease unemployment in those groups in which unemployment today principally exists"); see also 82 CONG. REC. 11 (1937) (statement of Pres. Roosevelt) (urging Congress to "protect workers unable to protect themselves from . . . excessively long hours").

42. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942) ("By this [overtime compensation] requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in

B. *FLSA's Evolving Reach: Third Circuit and Supreme Court Precedents Cast a Wide Net in Defining "Employer"*

In service of its broad policy agenda, the FLSA expansively defines employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . .”<sup>43</sup> This definition of “striking breadth” looks to the “economic reality” of the employment relationship rather than “technical concepts.”<sup>44</sup> Accordingly, the definition encompasses work relationships outside the traditional, formalistic conception of the employer-employee relationship.<sup>45</sup> Corporate officers, supervisors, and businesses that directly or indirectly control workers may also fall within the definition, sometimes simultaneously.<sup>46</sup> For example, a company may hire a subcontractor to provide labor without hiring any of the subcontractor's

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avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning.”), *superseded by statute* Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262, as stated in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

43. See 29 U.S.C. § 203(d) (2012).

44. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (basing holding on propositions that “‘economic reality’ rather than ‘technical concepts’ is to be the test of employment”); *Enterprise*, 683 F.3d 462, 467 (3d Cir. 2012) (characterizing Supreme Court precedent on FLSA as recognizing definition of employer of “striking breadth” (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1992)) (internal quotation marks omitted)).

45. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) (“[The FLSA] contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category.”). Similarly, the FLSA defines “employ” and “employee” expansively. See 29 U.S.C. § 203(e)(1), (e)(4)(A), (g) (providing “[t]he term ‘employee’ means any individual employed by an employer[,]” and “[e]mploy” includes to suffer or permit to work”). “Employ” in FLSA means only to “suffer or permit to work.” See *id.* A FLSA “employee” is “any individual employed by an employer.” See *id.* As the Supreme Court has observed, it would be difficult to imagine more inclusive definitions of “employ” and “employee.” See *United States v. Rosenwasser*, 323 U.S. 360, 362–63 (1945) (“A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words ‘each’ and ‘any’ to modify ‘employee,’ which in turn is defined to include ‘any’ employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the [FLSA] unless specifically excluded.”). Indeed, the Court acknowledged FLSA gave “employer” the “broadest definition that has ever been included in any one act.” See *id.* at 363 n.3. So long as a person works for another, he or she is an employee, regardless of whether or not the employer actively hired or instructed them; “suffer or permit to work” is all the FLSA requires. See 29 U.S.C. § 203(g). All employees, no matter how they work or receive payment, are covered unless specifically excluded. See *Rosenwasser*, 323 U.S. at 363.

46. See, e.g., *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983) (holding corporate officers to be employers personally liable for FLSA violations); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (finding local public agencies to be joint employers of homecare workers they provided to eligible recipients by virtue of agencies’ “considerable control over the structure and conditions of employment,” their determining tasks and “number of hours” of each chore worker, and their supervision of chore workers in event of dispute with the recipients), *disapproved by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).



workers, signing their paychecks, or fixing their wages and benefits.<sup>47</sup> However, the client company may be deemed a joint employer if it sets work schedules, *influences* pay rates, or monitors workers' productivity.<sup>48</sup> In the case of Mr. Rangel presented in Part I, for instance, Walmart arguably did each of these.<sup>49</sup> When determining employer status, courts must always remain cognizant of the long-established rule that FLSA is to be "liberally construed."<sup>50</sup> To serve its broad policy agenda, the FLSA also imposes liability upon successor firms for their predecessors' violations in some circumstances.<sup>51</sup>

### 1. *Joint Employers: When Two Bosses Call the Shots*

Because the FLSA's conception of employment reaches beyond immediate, formal employment relationships, it is possible for two or more entities to be deemed "joint employers" of workers.<sup>52</sup> This is an important determination because, in addition to violations they commit themselves, joint employers are also jointly and severally liable for the FLSA violations of other joint employers.<sup>53</sup>

In 2012, the Third Circuit articulated its standard for joint employment under FLSA in *Enterprise*.<sup>54</sup> The *Enterprise* court blended the Ninth Circuit's

47. See, e.g., *Torres-Lopez v. May*, 111 F.3d 633, 642–44 (9th Cir. 1997) (finding grower was joint employer of farm workers hired by staffing firm when grower set harvest schedules, inspected work performed, communicated satisfaction with work, and increased rates to subcontractor for explicit purpose of increasing workers' pay during a "first picking," but did not actually hire workers, pay them, or directly supervise them daily, with court stressing such indicia of direct control are not essential and that indirect control may suffice to establish joint employment).

48. See *id.*

49. See *supra* notes 2–27 and accompanying text.

50. See *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983) ("[W]e adhere to the firmly-established guidon that the FLSA must be liberally construed to effectuate Congress' remedial intent."), *abrogated on other grounds by Reich v. Bay, Inc.*, 23 F.3d 110 (5th Cir. 1994); see also *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955) (recognizing that long history of Supreme Court precedents have given FLSA "liberal construction" guided by "practical considerations, not by technical conceptions").

51. See, e.g., *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763 (7th Cir. 2013).

52. See *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 148 (3d Cir. 2014) ("Under the FLSA, multiple persons or entities can be responsible for a single employee's wages as 'joint employers' in certain situations. One such scenario occurs where both employers 'exert significant control' over the employee, 'by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.'" (citations omitted)).

53. See *id.* (explaining liability that arises after a court finds entity to be joint employer of workers within FLSA's definition of employer).

54. See *Enterprise*, 683 F.3d 462, 468 (3d Cir. 2012). In *Enterprise*, the court examined a case involving assistant managers for Enterprise Holdings's subsidiaries. See *generally id.* The managers asserted Enterprise Holdings was a joint employer along with the subsidiaries. See *id.* at 464–65. The *Enterprise* court looked to the Third Circuit's *NLRB v. Browning-Ferris Indus. of Penn., Inc. (Browning-Ferris)*, 691 F.2d 1117 (3d Cir. 1982), standard as its analysis's "starting point." See *id.* at 468. In 1982, the Third Circuit's

*Bonnette* test with the more restrictive test from *Lewis v. Vollmer*<sup>55</sup> adopted by the Western District of Pennsylvania.<sup>56</sup> The *Lewis* test would have effectively required direct control of employment matters because its factors failed to leave room for indirect avenues of control as contemplated by the FLSA.<sup>57</sup> Consequently, the Third Circuit refused to adopt *Lewis* wholesale, finding it too narrow for the FLSA.<sup>58</sup>

To better conform *Lewis* to the FLSA, the Third Circuit adopted aspects of the *Bonnette* test into its new standard.<sup>59</sup> The result was a blended test, considering the alleged employer's:

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landmark decision in *Browning-Ferris* established a test for joint employment under the NLRA. See *Browning-Ferris*, 691 F.2d at 1122–23. The *Browning-Ferris* standard still guides the National Labor Relations Board's standard on joint employment relationships under the NLRA nationwide. See *Browning-Ferris Indus. of California*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (“Today, we restate the Board's joint-employer standard to reaffirm the standard articulated by the Third Circuit in [the] *Browning-Ferris* decision. . . . In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.”). According to the Third Circuit in *Browning-Ferris*, two or more entities are joint employers when they “share or co-determine those matters governing essential terms and conditions of employment.” *Browning-Ferris*, 691 F.2d at 1119, 1123 (finding joint employment of drivers by waste processing facility (BFI) and truck brokers after consideration of following facts: drivers wore BFI logo on clothing; brokers and BFI insured trailers; BFI determined drivers' start times; BFI approved drivers before hire; BFI directed drivers to perform certain tasks in certain spots; and BFI employee effectively terminated certain drivers). The Third Circuit in *Enterprise* noted the *Browning-Ferris* standard is consistent with the standard articulated by the Department of Labor (which enforces FLSA) regulations, which find joint employment “[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with another employer.” See *Enterprise*, 683 F.3d at 468 (alteration in original) (internal quotation marks omitted).

55. No. 05-1632, 2008 WL 355607 (W.D. Pa. Feb. 7, 2008).

56. See *Enterprise*, 683 F.3d at 470 (“Therefore, we hold that the test for ‘joint employer’ under the FLSA is as we have fashioned it, a melding of the modified *Lewis* test and the *Bonnette* test, consistent with those considerations of the real world where such additional economic concerns are prominent. We will refer to this test as the *Enterprise* test . . .”). The *Lewis* test from the Western District considers the following factors when determining joint employer status: “(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; 2) day-to-day supervision of employees, including employee discipline; and 3) control of employee records, including payroll, insurance, taxes and the like.” *Lewis*, 2008 WL 355607, at \*4 (quoting *Cella v. Villanova Univ.*, No. CIV.A 01–7181, 2003 WL 329147, at \*9 (E.D. Pa. Feb. 12, 2003), *aff'd* 113 Fed. App'x 454 (3d Cir. 2004)) (internal quotation marks omitted).

57. See *Enterprise*, 683 F.3d at 469 (“A simple application of the *Lewis* test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well. We therefore conclude that while the factors outlined today in *Lewis* are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.”).

58. See *id.*

59. See *id.*

1) authority to hire and fire the relevant employees; 2) authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) involvement in day-to-day employee supervision, including employee discipline; and 4) actual control of employee records, such as payroll, insurance, or taxes.<sup>60</sup>

The court stressed this list is not exhaustive and courts may consider other indicia of control.<sup>61</sup>

The *Enterprise* test's relative breadth is illustrated by its consideration of any "indicia of 'significant control'" to show joint employment, and mere "involvement" in supervision and discipline as opposed to actual supervisory power.<sup>62</sup> "Significance," however, injects an important limitation: while indirect or direct control may suffice, such control must be significant.<sup>63</sup> For example, a parent company's nonbinding advice to subsidiaries about how to operate under its brand is something analogous to the suggestions of a "third party consultant" and insufficient to show joint employment in the Third Circuit.<sup>64</sup> In the final analysis, a joint employment determination "must be based on a consideration of the total employment situation and the economic realities of the work relationship."<sup>65</sup>

## 2. Successors: FLSA Liability as a Hot Potato

Generally, under most states' laws, successor corporations are "legally distinct" from their predecessors.<sup>66</sup> Successors only assume the debts or

60. *Id.* at 469.

61. *See id.* at 469–70 (stressing *Enterprise* test is not to be "blindly applied," and that "other indicia of significant control" may suffice to establish joint employment "when incorporated with the individual factors we have set forth," and in view of "economic realities of the work relationship" (internal quotation marks omitted)).

62. *See id.* at 469 (articulating non-exhaustive factors considered in Third Circuit's *Enterprise* test).

63. *See id.* at 468 ("We conclude that where two or more employers exert significant control over the same employees—[whether] from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute joint employers under the FLSA." (alteration in original) (internal quotation marks omitted)).

64. *See id.* at 471 (concluding *Enterprise* Holdings lacked sufficient authority to be deemed a joint employer of its subsidiaries' workers and comparing parent company's control to "third-party consultant").

65. *See id.* at 469 (quoting *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)) (internal quotation marks omitted) (finding *Enterprise* Holding not a joint employer). The Ninth Circuit found that *Enterprise* Holdings exercised "no control, let alone significant control." *See id.* at 471.

66. *Wilson v. Fare Well Corp.*, 356 A.2d 458, 463 (N.J. Super. Ct. Law Div. 1976) (articulating general rule that successor corporations are completely distinct from predecessors and delineating factors which could justify exception rendering successors liable for debts of predecessors under New Jersey law). In *Wilson*, a corporate defendant that bought a predecessor's assets, assumed its contractual and property liabilities, and maintained its

liabilities of predecessor entities when (1) the purchasing corporation expressly or impliedly agreed to assume debts or liabilities, (2) the transaction is tantamount to a merger of the successor and predecessor, (3) the successor is a “mere continuation” of the predecessor, (4) the transaction is entered into fraudulently to escape liabilities, or (5) there was inadequate consideration for the sale or transfer.<sup>67</sup>

In recent decades, however, federal courts have developed a broader standard for successor liability, specifically within the context of employment claims.<sup>68</sup> The federal standard holds more successor entities liable for predecessor violations than state common law rules in order to further federal labor policies.<sup>69</sup> Under the federal standard, courts may find successors liable considering merely “(1) continuity in operations and work force of the successor and predecessor employers; (2) notice to the successor-employer of its predecessor’s legal obligation; and (3) ability of the predecessor to provide adequate relief directly.”<sup>70</sup>

The Supreme Court first applied the federal standard to claims under the Labor Management Relations Act (LMRA) and the National Labor Relations Act (NLRA).<sup>71</sup> The NLRA seeks to promote labor peace by guaranteeing workers full freedom of association and the right to organize into unions and by imposing upon employers a duty to bargain collectively with those unions.<sup>72</sup> In

personnel was deemed a “continuation” of the predecessor, and thus liable for predecessor tortious conduct in allegedly producing a defective product. *See generally id.*

67. *See id.* Under New Jersey law, a “mere continuation” is established by the following factors: “continuity of ownership; continuity of management; continuity of personnel; continuity of physical location, assets and general business operations; and cessation of the prior business shortly after the new entity is formed,” and “the extent to which the successor intended to incorporate [the predecessor] into its system with as much the same structure and operation as possible,” thus determining “whether the purchaser holds itself out to the world as the effective continuation of the seller.” *See Bowen Eng’g v. Estate of Reeve*, 799 F. Supp. 467, 487–88 (D.N.J. 1992) (alteration in original) (citations omitted) (internal quotation marks omitted), *aff’d*, 19 F.3d 642 (3d Cir. 1994). The court stressed this standard does not require that all factors are present—only some. *See id.*

68. *See, e.g., Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 150 (3d Cir. 2014) (describing “federal common law standard for successor liability that has slowly gained traction in the field of labor and employment disputes over the course of almost fifty years”).

69. *See id.* at 150–51 (noting federal standard “presents a lower bar to relief than most state jurisprudence,” in order to “impos[e] liability upon successors beyond the confines of the common law rule when necessary to protect important employment-related policies” (alteration in original) (quoting *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 94 (3d Cir.2011)) (internal quotation marks omitted)).

70. *See id.* at 150–51 (quoting *Brzozowski v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 178 (3d Cir. 2004)) (internal quotation marks omitted).

71. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181–85 (1973) (applying federal common law standard to NLRA claims); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548–51 (1964) (applying federal common law standard to LMRA claims).

72. *See 29 U.S.C. § 151* (2012) (finding “the denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce” and declaring it U.S. policy to eliminate these problems by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-

the view of the Court, employees expect that NLRA violations, which disrupt their associational rights, will be remedied regardless of whether a predecessor or successor is in charge.<sup>73</sup> Further, such remedies may usually be achieved “at minimal cost” to successor employers.<sup>74</sup> The Court noted that employees and their unions typically are not involved in corporate negotiations to sell a business and therefore may be greatly “disadvantage[d].”<sup>75</sup> After weighing companies’ interest in being able to restructure their businesses with employees’ interest in “some protection . . . from a sudden change in the employment relationship,” the Court decided to apply the federal standard to NLRA claims.<sup>76</sup>

The Third Circuit later extended the federal standard to claims under Title VII and the Employee Retirement Income Security Act (ERISA), noting the policy agendas underlying those statutes are similarly broad and justify application of the standard.<sup>77</sup> Finally, the Ninth and Seventh Circuits have extended the federal standard to the FLSA claims as the “logical extension of existing case law.”<sup>78</sup>

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organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection”); *id.* § 157 (providing “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”); *id.* § 158(a)(5) (providing “[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees”).

73. See *Golden State Bottling Co.*, 414 U.S. at 184 (finding “[t]o the extent that the employees’ legitimate expectation is that the unfair labor practices will be remedied, a successor’s failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action[.]” and noting successors may benefit from predecessors’ NLRA violations if employees identify labor policies of successor with those of predecessor and refrain from protected activities out of fear).

74. See *Brzozowski*, 360 F.3d at 177 (citing *Golden State Bottling Co.*, 414 U.S. at 168) (discussing protection for employees’ associational rights and promotion of labor peace are important goals imposing only minimal costs on successors and noting costs associated with liability for NLRA violations can be taken into account during corporate purchase negotiations and may affect purchase price or be covered by indemnity clause).

75. See *John Wiley & Sons, Inc.*, 376 U.S. at 549.

76. See *id.*

77. See *Einhorn v. M.L. Ruberton Const. Co.*, 632 F.3d 89, 96 (3d Cir. 2011) (applying federal common law standard for successor liability to ERISA claims finding that policies underlying ERISA, protecting pension plan participants and their beneficiaries, “are no less important, and no less compel the imposition of successor liability than do the policies animating the NLRA, Title VII, or the other statutes to which the doctrine has been extended” (internal quotation marks omitted)); *Brzozowski*, 360 F.3d at 177–79 (applying federal common law standard for successor liability to employment discrimination claims under Title VII of Civil Rights Act of 1964, noting similarities between Title VII and NLRA in that both emphasize protecting and “providing relief for the victims of prohibited practices . . . sufficient . . . to warrant imposing liability on a corporate successor for Title VII violations of the predecessor company” (quoting *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1091 (6th Cir. 1974)) (internal quotation marks omitted)).

78. See *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 151 (3d Cir. 2014). See generally *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 765–67 (7th Cir. 2013); *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995).

### 3. *Supervisors: When the Wage Thief is a Person*

Individuals are *personally* liable to workers for FLSA violations when they commit the violations while “acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>79</sup> In *Haybarger v. Lawrence County Adult Probation & Parole*<sup>80</sup>, the Third Circuit articulated a standard for individual liability under the Family and Medical Leave Act (FMLA), noting that statute’s close similarity to the FLSA.<sup>81</sup> The court held “an individual is subject to FMLA liability when he or she exercises ‘supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation’ while acting in the employer’s interest.”<sup>82</sup> Sufficient “supervisory authority” exists under this standard when a supervisor “independently exercise[s] control over the work situation.”<sup>83</sup>

### III. *THOMPSON V. REAL ESTATE MORTGAGE NETWORK: THE THIRD CIRCUIT REAFFIRMS ENTERPRISE AND ADOPTS NEW TESTS ON SUCCESSOR AND SUPERVISOR LIABILITY*

In *Thompson*, the Third Circuit significantly expanded the FLSA’s reach to encompass more employment relationships. The court considered a claim by Patricia Thompson, an employee of one “defunct” business and its successor.<sup>84</sup> Ms. Thompson sued for alleged overtime violations and sought to hold both entities liable and two co-owners personally liable as supervisors.<sup>85</sup> Vacating the lower court’s dismissal of Thompson’s claims, the Third Circuit reaffirmed its test for joint employment established in *Enterprise* and adopted new tests with respect to successors’ and supervisors’ liability for FLSA violations.<sup>86</sup>

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79. See 29 U.S.C. § 203(a), (d) (2012) (defining “person” as “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons” and defining “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee”).

80. 667 F.3d 408 (3d Cir. 2012).

81. See *id.* at 417 (articulating standard for individual liability for FMLA violations). Under the FMLA, covered employees are entitled to unpaid, job-protected leave for twelve weeks after the birth of a child, to seek treatment for a serious health condition that renders them unable to work, or to care for a spouse, child, or parent with a serious health condition. See *Wage and Hour Division, Family and Medical Leave Act*, U.S. DEP’T LABOR, <http://www.dol.gov/whd/fmla/> [<http://perma.cc/5LGH-A73G>] (last visited Nov. 25, 2015).

82. See *Haybarger*, 667 F.3d at 417 (quoting *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)) (discussing individual liability under FMLA). The *Haybarger* court found a supervisor at a public agency may be liable for allegedly disciplining and discriminating against an employee for exercising protected FMLA rights. See *id.* at 419.

83. See *id.* at 417 (alteration in original) (quoting *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984)) (internal quotation marks omitted).

84. See *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 145 (3d Cir. 2014).

85. See *id.* at 153–54 (detailing allegations against individual supervisors).

86. See generally *id.* (applying *Enterprise* factors to alleged joint employment relationship in *Thompson*, adopting the federal common law standard for successor liability, and adopting *Haybarger* standard for supervisor liability).

A. *Accountability Through a Maze: Thompson's Factual Background*

Security Atlantic Mortgage Company (SA), a “nationwide direct mortgage lender,” hired Patricia Thompson as a mortgage underwriter in June of 2009.<sup>87</sup> Soon after being hired, SA required Thompson to attend a training session led by an employee of Real Estate Mortgage Network (REM N).<sup>88</sup> The REM N employee represented that SA and REM N were “sister compan[ies].”<sup>89</sup>

In February 2010, Thompson's superiors instructed her and other employees to “fill out new job applications to work for REM N.”<sup>90</sup> Thompson complied and then REM N, not SA, began issuing her paychecks.<sup>91</sup> SA went out of business, and the defendants characterized it as “defunct.”<sup>92</sup> “Virtually no change” occurred in Thompson's work environment despite her transfer to REM N.<sup>93</sup> She and other employees continued to do “the same work, at the same desks, at the same location.”<sup>94</sup> Her “pay rate, work email address, and direct supervisors” did not change.<sup>95</sup> No employees were discharged, but some “continued to receive paychecks from [SA].”<sup>96</sup>

Thompson alleged that between being hired by SA in June 2009 and leaving REM N on August 5, 2010, both employers permitted her “to regularly work more than eight hours per day and more than forty hours per week without overtime compensation” in violation of the FLSA.<sup>97</sup> Thompson also sought to recover against Samuel Lamparello, SA's co-owner and President, and Noel Chapman, its co-owner and Executive Vice President.<sup>98</sup> According to Thompson, Lamparello and Chapman “made decisions concerning [both firms'] day-to-day operations, hiring, firing, promotions, personnel matters, work schedules, pay policies, and compensation,” including the authority to direct lower-level supervisors on personnel issues.<sup>99</sup> In June 2010, Thompson asked Chapman about overtime, and he replied that he “did not pay overtime to underwriters.”<sup>100</sup> The following month, Chapman emailed all employees thanking them for “long hours, late nights and even weekends” working for the

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87. *See id.* at 145.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.* at 146.

95. *See id.*

96. *See id.*

97. *See id.* Thompson further alleged that her employers “uniformly misrepresented” to her and other employees “that they were exempt, salaried employees and, therefore, ineligible to receive overtime pay.” *See id.* (internal quotation marks omitted).

98. *See id.*

99. *See id.* (internal quotation marks omitted) (“When a work or personnel issue arose at [SA] or REM N that Thompson's immediate supervisor could not address alone, the supervisor would consult with, among others, Chapman or Lamparello.” (internal quotation marks omitted)).

100. *See id.* (internal quotation marks omitted).

company.<sup>101</sup> “In 2011, both Chapman and Lamparello became officers of REMN.”<sup>102</sup> On August 5, 2011, Thompson quit her job at REMN.<sup>103</sup>

Thompson sued SA, REMN, Lamparello, and Chapman, seeking “to hold REMN liable for SA[’s] own statutory violations under theories of joint [employment] liability and successor liability.”<sup>104</sup> Thompson further sought to hold Lamparello and Chapman “personally, jointly, and severally liable” as employers “by virtue of their [management] positions” within both firms.<sup>105</sup> The United States District Court for the District of New Jersey dismissed Thompson’s complaint without prejudice.<sup>106</sup> Thompson appealed the district court’s holding to the Third Circuit.<sup>107</sup>

B. *Widening the Net: Thompson Holdings on Joint Employers, Successors, and Supervisors*

The Third Circuit vacated the district court’s dismissal of Thompson’s claims.<sup>108</sup> First, the Third Circuit vacated the district court’s dismissal of Thompson’s claim based on primary employer liability.<sup>109</sup> The defendants argued that the lower court’s ruling should be sustained because Thompson “improperly group[ed] all defendants—individual and corporate—together and fail[ed] to differentiate between them . . . .”<sup>110</sup> The Third Circuit disagreed, finding it sufficient that “[t]he pleadings here put the corporate defendants on fair notice that the alleged violations began during Thompson’s employment” with SA and continued through her time at REMN.<sup>111</sup>

Second, the court vacated the district court’s dismissal of Thompson’s joint employment claim.<sup>112</sup> The court recited the factors of the *Enterprise* test and

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101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.* at 146–47 (internal quotation marks omitted).

106. *See id.* at 147. The district court found Thompson failed to adequately plead a claim upon which relief could be granted. *See id.* According to the district court, Thompson simply alleged an employment relationship without alleging “specific facts connecting her employment to each named Defendant” as her employers. *See Thompson v. Real Estate Mortg. Network*, No. 11–CV–01494 (DMC–JAD), 2011 WL 6935312, at \*3 (D.N.J. Dec. 30, 2011) (“The Complaint alleges that Plaintiff is an employee as defined by the FLSA and the NJWHL, and that each named Defendant is an employer and/or joint-employer within the meaning of the FLSA and the NJWHL. Plaintiff does not, however, allege any specific facts connecting her employment to each named Defendant. Without such specific facts, both the Court and Defendants are unable to determine the extent to which any of the named Defendants could be liable.”), *vacated*, 748 F.3d 142 (3d Cir. 2014).

107. *Thompson*, 748 F.3d at 147 (noting Thompson “elect[ed] to stand on the dismissed complaint without further amendment” (citing *Hogan v. Rodgers*, 570 F.3d 146, 151 (3d Cir. 2009))).

108. *See id.* at 154.

109. *See id.* at 148.

110. *See id.* (internal quotation marks omitted).

111. *See id.*

112. *See id.* at 149.



applied *Enterprise* to the facts of *Thompson*.<sup>113</sup> According to the Third Circuit, the district court's finding that Thompson's employment at each company was separate and distinct considered only "the name of the payor appearing on Thompson's pay stubs," which was inconsistent with FLSA's broader conception of employment relationships.<sup>114</sup> The court found Thompson's required attendance at an REMN training indicated REMN had the "authority to promulgate work rules and assignments," the second *Enterprise* factor, even before it officially hired Thompson.<sup>115</sup> The REMN employee's representation that REMN and SA were "sister compan[ies]" suggested to the court a "broader degree of corporate intermingling."<sup>116</sup> The court also found the "abrupt[] and seamless[]" nature of the alleged transfer of all SA employees to REMN suggested "shared authority over hiring"—the first *Enterprise* factor.<sup>117</sup> Finally, the court cautioned that its "assessment rest[ed] heavily on the [case's] procedural posture," and that a "fully developed factual record" may still indicate no joint employment existed.<sup>118</sup> The court concluded Thompson alleged a joint employment relationship that could pass its *Enterprise* test with sufficient detail.<sup>119</sup>

Third, the Third Circuit vacated the district court's dismissal of Thompson's claim against REMN as a successor to SA responsible for its FLSA liabilities.<sup>120</sup> The defendants urged the court to apply the New Jersey state law standard for determining when a successor corporation is liable for its predecessor's liabilities.<sup>121</sup> As noted in Part II.B, the state law standard is significantly less inclusive than the federal common law standard for employment claims.<sup>122</sup> Thompson urged the court to apply the federal standard, and the court agreed, finding it to be the "logical extension of existing case law."<sup>123</sup>

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113. *See id.* at 148–49 ("We have recently treated [joint employment issues] in some depth, and in so doing announced a directive that we described as the '*Enterprise* test.'" (citation omitted)).

114. *See id.* at 149.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 153.

121. *See id.* at 150 (noting defendants urged application of New Jersey law on successor corporations' liability for predecessor debts and liabilities and reciting state law standard).

122. For a comparison of the state and federal standards on successor liability, see *supra* notes 66–78 and accompanying text.

123. *See Thompson*, 748 F.3d at 150–51. The court quoted and adopted Judge Posner's reasoning for applying the federal standard in the Seventh Circuit. *See id.* at 152 ("We find [Judge Posner's] pronouncement well reasoned, directly applicable, and in accord with our own jurisprudence."). According to Judge Posner, a more liberal successor standard is applied to employment claims because the various labor statutes have overarching policy objectives like "labor peace" (NLRA) or non-discrimination in employment (Title VII). *See Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 766 (7th Cir. 2013) (justifying broader standard for statutes with broad policy aims). Judge Posner found these statutory goals are

After adopting the federal standard, the Third Circuit applied it to the facts of *Thompson* and found the allegations sufficient to demonstrate that REMN could be a successor liable for SA's violations.<sup>124</sup> The court found Thompson alleged plausible "continuity in operations and work force" because she "allege[d] that essentially all facets of the business at issue, including operations, staffing, office space, email addresses, employment conditions, and work in progress, remained the same after the February 2010 intercession of REMN."<sup>125</sup> With respect to the third factor, the predecessor's ability to compensate victims, the court noted the defendants' own characterization of SA as "defunct" and thus unable to pay any damages.<sup>126</sup>

Fourth, the Third Circuit vacated the district court's dismissal of Thompson's claims against Lamparello and Chapman as supervisors.<sup>127</sup> The court recited its *Haybarger* standard for personal claims against supervisors for FMLA violations.<sup>128</sup> Applying that standard to Thompson's FLSA claims, the court found her allegations contained sufficient information on the "scope of the [supervisors'] workplace authority . . ."<sup>129</sup> In particular, the court cited Chapman's alleged statement "that he 'did not pay overtime to underwriters'" and the fact that mid-level supervisors consulted with Lamparello and Chapman when they could not resolve a personnel issue alone.<sup>130</sup>

#### IV. KEEPING FLSA'S PROMISES: THOMPSON'S HOLDINGS COMPORT WITH THE TEXT AND POLICIES OF FLSA

*Thompson* liberalized the tests for determining when an entity is an "employer" and liable for FLSA violations.<sup>131</sup> These holdings are consonant

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served by a broader standard because "workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them." *See id.* Judge Posner found the FLSA's goal of protecting workers' standards of living is just "as fully deserving of protection" as the goals of other employment statutes. *See id.* Judge Posner also argued there is value in "legal predictability" in dealing with successors in the context of claims made under federal statutes designed to protect employees. *See id.* at 767 (noting predictability weighs in favor of applying federal standard given "all the cases" that applied federal standard to employment claims).

124. *See Thompson*, 748 F.3d at 153 ("In total, then, these allegations are enough to surmount a motion to dismiss under the federal standard.")

125. *See id.* at 152. The court found it was "unclear" whether the federal standard's second factor, notice to the successor, was met here. *See id.* at 153. However, the court found at this stage in the litigation, Thompson could not be expected to offer "detailed proof" of this notice given her relatively subordinate position within the company. *See id.*

126. *See id.* at 153 (internal quotation marks omitted).

127. *See id.* at 154.

128. *See id.* at 153 (noting "[a]side from the corporate entity itself, a company's owners, officers, or supervisory personnel may also constitute 'joint employers' for purposes of liability under the FLSA" and describing its recently articulated standard for such supervisor claims in context of FMLA).

129. *See id.* at 154.

130. *See id.*

131. For a discussion of *Thompson's* holdings, see *supra* notes 84–130 and accompanying text.

with FLSA's broad conception of employment, evidenced by its "employer" definition.<sup>132</sup> Further, these holdings facilitate FLSA's ambitious policy purposes.<sup>133</sup>

#### A. Thompson *Is Consistent with FLSA's Broad Language*

*Thompson's* broad tests to determine employer status under FLSA match the "expansive" statutory definition of employer and its emphasis on "economic reality" rather than technical concepts.<sup>134</sup> Joint employers can exercise significant influence over workers' terms and conditions of employment as a matter of "economic reality," even when such influence is not exercised directly.<sup>135</sup> For instance, if a contractor-employer requires its employees to attend a client-employer's training and learn its rules, the client-employer is shaping the rules that govern workers' conduct.<sup>136</sup> If a client-employer demands discipline of workers and the contractor-employer complies, workers face punishment—though indirect—at the command of the client-employer.<sup>137</sup> If a client-employer caps the wages of a contractor-employer's employees, the client-employer controls the most important employment term through its contract demands.<sup>138</sup> All of these examples of indirect control suggest control over the work relationship in view of "economic reality."<sup>139</sup> As such, they

132. For an analysis of *Thompson* in the context of the FLSA's statutory language, see *infra* notes 134–44 and accompanying text.

133. For a discussion of *Thompson's* impact on FLSA's policy purposes, see *infra* notes 145–78 and accompanying text.

134. See 29 U.S.C. § 203(d) (2012) (defining "employer"). The FLSA "expansive[ly]" defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" a definition of "striking breadth." See *id.*; *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) ("While the FLSA, like ERISA, defines an 'employee' to include 'any individual employed by an employer,' it defines the verb 'employ' expansively to mean 'suffer or permit to work.' This latter definition, whose striking breadth we have previously noted, stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." (citations omitted)).

135. See *Hickton v. Enter. Holdings, Inc. (In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.)*, 683 F.3d 462, 469 (3d Cir. 2012) ("Because of the uniqueness of the FLSA, a determination of joint employment 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.' A simple application of the *Lewis* test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well." (citation omitted)).

136. See, e.g., *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 148 (3d Cir. 2014) (observing joint employment exists when "one employer controls, is controlled by, or is under common control with the other employer" (quoting 29 C.F.R. § 791.2(b)(3) (2015)) (internal quotation marks omitted)).

137. See, e.g., *Floyd Epperson*, 202 N.L.R.B. 23, 23 (1973) (finding joint employment in NLRB case where contractor-employer requested employee discipline carried out by client-employer).

138. See, e.g., *id.* (noting that while client-employer set rates of pay, contractor employer indirectly influenced those rates by schedule and amount of payments to client-employer).

139. See *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 32–33 (1961) (declaring

ought to be taken into account and *Thompson* appropriately facilitates such consideration.<sup>140</sup>

This “economic reality” interpretation resonates equally in the context of individual supervisors that act as FLSA employers.<sup>141</sup> When a supervisor, pursuing the employer’s interest, violates the FLSA, they do so buttressed by the economic power of the employer.<sup>142</sup> To the employee, the supervisor embodies the employer because the supervisor is authorized to act in the employer’s interest.<sup>143</sup> Imposing liability on these actors for the violations they actually bring about comports with the “economic reality” interpretation of the FLSA’s definition, because, in a practical sense, they function as employers in relation to employees.<sup>144</sup>

#### B. *Thompson’s Tests Serve FLSA’s Broad Policy Agenda*

Congress enacted the FLSA not only to protect workers from abusive employment terms, but also to achieve the industrial policy goals of spreading employment and increasing consumers’ purchasing power.<sup>145</sup> The *Thompson* tests focus on whether employment exists in economic reality, which is necessary to facilitate a policy calculated to affect nationwide economic

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“economic reality” to be “test of employment” under FLSA, and finding such employment in situation where, though “formal differences” may weigh against finding of employment, real world economic concerns like pay and disciplinary authority show employment under FLSA (internal quotation marks omitted)).

140. *See generally Thompson*, 748 F.3d 142. This interpretation draws additional support from the Department of Labor’s FLSA regulations, which find employer status “[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.” *See* 29 C.F.R. § 791.2(b)(3). The Department’s emphasis on control is consistent with the “economic reality” standard for evaluating whether employer status exists: an employee of an employer that is controlled by a second employer surely may be said to be within the control of the second employer as a matter of economic reality. *See Goldberg*, 366 U.S. at 32–33 (outlining “economic reality” standard).

141. *See Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (finding FLSA test for employment turns on whether “supervisor carried out the functions of an employer with respect to the employee” (citing *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983))).

142. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166–67 (1971) (finding statutory definition looks to the “facts involved in the economic relationship” (internal quotation mark omitted)).

143. *See, e.g., Haybarger*, 667 F.3d at 418–19 (finding supervisor exercised sufficient control to be deemed employer in analogous FMLA context when he evaluated employee’s performance, recommended her discharge to her employer, which the employer carried out, and finding “a jury could reasonably conclude that, but for the substantial authority wielded by [the supervisor], [the employer] would not have exercised his ultimate authority to fire [the employee]”).

144. *See id.* at 419 (finding rational jury could find supervisor was FMLA employer when he supervised an employee’s work, prepared her performance review, disciplined her, and retained the authority to fire her).

145. *See supra* note 39 and accompanying text.

conditions.<sup>146</sup>

The joint employer context illustrates this point.<sup>147</sup> If an immediate employer of workers is not free to act outside the constraints that a second-level employer imposes, the latter should have obligations under the FLSA if its policies are to be realized.<sup>148</sup> The FLSA seeks to spread employment by making “overwork” costly.<sup>149</sup> This policy is most workable if FLSA’s disincentive structure affects all entities that control worker employment.<sup>150</sup> Similarly, the minimum wage provisions of FLSA seek to increase workers’ purchasing power, but they are of little practical relevance if one or more entities that control the employment relationship may ignore noncompliance and shift blame to smaller entities with smaller economic footprints.<sup>151</sup>

Broad “employer” standards are especially necessary given the recent growth in subcontracting and other multi-layered employment relationships.<sup>152</sup>

146. See *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 148 (3d Cir. 2014) (emphasizing “economic reality” as “the test of employment” and eschewing “technical concepts” (quoting *Enterprise*, 683 F.3d 462, 467–68 (3d Cir. 2012)) (internal quotation marks omitted)); see also *Linder*, *supra* note 38, at 152 (“Although the minimum wage was obviously also designed to create micro-welfare effects, its primary function lay in removing labor costs from competition, increasing productivity *macroeconomically* by driving ‘parasitic’ firms out of business and concentrating production in the most competent firms, and in steering capital-labor relations.” (emphasis added) (footnotes omitted)).

147. See *Thompson*, 748 F.3d at 148–49 (explaining “economic reality” is impacted by the dynamics of control, finding control firms exert on each other in real world factor into employer analysis).

148. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27 (1947) (agreeing that Congress enacted FLSA to reduce distribution of goods produced under “subnormal labor conditions” or to correct “economic evils”); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) (noting FLSA’s conception of employment was “comprehensive enough to require its application to many persons and working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category” (internal quotation marks omitted)). The Court in *Rutherford Food Corp.* concluded this policy agenda justified a legal test of employment that hinged on “the circumstances of the whole activity.” See *id.* at 730 (internal quotation marks omitted). One commentator credited *Rutherford Food Corp.* and other early FLSA cases with interpreting the law “broadly and to appeal to its underlying purposes.” See Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 22 (2010). Professor Rogers found *Rutherford Food Corp.* noteworthy in that it broadly “appealed to the statute’s purposes,” and emphasized that workers were “part of [an] integrated unit of production.” See *id.* at 23. (internal quotation marks omitted).

149. See *supra* note 42 and accompanying text.

150. For further discussion on the FLSA’s policy justifications, see *supra* notes 31–42 and accompanying text.

151. See Rogers, *supra* note 148, at 23 (“One thus might interpret the Court as having based its [*Rutherford*] decision on grounds of policy: if the statute aimed to eradicate the ‘economic evil’ of very low-wage work, it seemed to reason, and if the [second level, client-employer] enjoyed the power to determine the workers’ wages, then it should be held liable as their employer.”).

152. See *id.* at 1 (“In recent decades, responding to the globalization of product and labor markets, major firms have extended their supply chains and subcontracted many tasks that do not require skilled labor.”). Professor Rogers argued that while FLSA scholars mostly support addressing this issue by “liberalizing tests for joint employer liability,” courts would better effectuate FLSA by imposing a “duty of reasonable care to prevent wage and hour

In 2013, 3.4 million Americans worked for “staffing” businesses, accounting for 2.5% of all employment in the United States.<sup>153</sup> The American Staffing Association reports an even higher number, stating that one in ten workers are hired by a staffing business each year.<sup>154</sup> From 2009 to 2013, employment in the staffing industry increased by 41%, while all other employment grew by just 6%.<sup>155</sup> The amount of temporary workers hired through agencies for short-term employment more than doubled between 1990 and 2008, from 1.1 million to 2.3 million workers.<sup>156</sup> Multi-layered employment is especially common in construction and custodial services where 51% and 37% of workers, respectively, are employed by contractors, rather than the clients receiving the services.<sup>157</sup> Research suggests outsourcing is associated with lower wages and fewer benefits for employees.<sup>158</sup> This renders the joint employment inquiry under the FLSA especially important as multi-layered employment relationships proliferate.<sup>159</sup>

Congress enacted the FLSA to protect workers who occupied vastly unequal bargaining positions with respect to their employers.<sup>160</sup> Workers in

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violations within their domestic supply chains.” *See id.* at 2. *Thompson* certainly represents the former approach. *See generally* *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142 (3d Cir. 2014).

153. *See* RUCKELSHAUS ET AL., *supra* note 21, at 19 (reporting number of U.S. jobs in staffing).

154. *See* Grabell, *supra* note 21 (quoting American Staffing Association claim that staffing jobs account for up to 10% of all U.S. employment).

155. *See* RUCKELSHAUS ET AL., *supra* note 21, at 21 (reporting 41% growth in staffing jobs between August 2009 and 2013).

156. *See* Tian Luo, Amar Mann & Richard Holden, *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LAB. REV., Aug. 2010, at 3, 3 (charting growth in temporary help jobs from 1990 to 2008 and finding sector experienced “explosive” growth between 1990 and 2000).

157. *See* Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 17 (Inst. for Research on Labor & Emp’t, UC Berkeley Working Paper No. 100–14, Jan. 2014) (reporting percentages of workers employed by subcontractors in 2012).

158. *See* Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. REL. REV. 287, 287 (2010) (finding outsourcing is generally associated with lower wages and fewer benefits for workers and specifically results in a 4% to 7% wage penalty for janitors and an 8% to 24% wage penalty for guards).

159. *See* Rogers, *supra* note 148, at 1 (basing evaluation of FLSA’s protection of workers on “economy no longer characterized by vertically integrated production”).

160. *See* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (“The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the *unequal bargaining power* as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided.” (emphasis added) (footnotes omitted)); *see also* *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (finding FLSA and its definition of “employ” are

subcontracted or other multi-layered employment relationships are likely to earn low wages and have very little bargaining power.<sup>161</sup> Subjecting outsourcing employers to the FLSA's protections serves the law's goals by ensuring that even employees with an intermediary employer enjoy the law's protections.<sup>162</sup> Employers may argue that this imposes unjust costs on outsourcers for violations they did not commit.<sup>163</sup> However, the *Enterprise* test still requires active participation or influence of some kind on the part of the employer (including the ability to set rules, make hiring decisions, and the like).<sup>164</sup> In this regard, *Enterprise* is arguably under-inclusive if "economic reality" is to be the guiding principle; *Enterprise* fails to encompass some employers that take no active role in the employment relationship, yet still hold sway over terms and conditions of employment in view of "economic reality."<sup>165</sup> For example, companies at the purchasing end of a supply chain (to which *Enterprise* likely would not apply) may be uniquely capable of demanding compliance of employers down the supply chain via contractual provisions and monitoring.<sup>166</sup>

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"remedial and humanitarian in purpose"); *id.* ("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. Such a statute must not be interpreted or applied in a narrow, grudging manner."), *superseded by statute*, Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262, *as stated in* Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014).

161. See Dube & Kaplan, *supra* note 158, at 287.

162. See 81 CONG. REC. 4983–84 (1937) (statement of Pres. Roosevelt) (urging Congress, in address that inspired FLSA, to pass a law "insuring to *all* our able-bodied working men and women a fair day's pay for a fair day's work" (emphasis added)).

163. See, e.g., John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 TRIAL ADVOC. Q. 16, 17 (2006) (arguing Department of Labor's understanding of joint employment, which *Enterprise* court relied on, should be changed because it "is causing increased legal exposure for corporations with subsidiary operations, because parent entities are being named as FLSA defendants even though they have no relationship with the employee bringing suit," and taking issue with Department's consideration of control exerted over other employers, arguing "[t]he true test of liability for a parent corporation under joint employment law should be whether it exerts control over the complaining employee(s), not whether it controls the purportedly offending subsidiary.").

164. See *supra* note 17 and accompanying text (delineating Third Circuit's *Enterprise* test for joint employment under FLSA).

165. For further discussion on the bounds of the *Enterprise* test, see *supra* notes 52–65 and accompanying text.

166. See Rogers, *supra* note 148, at 46–47 (arguing for even broader joint employer liability standard than tests akin to *Enterprise/Thompson*). Professor Rogers's proposed standard would impose a "duty of reasonable care" to prevent foreseeable FLSA breaches down a company's supply chain, regardless of whether a "contractual relationship with the primary wrongdoer" exists. See *id.* at 2. Professor Rogers argues, "violations are arguably foreseeable whenever one enters into a contract for goods or services in an industry with a well-publicized history of violations . . . . They are acutely foreseeable if a firm plays one contractor or supplier off against another to lower prices, is a frequent purchaser of such goods or services, enters into a contract that does not include sufficient funding for minimum wages to be paid, and/or could but does not take reasonable steps to deter or prevent such violations. In other words, when a firm engages in such a course of action it is not a mere bystander, but rather is helping to create or heighten the risk—or even the near-certainty—of

The FLSA's practical impact would be similarly diluted if employers could evade their responsibilities under the law by handing their business off to a new entity, even one with the same top personnel, with no responsibility to compensate wronged workers.<sup>167</sup> Opponents of the federal standard *Thompson* adopted may argue its broad standard unduly burdens successor corporations by forcing them to pay the cost of the predecessor's violations.<sup>168</sup> However, as Judge Posner pointed out in *Teed*, this is a weak argument.<sup>169</sup> Judge Posner explained, "The successor will have been compensated for bearing the liabilities by paying less for the assets it's buying; it will have paid less because the net value of the assets will have been diminished by the associated liabilities."<sup>170</sup> Judge Posner also appropriately pointed out there is an interest in uniformity, and if the goals of other statutes warrant a broader federal successor standard, so should the equally important purposes of the FLSA.<sup>171</sup> Moreover, Judge Posner and *Thompson's* concern that employers could "extinguish" workers' FLSA rights by transferring a firm to a successor company resonates with the Supreme Court's application of the federal standard to NLRA claims.<sup>172</sup>

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noncompliance. It therefore seems fair to hold it liable for that harm." *See id.* at 46–47. Although the *Enterprise* test fails to erect such a scheme, its "catchall" factor may partially address Rogers's concerns. *See Enterprise*, 683 F.3d 462, 469–70 (3d Cir. 2012) ("[T]his list is not exhaustive, and cannot be blindly applied as the sole considerations necessary to determine joint employment. If a court concludes that other indicia of significant control are present to suggest that a given employer was a joint employer of an employee, that determination may be persuasive, when incorporated with the individual factors we have set forth." (citations omitted) (internal quotation marks omitted)). It must be noted, however, as Professor Rogers stresses, that courts have often fallen short in the "implementation" of similar control language to the detriment of aggrieved workers. *See Rogers, supra* note 148, at 1.

167. *See Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 766 (7th Cir. 2013) ("In the absence of successor liability, a violator of the [FLSA] could escape liability, or at least make relief much more difficult to obtain, by selling its assets without an assumption of liabilities by the buyer (for such an assumption would reduce the purchase price by imposing a cost on the buyer) and then dissolving.").

168. *See, e.g., Reply Brief of Appellant at 16, Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763 (7th Cir. 2013) (No. 12-2440), 2012 WL 6127031, at \*16 (arguing against application of federal common law successor standard to FLSA claims, emphasizing that FLSA "focuses its impact on an existing employment relationship," and arguing none of FLSA's policy objectives are served by "requiring a *bona fide* successor to compensate a predecessor employer's former workers for unpaid wages").

169. *See Teed*, 711 F.3d at 766–67 (pointing out that liability for FLSA violations will affect predecessor firms' purchase prices).

170. *Id.*

171. *See id.* at 767.

172. *Compare Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973) (finding that "[t]o the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action," and noting successors may benefit from predecessors' NLRA violations if employees identify labor policies of successor with those of predecessor and refrain from protected activities out of fear), *with Teed*, 711 F.3d at 766 ("[W]orkers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them.").



Workers are no more capable of avoiding a sale calculated to deny their FLSA rights than one “extinguish[ing]” their associational rights.<sup>173</sup>

Additionally, the FMLA’s policy goal of ensuring workers job-protected leave in the event of a birth or medical condition is no more important than FLSA’s protections against abusive employment terms.<sup>174</sup> FLSA’s protections are arguably even more impactful upon workers’ interests in that they constantly govern the most important term (payment) of the employment relationship, not how that relationship must adapt to specific eventualities.<sup>175</sup> If broadening the employer standard to certain supervisors is necessary to effectuate the FMLA, it is just as essential to FLSA, where supervisors act as the face of the employer with respect to wage violations by, for example, refusing to pay overtime.<sup>176</sup> Extending FLSA’s scheme of incentives and disincentives to supervisors to achieve compliance serves the law’s broad agenda.<sup>177</sup> Accordingly, *Thompson’s* adoption of the *Haybarger* FMLA standard for supervisor liability comports with FLSA’s equally expansive policy agenda.<sup>178</sup>

173. See *Teed*, 711 F.3d at 766 (internal quotation marks omitted) (finding FLSA’s policy purposes were “as fully deserving of protection as the labor peace, anti-discrimination, and worker security policies underlying the NLRA, Title VII, 42 U.S.C. § 1981, ERISA, and MPPAA.” (quoting *Steinbach v. Hubbard*, 51 F.3d 843, 745 (9th Cir. 1995)) (internal quotation marks omitted)).

174. See *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 153 (3d Cir. 2014) (finding Third Circuit’s holding in *Haybarger* applied in “analogous context” of FMLA claims). Indeed, the Third Circuit in *Haybarger* observed “that Congress, in drafting the FMLA, chose to make the definition of ‘employer’ *materially identical* to that in the FLSA means that decisions interpreting the FLSA offer the best guidance for construing the term ‘employer’ as it is used in the FMLA.” See *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 414 (3d Cir. 2012) (emphasis added) (quoting *Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006)) (internal quotation marks omitted).

175. Compare 29 U.S.C. §§ 206–207 (2012) (establishing minimum wage rates and overtime compensation requirements applicable to most employees), with *id.* § 2612(a)(1) (ensuring twelve work weeks of job-protected leave per year for covered employees because of child’s birth, employee’s serious health condition, or to care for close relative’s serious health condition, among other reasons).

176. See *Haybarger*, 667 F.3d at 417 (holding FMLA “permits individual liability against supervisors at public agencies” given FLSA’s express definition of “employer” including “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency,” and FMLA’s “materially identical” definition (quoting *Modica*, 465 F.3d at 186) (internal quotation marks omitted)).

177. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947) (agreeing with lower court that FLSA seeks to “correct[] [] economic evils through remedies which were unknown at common law” and that “underlying economic realities” should establish employment, finding employment where employees’ work is “a part of the integrated unit of production,” if not technically part of established employment relationship (internal quotation marks omitted)).

178. For a discussion of the policy agendas and “materially identical” definition of “employer” in FLSA and FMLA, see *supra* notes 174–76 and accompanying text.

V. ADVICE FOR PRACTITIONERS: HANDLING FLSA CLAIMS AFTER *THOMPSON*

*Thompson's* tests expand the universe of potential FLSA-employer defendants.<sup>179</sup> Accordingly, attorneys for employee-plaintiffs will argue *Thompson* renders multiple entities liable for FLSA violations.<sup>180</sup> Conversely, defense attorneys will argue that their clients' connections to workers or violations are too tenuous to render them employers.<sup>181</sup>

A. *After Thompson, Employee-Side Attorneys Will Argue That Putative Employers Exercise Sufficient Control*

On the joint employer front, plaintiffs' attorneys will want to stress the interconnectivity of immediate employers and indirect employers with respect to employment matters.<sup>182</sup> Evidence like a putative joint employer's recommendations to an immediate employer regarding hiring, promotion, discipline, discharge, and the like will be probative to establish sway over hiring and discipline authority, the first and third *Enterprise* factors.<sup>183</sup> Evidence of control over the parameters of the work relationship, such as dictating workers' schedules, tasks, and rules, helps establish the second *Enterprise* factor.<sup>184</sup> Mr. Rangel's working conditions, described in Part I, provide an illustrative example.<sup>185</sup> In addition to the delineated factors, plaintiffs' attorneys should stress any outside indicia of control showing employment in "economic reality," for instance, if one employer's "hands were tied" because it was controlled by another employer.<sup>186</sup>

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179. For a discussion of *Thompson's* holdings, see *supra* notes 84–130 and accompanying text.

180. For advice for employee-side attorneys, see *infra* notes 182–96 and accompanying text.

181. For advice for employer-side attorneys, see *infra* notes 197–206 and accompanying text.

182. See, e.g., *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 149 (3d Cir. 2014) (stressing, in joint employment determination, "[t]he employee responsible for *Thompson's* training allegedly described REMN as [SA]'s 'sister company,' a term which suggests some *broader degree of corporate intermingling*." (emphasis added)).

183. See, e.g., *id.* ("[T]he scenario described by *Thompson*, in which she and virtually all other [SA] employees were abruptly and seamlessly integrated into REMN's commercial mortgage business while some of those same employees continued to be paid by [SA], supports *Thompson's* claim that the two companies shared authority over hiring and firing practices.").

184. See, e.g., *id.* ("[A]n employee of REMN conducted *Thompson's* training immediately after she was hired by [SA] in June 2009, indicating that REMN had at least some authority to 'promulgate work rules and assignments' even before REMN formally hired *Thompson* . . ." (emphasis added)).

185. See *supra* notes 2–28 and accompanying text.

186. See, e.g., *Thompson*, 748 F.3d at 148 (relying on Department of Labor's conception of joint employment, holding joint employment exists where multiple employers "exert significant control" over workers "by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer" (internal quotation marks omitted)).

With respect to successors, plaintiffs' attorneys will want to demonstrate that, though a transition occurred, workers' conditions remained the same.<sup>187</sup> Crucially, "continuity in operations" is considered as well as notice of FLSA violations and the predecessor's ability to pay.<sup>188</sup> *Thompson's* facts provide a useful example: although the plaintiff's paychecks were signed by a different payor, none of the workplace operations changed.<sup>189</sup> Workers did the same work at the same stations.<sup>190</sup> Furthermore, the predecessor was "defunct" and therefore unable to pay.<sup>191</sup> Attorneys should mine the facts of their cases to draw parallels to this sort of scenario.<sup>192</sup>

Finally, employee-side attorneys will want to establish that when supervisors were directly involved in conduct running afoul of FLSA, they were responsible for the statutory violation.<sup>193</sup> Further, to be liable, the supervisors must have acted within the employer's interest when the FLSA violation occurred.<sup>194</sup> Here, *Haybarger's* facts are instructive: a supervisor expressly recommended an allegedly unlawful discharge as "in the best *interest of the [employer's]* overall operations."<sup>195</sup> Evidence establishing a FLSA violation under similar circumstances will go a long way towards holding supervisors responsible as employers for wage and hour violations.<sup>196</sup>

B. *Employer-Side Attorneys Will Argue That Their Corporate and Individual Clients Lack Sufficient Control over Workers*

On joint employment, employer-side attorneys will seek to minimize the

187. *See id.* at 151 (considering "continuity in operations and work force of the successor and predecessor employers" to determine liability, abandoning state law factor of express or implied adoption of liabilities by successor).

188. *See id.* (considering continuity in addition to "notice to the successor-employer of its predecessor's legal obligation" and "ability of the predecessor to provide adequate relief directly" (internal quotation marks omitted)).

189. *See id.* at 145–46 ("Despite Thompson's transfer to REMN, virtually no change occurred in on-site operations. Thompson and her colleagues continued to do the same work, at the same desks, at the same location. Thompson's pay rate, work email address, and direct supervisors remained the same. Thompson alleges that no employees were laid off during this transition, although some of her colleagues continued to receive paychecks from [SA].").

190. *See id.*

191. *See id.* at 153 ("[D]efendants have represented that [SA] is now 'defunct,' which we take to mean that it is likely incapable of satisfying any award of damages to Thompson.").

192. *See id.*

193. *See Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (crafting test for supervisor liability under FMLA, which *Thompson* court applied to FLSA: "an individual is subject to FMLA liability when he or she exercises 'supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation' while acting in the employer's interest" (citing *Riodran v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987))).

194. *See id.*

195. *See Haybarger*, 667 F.3d at 418 (emphasis added).

196. *See Thompson*, 748 F.3d at 154 (noting supervisor's alleged statement and authority to address personnel issues that mid-level supervisors could not establish sufficient control to be deemed FLSA employer).

“degree of corporate intermingling” between putative joint employers and immediate employers.<sup>197</sup> These attorneys will argue that all control over the terms and conditions of workers’ employment rests with the immediate employer.<sup>198</sup> They will argue, whenever possible, that defendants have no control—or even knowledge—over personnel decisions and that the defendants do not involve themselves in employee discipline.<sup>199</sup> While some control of the rules and schedules governing workers may be unavoidable, putative joint employers seeking to avoid that designation will argue that they simply set broad and general parameters that the immediate employer was free to meet any way it chose, and assigned workers only according to its own policies.<sup>200</sup>

Successor defendants will stress that a complete break occurred when the firm changed hands.<sup>201</sup> Any evidence that supports the absence of continuity will be useful to show the new business is not a continuation, but simply a firm that had the misfortune of purchasing all or parts of a business without knowing about any FLSA violations.<sup>202</sup> These defendants will also argue that, although the predecessor no longer controls the business, it is still capable of compensating workers for its own wrongs, in which the successor was uninvolved.<sup>203</sup>

Supervisors’ attorneys will seek to minimize the supervisor’s role in precipitating FLSA violations.<sup>204</sup> While a violation may have occurred, these

197. *See id.* at 149.

198. *See, e.g., Enterprise*, 683 F.3d 462, 471 (3d Cir. 2012) (finding plaintiff failed to show joint employment to pass its newly enunciated joint employment test because putative joint employer “exercised *no* control, let alone *significant* control, over the [employees]”).

199. *See id.*

200. *See id.* (finding putative joint employer had “no authority to promulgate work rules or assignments, and no authority to set . . . schedules,” and while plaintiffs argued putative joint employer’s “guidelines and manuals” to subsidiaries made it hold these roles “functionally,” the court found this unpersuasive, noting putative joint employer’s “*suggested* policies and practices [were] entirely discretionary on the part of the subsidiaries,” and that putative joint employer held “no more authority over the conditions of the assistant managers’ employment than would a third-party consultant who made suggestions for improvements to the subsidiaries’ business practices”).

201. *See, e.g., Teed v. Thomas & Betts Power Solutions*, 711 F.3d 763, 768 (7th Cir. 2013) (“[I]f [a firm’s] assets had been sold piecemeal there is no successor liability, because of the *lack of continuity* between predecessor and successor; for when a company is broken up and its assets sold piecemeal, there is no successor to transfer the company’s liability to. But to allow [a firm] to acquire assets without their associated liabilities, thus stiffing workers who have valid claims under the Fair Labor Standards Act, is equally a ‘windfall.’” (emphasis added)).

202. *See id.* (stressing “lack of continuity” between predecessors and successors when deciding whether to impose liability and finding where continuity is present, it would be inequitable to allow workers to go uncompensated for FLSA violations).

203. *See id.* at 766 (considering “[w]hether the predecessor could have provided relief after the sale,” as factor weighing in favor of workers’ interests because it considers likelihood they will be made whole in reality).

204. *See Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 153 (3d Cir. 2014) (requiring supervisors be “*responsible in whole or part for the alleged violation*” in order to impose liability (emphasis added) (quoting *Riodran v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)) (internal quotation marks omitted)).

attorneys will want to show the supervisor was not actually the driving force behind the violation, and that some other player in the work relationship is responsible instead.<sup>205</sup> Companies seeking to deflect responsibility for supervisors' conduct will argue the supervisor was acting to serve an unsanctioned, personal interest that was unrelated to the employer's interests.<sup>206</sup>

## VI. CONCLUSION

*Thompson* expanded the reach of the FLSA in the Third Circuit to encompass "joint employers" with indirect control over workers, more successors under a relaxed standard, and individual supervisors so long as they are directly responsible for the violations themselves.<sup>207</sup> This development comports with FLSA's expansive language and policy agenda, which were intended to apply to a wide array of employment relationships to raise labor standards and reduce unemployment.<sup>208</sup> This decision is especially relevant in today's economy, where a growing percentage of work relationships are structured with multiple levels of businesses controlling workers' terms and conditions of employment.<sup>209</sup> However, the true test of *Thompson's* progress will be whether courts adhere to its liberalized standards or instead look for escape routes in the facts of future cases.<sup>210</sup>

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205. *See id.*

206. *See id.* (requiring supervisors to have committed FLSA violations "while acting in the employer's interest" in order to impose liability (emphasis added)).

207. For a discussion of *Thompson's* confirmation of *Enterprise* and additional tests on successor and supervisor liability, all of which will liberalize the test for employment, see *supra* notes 84–130 and accompanying text.

208. For a discussion of FLSA's underlying policies, see *supra* notes 31–42 and accompanying text.

209. For a discussion of the increasing prevalence of multi-layered employment relationships, see *supra* notes 152–59 and accompanying text.

210. *See* Rogers, *supra* note 148, at 1 (noting FLSA scholars have mostly endorsed liberalized tests like *Thompson*, while noting courts have often fallen short on "implementation").