NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 20 SPRING 2024 NUMBER 2

THE GOOD, THE BAD, AND THE UGLY: FRANCHISING HAS A JOINT EMPLOYMENT AND INDEPENDENT CONTRACTING PROBLEM

ROBERT W. EMERSON*

Legal turmoil originating from the ambiguity of independent contractor and joint employment law has been exacerbated by the COVID-19 pandemic and the growth of e-commerce and the gig economy. Chaos and uncertainty have hindered business advancement, especially for franchises. Still, there are exemplary international approaches, proposed U.S. and state laws, uniform tests or guarantees, and fresh methodologies as well as legal presumptions. By narrowing the definition of "independent contractor" and expanding the definition of "joint employer," evolving legal interpretations will foster, inter alia, franchisee collective bargaining and other avenues toward fair and efficient compromise. Greater legal clarity could stimulate business growth and lead to stronger, fairer franchise systems.

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* J.D., Harvard Law School; Huber Hurst Professor of Business Law at the University of Florida.

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Introduction

The ongoing evolution of independent contracting and joint employment law presents a significant challenge for businesses, particularly franchises. That, in turn, raises questions about the status and benefits of workers, and they create a host of tax implications. At the heart of the hiring relationship lies a fundamental question: Is the individual being hired actually an employee of the company? This determination is crucial

because it triggers a range of financial and legal obligations under various federal and state laws that do not apply to independent contractors. This classification of a hiree as either an employee or an independent contractor is controlled by the terms of the relationship, which are dictated by the hiring company. Therefore, determining a hiree's classification must be done on a case-by-case basis.

Moreover, while related to independent contractor relationships, joint employer status is an analytically distinct issue. The Fair Labor Standards Act (FLSA) classifies an employer's status as a joint employer when an employee not only works for that employer but also simultaneously benefits another entity or individual, who may thus constitute a second, joint employer.[1] While that additional employer may not consider certain workers to be its employees, the law may disagree, holding both employers responsible for compliance with the FLSA's minimum wage and overtime provisions as well as other labor laws. Issues surrounding joint employment and independent contracting are frequently intertwined. For example, a disgruntled worker may allege wage disputes against two discrete entities—putative joint employers—which in turn prompts a battle over whether the worker was an employee of the second enterprise (e.g., the franchisor) in the first place.[2]

This highlights the critical importance of correctly classifying the relationship between employers and their workers. In the franchise model, where rapid expansion is the goal, any uncertainty surrounding workers' employment status may lead to legal disputes and stall growth.[3] Unfortunately, the current state of independent contractor and joint employment law is governed by a perplexing mix of judicial, legislative, and

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1. *See generally* 29 U.S.C. § 203 (2018). The Department of Labor announced and then later rescinded a "final rule" that updated and revised its interpretation of joint employer status. Important for franchise systems, the final rule specified that an employer's franchisor, brand and supply, or certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely.

2. *See, e.g.*, Andrew Elmore, *The Future of Fast Food Governance*, 165 U. Pa. L. Rev. Online 73, 80 (2017) (noting that labor contractors and employees in low-wage industries economically depend on a lead firm for work, but the lead firm is seldom held liable as a joint employer in the franchise relationship).

3. *See* Daniel B. Yaeger, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 Drake L. Rev. 179, 204, 207 (2017) (arguing that franchisors are not fiduciaries of franchisees, but that franchisees are like independent contractors and franchisors are like employers).

administrative law. To make matters worse, e-commerce,[4] the rise of the gig economy,[5] and the COVID-19 pandemic[6] have compounded the problem, threatening to make an already confusing area of law unworkable.

The unclear and ever-shifting guidance on both independent contracting and joint employment law becomes even more confusing when one attempts to apply it to the modern franchising environment. It seems the existing framework is not built to accommodate the continuously evolving franchise business model, resulting in a murky legal landscape for both franchisors and franchisees to navigate.

In an attempt to clarify the situation, this article commences by discussing the current state of franchising in the United States, and what makes this business model unique. Next, it is necessary to examine how the current landscape of independent contractor and joint employment law, alongside the administrative twists and turns, has shaped the current guidance available to employers and workers. This discussion explains the multitude of different tests used by administrative agencies and the courts to classify these relationships. After detailing how recent developments in the broader business environment have exacerbated the need for clearer standards, this article concludes by recommending several solutions drawn from foreign standards, uniform tests, improved bargaining, and a shift in priorities and presumptions.

I.
The Franchise Business Model

The franchise model is a widely used business arrangement that allows for rapid, inexpensive expansion.[7] Franchised

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4. *See infra* Section IV.A.

5. *See* Melissa Lewis, *Independent Contractor Laws and the Sharing Economy*, 36 GPSolo 15, 16 (2019) (noting that the gig-economy is also known as the "sharing economy," in which assets or services are shared between private individuals through a host company).

6. *See infra* Section IV.C.

7. Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 52 (N.J. 1981) (noting that, by employing the franchise business model, franchisors can expand more quickly than traditional models and with less capital investment). The American concept of franchising is expanding rapidly throughout the world, with an increasing share of international commerce. *See* Robert W. Emerson, *Franchise Encroachment*, 47 Am. Bus. L.J. 191, 196–97 n.23 (2010) (detailing the numerous statistics indicating the phenomenal

businesses account for roughly 40% of all retail sales in the United States,[8] with over 821,000 operating franchised units directly employing about 8.9 million people.[9] They indirectly account for close to twice as many jobs.[10] These franchised businesses also create a direct and indirect economic output of $826.6 billion, accounting for 7% of the U.S. GDP.[11]

Logistically, this franchising business model operates on a system where a franchisor licenses its name, trademark, and business model to independent franchisees in exchange for an initial franchising fee and recurring royalty payments.[12] This arrangement allows the franchisee to benefit from the franchisor's experience, knowledge, research and development, capital, and reputation.[13] As a result, the franchisee can

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growth of franchising worldwide, both throughout Europe and such diverse and important national economies as those of Australia, Brazil, China, India, and Japan).

8. This is an estimate of the International Franchise Association. Honey v. Gandhi, *Franchising in the United States*, 20 Law & Bus. Rev. Am. 3, (2014) https://scholar.smu.edu/lbra/vol20/iss1/2. At the very least, franchising's share of the total retail economy, since at least the year 2001, has been one-third. Roger D. Blair & Francine Lafontaine, The Economics of Franchising 26–27 n.28 (2005); Emerson, *supra* note 7, at 196–97; Robert W. Emerson, *Franchising Covenants Against Competition*, 80 Iowa L. Rev. 1049, 1050–51 n.4 (1995) (citing numerous sources concerning the rapid growth of franchising in both the 1980s and the early 1990s).

9. 2024 Franchising Economic Outlook, International Franchise Association, https://www.franchise.org/franchise-information/franchise-business-outlook/2024-franchising-economic-outlook.; *see* Robert W. Emerson, *Franchisors in a Jam: Vicarious Liability and Spreading the Blame*, 47 J. Corp. L. 571, 573–74 (2022) (noting a 4% downturn in the number of franchised outlets at the start of the COVID-19 pandemic, but with a strong recovery thereafter).

10. 2024 Franchising Economic Outlook, *supra* note 9.

11. *A Look at How Franchises Impact the U.S. Economy*, Franchise Direct (July 26, 2022), https://www.franchisedirect.com/information/a-look-at-how-franchises-impact-the-economy.

12. Blair & Lafontaine, *supra* note 8, at 6–8; Elizabeth Crawford Spencer, The Regulation of Franchising in the New Global Economy 7 (2010). A study of 100 randomly selected fast-food franchises found the medial initial franchise fee to be $25,000. In the same study, the median royalty payment was 5% of revenue. Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 Mich. St. L. Rev. 641, 686–89 (2013) (hereinafter Emerson, *Two-Standard Approach*). The author's study of 200 fast-food franchise contracts in 2023 found the median initial franchise fee to have risen to $35,000. Robert W. Emerson, *Franchise Contract Standards Based on Legal Counsel, Sophisticated Parties, Ardent Admonitions, and Collective Negotiations* (Aug. 14, 2023) (hereinafter, "Emerson, *Franchise Contract Standards*") (unpublished manuscript) (on file with author).

13. Emerson, *Two-Standard Approach*, *supra* note 12, at 642.

effectively operate its own business without having to invest its limited resources in perfecting a new product or business model.[14]

A. *Operational Guidance, Advertising Strategies, and Controls*

One of the most important benefits that franchisees receive, apart from affiliation with the franchisor's brand, is operational guidance from the franchisor.[15] It is typically provided throughout the life of the franchise relationship and includes training, consultation services, and operations manuals that establish required procedures and best practices.[16] Ordinarily, this guidance addresses various areas of the franchisee's business, such as site selection, regional product preferences, and store displays and layouts.[17] The value of such guidance is high because it is informed by sophisticated market research that would otherwise be unavailable to most fledgling businesses.[18] Therefore, the franchise business model provides franchisees with the tools necessary to compete with established businesses, placing them on a relatively equal footing with other business owners who sell similar products or services and use the same or similar business model.[19]

Apart from this guidance, the franchisee derives further benefit from cooperative advertising, which often occurs on a national scale. For example, even when the franchisee is allowed to run its own advertisements, the franchise system's national

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14. Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 Alb. L. Rev. 193, 203 (2013).

15. Emerson, *Two-Standard Approach*, *supra* note 12, at 686, 691–92.

16. *Id.* Many courts in different countries recognize that savoir-faire—the transfer of know-how from franchisor to franchisee—must regularly occur, either as a legal requirement (e.g., in France, Belgium, Italy, and Spain) or at least as a practical matter (e.g., in the United States). *See* Robert W. Emerson, *The Faithless Franchisor: Rethinking Good Faith in Franchising*, U. Pa. J. Bus. L. 411, 444–45 (2022); Robert W. Emerson, *Franchise Savoir Faire*, 90 Tul. L. Rev. 589, 592 (2016).

17. Emerson, *Two-Standard Approach*, *supra* note 12, at 686, 690–91.

18. Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk from Yum Brands and Schlotzsky's*, 24 Lewis & Clark L. Rev. 997, 1007 (2020) (stating franchisees gain the benefit of the franchisor's research and development when entering into a franchise agreement).

19. *Id.*

campaign is coordinated, with uniform goals expressed at the outset.[20]

These practices, operational guidance, and cooperative advertising are even more important in the context of vicarious liability because a franchisor's liability turns on traditional agency law.[21] Thus, in assessing a franchisor's liability, courts will look to whether the franchisor had the right to control the franchisee's marketing plan and, if so, the degree of control that the franchisor had.[22] The more direct a role the franchisor played in advertising and providing operational guidance, the greater the potential for successfully alleging vicarious liability.[23]

B. *Financial Developments in Franchising*

Franchisees not only benefit from coordinated advertising campaigns and operational guidance but also often enjoy increased access to financial assistance. Depending on the franchise agreement, financing may be provided to enable the opening of new locations or renovating of existing ones.[24] Even if the agreement does not provide such assistance, the franchisee may still receive financing on more favorable terms simply by virtue of its affiliation with an established and reputable brand. This is because the franchisor has already performed some of the vetting that a loan officer normally would do, eliminating much uncertainty in the proposed business model.[25]

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20. Emerson, *Two-Standard Approach*, *supra* note 12, at 686, 696.

21. *See* Robert W. Emerson, *Franchise Independence: Still Awaiting Customer Recognition*, 15 N.Y.U. J. L. & Bus. 287, 297–98 (2019) (discussing the Restatement (Third) of Agency, cases, and commentary related to the franchisor's vicarious liability for the wrongful acts of its franchisees).

22. *See* Friedman v. Massage Envy Franchising, LLC, No. 3:12-cv-02962, 2013 WL 3026641, at *8–9, *12 (S.D. Cal. June 13, 2013).

23. *See* Agne v. Papa John's Int'l, Inc., 286 F.R.D. 559, 562–64 (W.D. Wash. 2012).

24. Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care toward Its Franchisees*, 72 N.C. L. Rev. 905, 941–42 (1994).

25. The franchisor's vetting process includes running credit checks and gathering information regarding the franchisee's assets, as well as maintaining permission to run periodic asset level checks of the franchisee. The level of due diligence and pre-contract vetting will largely depend on the franchisor's risk tolerance and desire for contractual protections in the case of franchisee default. *See* Jason B. Binford et al., *Structured Workouts: Franchisor Strategies for Dealing with the Financially-Challenged Franchisee*, 2015 A.B.A. F. on Franchising 4.

Furthermore, struggling franchisees can benefit from periodic support furnished by their franchisors in the form of capital improvements, renovations, and even the waiver of burdensome requirements imposed by the franchise agreements.[26] The franchisor is incentivized to provide financial assistance due to the costs involved in vetting, training, and establishing new franchisees.[27] Moreover, a franchisor may suffer negative reputational consequences if a franchisee burns out and sells off its franchise or closes a location completely.[28] While the franchisor may offer financial assistance to franchisees, it must avoid crossing the line into providing financial compensation for franchise operations, because doing so may trigger joint employment issues. This would enable disgruntled workers to pursue legal action against the franchisor's deeper pockets in the event of a labor dispute. As discussed below, courts typically apply the economic realities test or the right to control test in such cases.[29]

Franchisors can face high upfront costs when developing operations manuals, contracts, and disclosures to support and control their franchisees. Not only is this a matter of self-interest

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26. *See* Emerson, *supra* note 24, at 938, 942, 953.

27. Training of a new franchisee remains one of the most serious functions of the franchisor or its designees. For example, surveys of 100 U.S. restaurant systems' franchise contracts in 2013 and 200 such systems' franchise contracts in 2023 showed that 100% of the contracts examined in 2013 and 98.5% in 2023 required that the franchisor provide training for the franchisee. Emerson, *Two-Standard Approach*, *supra* note 12, at 686, 691. Emerson, *Franchise Contract Standards*, *supra* note 12.

28. A high proportion of franchise turnovers in a relatively short period of time is generally read as indicative of a franchise system in turmoil—a system to be avoided by prospective franchisees or other investors. *See* Eric Bell, *What the Top 10 Franchises Have In Common*, Franchise Gator (Sept. 27, 2016), https://www.franchisegator.com/articles/what-the-top-10-franchises-have-in-common-12613/. According to Franchising USA Magazine, the average turnover rate among franchise systems between 2010 and 2014 was right around 10%. Our Top 10 franchises had an average turnover rate of 7.3%. Three concepts saw a percentage under 5%, while another four were in the 6% – 10% range. Notably, FASTSIGNS, our #1 ranked franchise system, had 451 units open at the beginning of 2012. Over the next three years, only 20 units ceased operation, and only four in 2015. That is the kind of turnover rate that those seeking to invest in a franchise should be looking for. *Id. See also* Bill Bradley, *What Do Franchise Turnover Rates Mean?* SmallBizClub (May 29, 2014), https://smallbizclub.com/startup/franchise-center/what-do-franchise-turnover-rates-mean/ ("A higher than usual FTR [Franchise Turnover Rate] might not be a deal-breaker, but it's worth digging deeper to find the reason.").

29. *See infra* Sections II.B, III.A.

but it is also sometimes legally required to limit franchisors' exposure. To accomplish this, franchisors may include explicit disavowals of any business relationship that could establish fiduciary duties between themselves and franchisees, as well as disclose these disavowals to both customers and franchisees.[30] The Franchise Disclosure Document (FDD), which may include a section on independent contracting, is required to be given to franchisees.[31] For example, such a section may state the following:

> You and we understand and agree that this Agreement does not create a fiduciary relationship between you and us, that you and we are and will be independent contractors, and that nothing in this Agreement is intended to make either you or us a general or special agent, joint venturer, partner, or employee of the other for any purpose. You agree to identify yourself conspicuously in all dealings with customers, suppliers, public officials, Franchised Business personnel, and others as the Franchised Business's owner under a franchise we have granted and to place notices of independent ownership on the forms, business cards, stationery, advertising, and other materials we require.

In Oregon, a proposed piece of legislation, House Bill 4152, would have required mandatory disclosures of financial performance in a franchise sale.[32] The bill further provided that

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30. Item 21 of the Franchise Disclosure Document requires that "disclose and include three years of audited financial statements of the franchisors company. The financial statements must be comprised of income statements, cash flow statements, and balance sheets for the fiscal three year period preceding the issuance of the FDD." *FDD Item 21 Financial Statement Disclosure Requirements*, Internicola Law Firm, https://www.franchiselawsolutions.com/franchising/financial-statement-disclosure-requirements/ (last visited July 22, 2022).

31. 16 C.F.R. § 436.2 (2024).

32. The American Association of Franchisees and Dealers (AAFD), the oldest and largest national not-for-profit trade association advocating for the rights and interests of franchisees, claims that this bill protects franchise owners so that they have freedom of association, rights in termination and renewals, and fair sourcing of goods and services. Franchisees benefit in that they are able to bring action for damages and equitable relief for franchisor's violation of the Act. Letter from Robert L. Purvin, Jr, Chair, Board of Trustees, Am. Ass'n Franchisees & Dealers, to Janelle Bynum, Or. State Rep., (Jan. 21, 2021), https://www.aafd.org/wp-content/uploads/2021/01/AAFD-Support-of-2021-Oregon-HB-2946.pdf. Note that Oregon House Bill 4152 proposed

"[a] franchise agreement may not . . . [p]ermit a franchisor to have direct or indirect control of a franchisee's employees or of the day-to-day operations of the franchisee's business."[33] While Oregon House Bill 4152 and similar laws are designed to help parties ensure that the franchise agreement is entered into in good faith,[34] the requirements they impose can result in increased costs that must be borne by the parties.

C. *The Preferred Organizational Identity for Franchisees*

The selection process for a franchisor and potential franchisee goes beyond addressing financial and legal concerns. Issues of identification and association may also come into play because they can impact the success of a particular franchisee. As a business model, franchising is designed around standardization and uniformity to give the franchisor better control and protection of its brand.[35] To maintain standardization across franchisees, the franchisor must carefully select franchisees who are willing and able to adopt its brand.[36] Franchisors may "avoid selecting prospective franchisees that have high entrepreneurial tendencies, as they are more likely to deviate from the franchisor's standardized procedures."[37] However, there may be benefits to having an entrepreneurial franchisee that shares the franchisor's entrepreneurial spirit.[38] Finding the

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as part of the 2022 session was, in most respects, HB 2946 from 2021 reintroduced in the 2022 session.

33. H.D. 4152, 2022 Leg. (Or. 2022). Revisions to Section 4(1)(g) of the bill include mandatory disclosure of the financial performance or forecasted financial performance of existing franchises to any prospective franchisee; a new cause of action if a franchisor develops a new location in close geographical proximity to an existing location and the existing franchisee suffers a material adverse effect; retroactive application of the new statutory sections. *See* Nathan D. Imfeld, *Proposed Revisions to Oregon Franchise Law A Lawsuit Waiting to Happen*, Foley & Lardner, LLP (Feb. 10, 2021), https://www.foley.com/en/insights/publications/2021/02/proposed-revisions-oregon-franchise-law.

34. H.D. 4152, *supra* note 33. The bill died in committee upon adjournment.

35. Anna Watson et al., *When do Franchisors Select Entrepreneurial Franchisees? An Organizational Identity Perspective*, 69 J. Bus. Rsch. 5934, 5934 (2016).

36. Catherine L. Wang, *Entrepreneurial Orientation, Learning Orientation, and Firm Performance*, 32 Entrepreneurship Theory & Prac. 635, 638 (2008).

37. Watson et al., *supra* note 35, at 5934.

38. *See* Olufunmilola Dada et al., *Toward a Model of Franchisee Entrepreneurship*, 30 Int'l Small Bus. J. 559, 561 (2013) (discussing how innovations by entrepreneurial franchisees can have system-wide benefits). McDonalds

right balance between enforcing strict adherence to standards and allowing for adaptability remains a major management challenge for franchisors.[39]

As a way of explaining the franchise selection process, commentators have developed the organizational identity theory; it highlights the importance of franchisees relating to the franchisor organization and thereby maintaining a healthy business relationship.[40] This theory also applies outside of the franchise context, as individuals generally benefit from working for a company with which they identify.[41] Furthermore, employees are more likely to be satisfied and devote more resources to their job, which can lead to better performance and longer retention.[42] Relatedly, market orientation is a prerequisite for both gaining a competitive advantage and maintaining franchisee satisfaction. By utilizing market orientation processes, franchisors can develop a business model for growth and retention.[43] This process relates back to the organizational identity and selection process that gives rise to satisfaction in the franchise business model. Franchisors with "institutionalized entrepreneurial activities" tend to select franchisees with values similar to their own,[44] which leads to better franchise performance.[45] Market-oriented franchisors should seek out similarly oriented franchisees to maintain this identity throughout the franchise system.

The selection process and organizational identity affect the traditional agency relationship between the franchisor as

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franchisees, for example, were responsible for creating the Egg McMuffin and other popular menu items. *Id.* at 563. Patrick J. Kaufmann & Raviv P. Dant, *Franchising and the Domain of Entrepreneurship Research*, 14 J. Bus. Venturing 5 (1998) (detailing a study of franchisors, which found that entrepreneurially oriented franchisors were more likely to select similarly entrepreneurial franchisees when expanding their systems; additionally, providing survey data suggesting that franchise systems perform better when franchisors and franchisee share this entrepreneurial orientation).

39. Kaufmann & Dant, *supra* note 38, at 13.

40. Watson et al., *supra* note 37, at 5935, 5937 ("The loss of individual identity is the hallmark of the franchise relationship, and thus in the context of franchising, organizational identity appears to be particularly pertinent . . .").

41. Steven L. Blader et al., Research in Organizational Behavior, Organizational Identification And Workplace Behavior: More Than Meets The Eye, 34 19 (2017).

42. Yong-Ki Lee et al., *Market Orientation and Business Performance: Evidence from Franchising Industry*, 44 Int'l J. Hosp. Mgmt. 28, 36 (2015).

43. *Id.*

44. Watson et al., *supra* note 37, at 5942.

45. *Id.*

principal and the franchisee as agent. While the principal may seek to limit the agent's opportunistic behavior as its residual beneficiary, the principal directly benefits from locating agents whose interests align with its own.[46] Similarly, in the context of franchising, "where identification is present, franchisors may become stewards of the system: that is, the organizational identification further aligns franchisees' motives with their principal (franchisor) such that franchisees do not engage in self-serving behavior to the detriment of the system."[47] This symbiotic relationship benefits the franchise's overall performance as a whole and minimizes disputes during the relationship.

As it stands, a conflict exists between standardization and entrepreneurial values, as uniformity is mandated but franchisee freedom is desired. However, research indicates that there is a benefit to affording franchisees more entrepreneurial flexibility, which suggests the need to incorporate innovative ideas within the standardization process of the franchise system—effectively wedding these opposed goals.[48] By doing so, franchisors can gain the benefits of having entrepreneurial franchisees, while ensuring a uniform product and experience for consumers. To reap the full benefits under this theory, the franchisor and franchisees must be aligned in their identities as both entrepreneurial (liberated) and organizational (constrained).[49] However, businesses must remain cautious because greater standardization increases the chance of worker classification as an employee under certain tests.

II.
Independent Contracting Law

Independent contractors constitute a significant portion of the United States workforce—around 7%, or over 10.6 million people.[50] Interestingly, more than one in three are over the age of 55.[51] Independent contracting has become increasingly

46. *Id.* at 5943.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Contingent and Alternative Employment Arrangements—May 2017*, U.S. Dep't of Labor, Bureau of Lab. Stat., https://www.bls.gov/news.release/pdf/conemp.pdf. This is the latest official collection of data.
51. *Id.* at 6. Paula Span, *Our Uber Driver Is 'Retired'? You Shouldn't Be Surprised*, N.Y. Times (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/

prevalent in areas such as management, financial operations, sales, construction, and extraction occupations, outpacing traditional business arrangements.[52]

In the United States, a worker is either an employee or an independent contractor.[53] An employee is generally defined as a person who is hired by an employer for a continuous period and is subject to the employer's control over both the desired result of their work and how it is achieved.[54] An independent contractor, on the other hand, is a worker who performs services for the hirer, usually under contract, while maintaining some measure of autonomy and control over the method and final product.[55] This is a vital distinction, as it may implicate a host of issues for hirers and their workers, including employment benefits, workers' compensation, unemployment compensation, wage and hour laws, taxes, and protection under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Family and Medical Leave Act.[56]

An essential factor in determining whether a worker is an employee or an independent contractor is the level of control the business exerts over them.[57] The more control exerted by the hirer, the more it seems the worker is an employee rather than an independent contractor.[58] The potential for business savings through decreased tax liability and benefit pay-outs provides a keen incentive for hirers to classify a worker as an independent

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health/seniors-nontraditional-jobs.html (indicating that those working non-traditional jobs, such as driving for Uber, often do not fit the age and socioeconomic level people associate with those positions). These unexpected demographics, and other considerations—such as that many gig workers may take jobs to supplement income or fill their time, not as a principal occupation—should be factored into the independent-contractor-or-employee public policy debate.

52. U.S. Dep't of Labor, *supra* note 50, at 6.

53. *How to Determine a Worker's Classification*, NFIB Guide to Independent Contractors (last visited June 20, 2022), https://www.nfib.com/Portals/0/PDF/AllUsers/legal/guides/independent-contractors-guide-nfib.pdf (hereinafter NFIB Guide).

54. *Id.*

55. *Id.*

56. Lynn Rhinehart et al., *Misclassification, the ABC Test, and Employee Status*, Econ. Pol'y Inst. (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.

57. *Id.*

58. *Id.*

contractor.[59] A 2013 report from the Treasury Inspector General for Tax Administration concluded that employers could save an average of $3,710 per employee earning an annual income of $43,007 by misclassifying the employee as an independent contractor.[60] However, employers can face heavy fines, litigation costs, and back pay if a worker is misclassified as an independent contractor and therefore does not receive the protections afforded employees by law.[61] Even innocent misclassifications can result in stiff penalties.[62] For example, a franchise owner who misclassifies *all* workers as independent contractors will incur significant penalties and have to reclassify their workforce as employees from the date of the initial misclassification.[63] Other penalties may include a $50 fine for each Form W-2 the employer failed to file on a misclassified employee, as well as a penalty of up to 3% of the wages, 40% of the FICA taxes that were not withheld from the employee, and 100% of the matching FICA taxes the employer should have paid.[64]

If the IRS concludes that an employer intentionally misclassified employees, the penalties are even greater, and may make employers liable to their misclassified employees.[65] Accordingly, making an accurate designation is crucial, but the tests courts

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59. *Misclassification of Employees as Independent Contractors – 2016 Fact Sheet*, Dep't for Professional Employees (June 15, 2016), https://www.dpeaflcio.org/factsheets/misclassification-of-employees-as-independent-contractors. Employment, income, and Social Security taxes account for 20-40% of labor costs (citing *Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. 2 (2010) (statement of Seth D. Harris, Deputy Sec'y of the U.S. Dep't of Lab.), https://www.help.senate.gov/imo/media/doc/Harris4.pdf).

60. *Id.* (citing *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, Treasury Inspector General for Tax Administration (June 14, 2013), http://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf).

61. Rhinehart et al., *supra* note 56; MBO Partners, *Top 5 Employee Misclassification Penalties to Avoid* (Oct. 21, 2022), https://www.mbopartners.com/blog/misclassification-compliance/employee-misclassification-penalties/ (Oct. 21, 2022).

62. *See* Richard Reibstein, *Cares Act III: Pandemic Unemployment Assistance Extended Yet Again for Independent Contractors*, Locke Lord (Mar. 11, 2021), https://www.lockelord.com/newsandevents/publications/2021/03/cares-act-iii-pandemic-unemployment-assistance-ext.

63. *Id.*

64. Burr Forman, *2021 Update – IRS Misclassifications and Costly Penalties: Independent Contractor or Employee* (June 16, 2021), https://www.jdsupra.com/legalnews/2021-update-irs-misclassifications-and-8009270/.

65. 26 U.S.C. § 7434 (1998) calls for civil damages for the fraudulent filing of information returns.

use to determine worker status are perplexing and vary on a case-by-case basis, leading to uncertainty.[66]

A. *The Common Law Test: FedEx Home Delivery, to SuperShuttle, to Atlanta Opera*

The traditional or common law test, also known as the "right to control" or "master-servant" test,[67] focuses primarily on the level of control an employer has over its employee.[68] The more control and authority an employer holds over the worker, the more likely that worker is an employee.[69] This test has its origins in agency and tort law, where plaintiffs seek to establish vicarious liability against employers for the actions of their employees.[70] Courts examine multiple factors when determining the right to control, including:

> (1) The extent of control which it is agreed that the employer may exercise over the details of the work; (2) whether or not the worker is engaged in a distinct business or occupation; (3) the kind of occupation, and whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the worker supplies the instrumentalities, tools, and the workplace; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time worked or by the job; (8) whether or not the work is part of the regular business of the employer; (9) whether or not the parties believe they are creating an employer-employee relationship; and

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66. *See* Fortner v. Specialty Contracting, LLC, 217 So. 3d 736 (Miss. Ct. App. 2017) (holding that Mississippi courts could use the control test and the nature of work test, which looks at (1) the character of the work, such as how skilled is the work, how much of the work is a separate calling or enterprise, and to what extent the work considers its accident burden; (2) the work's relation to the employer's business; (3) whether the work is continuous or intermittent; and (4) the length of time needed to do the work).

67. Oria O'Callaghan, *Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws*, 55 Hous. L. Rev. 1187, 1194 (2018).

68. *Id.* at 1194.

69. *Id.*

70. *Id.*

> (10) whether or not the worker does business with others.[71]

No single factor is meant to be controlling in this analysis, and the determination is made on a case-by-case basis.[72]

Eighteen states, the District of Columbia, and the National Labor Relations Board (NLRB) use a version of this test.[73] The NLRB's use of this test is especially significant because independent contractors do *not* have a protected right under the National Labor Relations Act (NLRA) to form labor unions,[74] highlighting the impact of employee classification on workers' bargaining power.

Moreover, the NLRB's recent *Atlanta Opera* decision makes it easier for workers to be classified as employees and to access the privileges afforded by the NLRA.[75] While the NLRB follows the common law test, the 2019 *SuperShuttle* ruling[76] reintroduced the worker's "entrepreneurial opportunity for gain or loss" as the test's "animating principle."[77] Despite the traditional hallmarks of control exercised by the hirer in *SuperShuttle*, which included mandatory uniforms and established set fares the drivers could charge, the NLRB found that the drivers were independent contractors given their "freedom to keep

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71. Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 Lab. Law. 457, 459 (1999).

72. *See How to Apply the Common Law Control Test in Determining an Employer/Employee Relationship*, Soc. Sec. Admin., https://www.ssa.gov/section218training/advanced_course_10.htm#4.

73. Shelbie Watts, *Independent Contractor Laws: What You Need to Know*, Homebase (Oct. 31, 2023), https://joinhomebase.com/blog/independent-contractor-laws/; *See* Office of Public Affairs, *NLRB Returns to Long-Standing Independent-Contractor Standard*, Nat'l Lab. Rels. Bd., (Jan. 25, 2019), https://www.nlrb.gov/news-outreach/news-story/nlrb-returns-to-long-standing-independent-contractor-standard; Minnesota Timberwolves Basketball, LP, 365 N.L.R.B. 124 (2017).

74. David J. Pryzbylski & Emily Lodge, *Classifying Workers as Independent Contractors May Soon Become More Complicated*, Barnes & Thornburg (July 18, 2022), https://btlaw.com/en/insights/blogs/labor-and-employment/2022/classifying-workers-as-independent-contractors-may-soon-become-more-complicated.

75. The Atlanta Opera, Inc., 372 N.L.R.B. 95 (2023).

76. SuperShuttle DFW, Inc., 367 N.L.R.B. 75 (2019).

77. Hirschfeld Kraemer LLP, *NLRB Returns to Employer-Friendly Standard for Employee vs. Independent Contractor Test; Little Impact Foreseen for CA Employers*, Blog: The Cal. Workplace Advisor, (Mar. 7, 2019), https://www.hkemploymentlaw.com/nlrb-returns-to-employer-friendly-standard-for-employee-vs-independent-contractor-test-little-impact-foreseen-for-ca-employers/.

all fares they collect, coupled with their unfettered freedom to work whenever they want."[78]

The *SuperShuttle* approach was in sharp contrast to the NLRB's previous analysis under *FedEx Home Delivery*, which focused on whether workers were "*in fact*, rendering services as part of an independent business."[79] By emphasizing a worker's "*potential* for entrepreneurial activity,"[80] and adjusting the focus of its test in this manner, the NLRB effectively made it easier for employers to draft working agreements that keep workers as independent contractors based on the *potential* for entrepreneurial activity by the worker, whether actualized or not.[81] In theory, a restaurant may be able to classify its wait staff as independent contractors by allowing servers to decide the lengths of their shifts based on how busy the restaurant is. Instead of having a manager create a weekly schedule, in this arrangement, the servers would have the entrepreneurial opportunity to pursue more tips by coming to work during the restaurant's busiest hours and serving additional customers during these shifts.

The implications of the *SuperShuttle* Board's employment test may best be illustrated with an example. Consider a courier service that picks up and delivers items within a bounded locale. We will call this hypothetical service, "SuperiorCourier." SuperiorCourier, seeking to limit its liability through use of independent contractors, could force its couriers to enter into non-negotiable, uniform "franchising" agreements that outline required standards and operating procedures, and which expressly bar couriers from working for other courier operations. These agreements could also mandate that the couriers utilize SuperiorCourier's proprietary software as the sole means for accepting jobs. SuperiorCourier could retain the right to modify the terms of this agreement for any reason, and at any time. Further still, SuperiorCourier could compel its couriers to accept coupons, recognize promotions, lease vehicles to couriers with poor credit, and employ largely unskilled laborers. As the dissenting NLRB member in *SuperShuttle* points out, each of these requirements contradicts the traditional notions

78. *Id.*
79. FedEx Home Delivery, Inc. 361 N.L.R.B. 55 (2014).
80. Hirschfeld Kraemer LLP, *supra* note 77.
81. *See id.*

of agency law.[82] Nevertheless, under the majority's reasoning, SuperiorCourier would be able to operate in this manner and still classify its workers as independent contractors.

Nonetheless, the NLRB has since abandoned this employer-friendly standard. In *Atlanta Opera*, the Board overruled *SuperShuttle* and decided to return to the *FedEx* approach.[83] Following this decision, the NLRB again evaluates worker-business relationships using the ten factors of the common law test, with no single factor being determinative.[84] This is a more holistic approach, as it allows workers to specify many factors indicating that they should be classified as employees, rather than focusing on minimizing their potential opportunity for entrepreneurial gain. In theory, this will make it easier for workers to be classified as employees and thereby access NLRA protections.

B. *The Economic Realities Test*

While the "right to control" test is still in use, new tests have developed in accord with a heightened emphasis on workers' protections, rather than imposition of tort liability.[85] These tests have led courts to consider factors other than control when distinguishing between employees and independent contractors.[86] One such test is the "economic realities" test.[87] The Department of Labor (DOL) uses a version of this test to determine whether a worker is an employee and thereby entitled to minimum wage and overtime protections under the FLSA, or an independent contractor without such protections.[88]

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82. SuperShuttle, 367 N.L.R.B. at 75.

83. Steven J. Porzio, Joshua S. Fox & Alexander J. Blutman, *Third Act: NLRB Reinstates Employee-Friendly Independent Contractor Analysis under the NLRA*, Nat'l L. Rev. (June 15, 2023), https://www.natlawreview.com/article/third-act-nlrb-reinstates-employee-friendly-independent-contractor-analysis-under.

84. *Id.*

85. *See* Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 301–34 (2001).

86. *See id.*

87. *See id.* For a discussion of the key terms in the "economic realities" test, *see infra* notes 215–18 and accompanying text.

88. *See* Michael D. Koppel, *Independent Contractor or Employee? Varying Tests*, The Tax Advisor (Dec., 1, 2019), https://www.thetaxadviser.com/issues/2019/dec/independent-contractor-employee-tests.html. A number of jurisdictions use this test, while others use a "hybrid" test which analyzes the economic realities of the work relationship while emphasizing the hiring party's

According to the DOL, significant factors for determining worker classification under the FLSA include:

> (1) The extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation.[89]

As the DOL notes, the U.S. Supreme Court, interpreting the FLSA, has held that there is no one rule, factor, or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA; rather, one must look to the totality of the circumstances.[90] "In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, *as a matter of economic reality*, follows the usual path of an employee and is *dependent* on the business which he or she serves."[91] This is a departure from the common law test because the working relationship under the FLSA is determined by "economic reality" rather than "technical concepts."[92] Under the broader scope of this test, each case is examined on a case-by-case basis, and it is the total activity or situation which controls the outcome, not contractual language.[93]

"right to control the 'means and manner' of the worker's performance." Blake E. Stafford, *Riding the Line Between Employee and Independent Contractor in the Modern Sharing Economy*, 51 Wake Forest L. Rev. 1223, 1228 (2016).

89. *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, Dep't of Lab. (Revised July 2008), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

90. *Id.*

91. *Id.* (emphasis added) (paraphrasing Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) (citing Herman v. Express Sixty–Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998))).

92. *See id.* (citing Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043–44 (5th Cir. 1987)).

93. *See, e.g.*, Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1329 (5th Cir. 1985) ("The principles governing employer status . . . turn on economic reality, not contractual niceties.").

Interestingly, Donald Trump, late in his presidency, attempted to change the economic realities test, which has existed in its current form for several decades.[94] On January 7, 2021, the Trump Administration issued a "simplified" version of the test,[95] which primarily focused on two core or primary factors, but also considered three additional or secondary factors.[96] The core factors would have been (1) the nature and degree of the worker's control over the work, and (2) the worker's opportunity for profit or loss.[97] The three additional factors would have been (1) the amount of skill the work required, (2) the permanence of the working relationship, and (3) how integrated the worker's role was to the organization's operation.[98] However, before the business-friendly Trump version of the test made it through the formal rulemaking process, President Joe Biden ordered its withdrawal by the DOL, and it never took effect.[99] Publicly, the DOL stated that the rule was not "fully aligned with the FLSA's text or purpose or with decades of case law describing and applying the multifactor economic realities test."[100]

Accordingly, on October 13, 2022, the DOL proposed a new rule which would provide guidance for employers in classifying their workers.[101] The framework to be used under this proposed rule is intended to be more "consistent with

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94. *See DOL Withdraws January 2021 Trump Administration Independent Contractor Test*, McGuire Woods (May 6, 2021), https://www.mcguirewoods.com/client-resources/Alerts/2021/5/dol-withdraws-january-2021-trump-administration-independent-contractor-test.

95. *See* Tahir Boykins & Mark Konkel, *The Trump-era Independent Contractor Rule is Officially Out*, JDSupra (May 11, 2021), https://www.jdsupra.com/legalnews/the-trump-era-independent-contractor-8408573/.

96. *See id.*

97. *See id.*; note the resemblance of this approach to the aforementioned Trump-era *SuperShuttle* decision, which also highlighted a worker's potential for entrepreneurial activity in the employee-independent contractor analysis.

98. Mark A. Konkel, *Independent Contractor Final Rule (For Now)*, Kelley Dry (Jan. 12, 2021), https://www.labordaysblog.com/2021/01/independent-contractor-final-rule-for-now/.

99. *See* Lindsey R. Camp et al., *DOL Rescinds Trump-Era Rule Regarding Employment Status Under the FLSA*, Holland & Knight (May 19, 2021), https://www.hklaw.com/en/insights/publications/2021/05/dol-rescinds-trump-era-rule-regarding-employment-status-under-the-flsa.

100. *Id.*

101. Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795); *U.S. Department of Labor Announces Proposed Rule on Classifying Employees, independent Contractors;*

longstanding judicial precedent," and would provide greater protection for workers.[102] The DOL took public comments on the proposed rule until December 13, 2022, and a final version of the rule took effect in March 2024.[103] This action signals President Biden's intent to make workers' protections and rights a continuing priority of his administration.

C. *The ABC Test*

Currently, the ABC test is the most commonly used assessment, with over two-thirds of states adopting it.[104] Under this test, a worker is deemed an independent contractor only if all three components are met: (A) the business does not control the worker's performance of the service, (B) the work is either outside the business's usual course or performed outside of all the business's locations,[105] and (C) the worker is customarily engaged in an independent trade or occupation of the same nature as the work performed for the hiring entity.[106] While a degree of ambiguity is manifest in these factors, which allows agencies applying the ABC test freedom to examine the totality of a worker's relationship to the hirer, the most important factor to consider is the degree of control the hirer has over the worker.[107] The practical effect of the ABC test is to place a large burden on hirers seeking to designate workers as independent

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Seeks to return to Longstanding Interpretation, Dep't of Lab. (Oct. 13, 2022), https://www.dol.gov/newsroom/releases/WHD/WHD20221011-0.

102. *See* U.S. Dep't of Lab., *supra* note 101.

103. *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, Off. of Info. and Regul. Affs. (2023), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1235-AA43. On January 10, 2024, the Department of Labor published a final rule, effective March 11, 2024. *Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235–AA43*, U.S. Dept. of Lab. (2024), https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking.

104. NFIB Guide, *supra* note 53, at 11. *See also* Watts, *supra* note 73 (indicating that 33 states use the ABC test).

105. *I.e.*, (1) is the work substantially different from an employer's usual course of business (*e.g.*, installing a fence for a law firm), or (2) is the work not performed in a location where the hirer typically does business. *Information for Independent Contractors & 1099 Workers*, N.J. Dep't of Lab. & Workforce Dev., https://www.nj.gov/labor/worker-protections/myworkrights/independentcontractors.shtml (last visited Sept. 5, 2022).

106. NFIB Guide, *supra* note 53, at 11; *ABC Test*, Cal. Lab. & Workforce Dev. Agency, https://www.labor.ca.gov/employmentstatus/abctest/ (last visited Oct. 1, 2022).

107. *Id.*

contractors, as the test presumes that workers are employees unless all three components are established.[108]

Component A of the ABC test corresponds with the common law test, which emphasizes control over a worker to the exclusion of other factors.[109] However, to qualify as an independent contractor, components B and C must also be met, both of which suffer from ambiguity.[110] Component B closely examines the service performed and demands that one of two requirements be met.[111] For example, if the service is integral to the nature of the business, then it must be performed outside of the location where the hirer typically conducts its business.[112] This constraint greatly limits the types of workers businesses can hire without designating such workers as employees.[113] The issue with component B lies in the lack of a universally accepted definition for a company's "usual course of business."[114] While state and federal courts have provided interpretations, they often apply the "strictest" description of what the business does.[115] Similarly, component C, which requires the worker's business to operate separately and independently from the hiring entity, suffers from the same issue—consistently and accurately defining what a business does is difficult.[116]

To further complicate matters, there is no uniform version of the test. States that use the ABC test vary in the wording of and emphasis placed on its components.[117] For example, in 2004, the Massachusetts legislature removed the latter factor from component B, which focuses on the location where

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108. Erik Sherman, *PRO Act & ABC Test: No One Knows What the Effects Will Be*, Forbes, (Mar. 24, 2021), https://www.forbes.com/sites/eriksherman/2021/03/24/pro-act-and-abc-test-no-one-knows-what-the-effects-will-be/?sh=5c2606a3339e; Koppel, *supra* note 88.

109. *See supra* notes 68–71 and accompanying text.

110. Koppel, *supra* note 88.

111. *See* N.J. Dept. of Lab. & Workforce Dev., *supra* note 105.

112. *Id.* For example, if a law firm hires an outside attorney to perform document review, that attorney must perform the work outside of the firm's offices if the firm wishes to characterize the attorney as an independent contractor. Otherwise, they will be more readily found an employee by a reviewing court or agency.

113. *See* Watts, *supra* note 73.

114. *See* Sherman, *supra* note 108.

115. *Id.*

116. *Id. See also* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 70 (2015).

117. *See, e.g.*, Watts, *supra* note 73.

the work is performed.[118] As a result, under Massachusetts law, the presumption that a worker is an employee is even more robust than in the typical ABC test, as a worker is considered an employee unless the worker's services are demonstrated to be "outside the usual course of business."[119] This standard has led courts in Massachusetts to classify workers in several industries as employees, regardless of the level of control exerted over them.[120]

California has implemented its own version of the ABC test. Under wage orders set by California's Industrial Welfare Commission (IWC), an individual is employed by a business if said business "suffered or permitted" the individual's performed work to be carried out.[121] In the absence of a clear meaning of "suffered or permitted," however, the courts were left to develop their own interpretation.[122] The court in *Martinez v. Combs*[123] took up that role, creating a three-part test, which establishes that a business "suffers or permits" work where it: has knowledge that work is occurring and fails to prevent it.[124] The clear upshot of this definition is that it allows employment status to be triggered not only through an individual's actions but also through inaction, thereby protecting non-traditional or irregular working relationships previously not recognized at common law.[125]

With *Martinez* as its foundation, the California Court of Appeals further clarified employment status in *Dynamex* by

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118. Mass. Gen. Laws ch. 149, § 148B (2019).

119. *Id.*

120. *See* Schwann v. FedEx Ground Packages Sys., Inc., 2013 WL 3353776 (D. Mass. July 3, 2013) (holding delivery drivers to be employees of delivery company under § 148B); Chaves v. King Arthur's Lounge, Inc., 2009 WL 3188948 (Mass. Super. July 30, 2009) (holding exotic dancers to be employees of strip club in which they performed); Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80 (D. Mass. 2010) (holding cleaning workers who were classified as franchisees to be employees).

121. Martinez v. Combs, 231 P.3d 259, 273 (Cal. 2010).

122. *See* Alexander Moore, *Reexamining Joint Employment Wage and Hour Claims Following Dynamex and AB 5*, 54(3) Loy. of L.A. L. Rev. 917, 939–40 (2021).

123. *See Martinez*, 231 P.3d at 281 (holding that a business owner "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder" the work (quoting Curtis & Gartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913))).

124. *Id.*

125. *Id.*

instituting the ABC test.[126] Under the ABC test, a worker is *presumed* to be an employee unless the business proves: (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, as per the contract and the relationship in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[127] This test has been applied in a number of franchise cases in numerous states.[128] For each jurisdiction, however, just because an independent contracting versus employment test applies in one field does not mean that it applies in another field.[129]

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126. Moore, *supra* note 122, at 950.

127. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 35 (Cal. 2018). Note that his is the same test as that codified in 2019 by California's AB 5. *See supra* Part IV.B.ii. It should also be noted that while *Martinez* arose from a joint employment action, *Dynamex* and AB 5 deal with misclassification of independent contractors. *Dynamex*, 416 P.3d at 5. Finally, *Dynamex*'s ABC test has since been held by the California Supreme Court to apply to "all nonfinal cases that predate the effective date of the *Dynamex* decision." Vazquez v. Jan-Pro Franchising Int'l, Inc., 478 P.3d 1207, 1216 (Cal. 2021).

128. *See* Mujo v. Jani-King Int'l, Inc., 13 F.4th 204, 210 (2d Cir. 2021) ("individual can be an employee . . . if an application of the ABC test would deem that individual an employee, even if that same individual is also a franchisee"); Vazquez v. Jan-Pro Franchising Int'l, Inc., 986 F.3d 1106, 1124 (9th Cir. 2021) (upholding the application of the ABC test to franchises); Depianti v. Jan-Pro Franchising Int'l, Inc., 39 F. Supp. 3d 112, 124 (D. Mass. 2014) (citing Jan-Pro Franchising Int'l, Inc. v. Depianti, 712 S.E.2d 648, 649–52 (Ga. Ct. App. 2011) and likewise applying a form of the ABC test, as found in Massachusetts law, to deny the claims of janitorial franchisees that they were misclassified as independent contractors and were actually employees of both their regional master franchisee and the franchisor); Jason Robert's, Inc. v. Administrator, Unemployment Compensation Act, 15 A.3d 1145 (Conn. App. 2011) (holding that the ABC test applies to franchises); Patel v. 7-Eleven, Inc., 183 N.E.3d 398, 412 (Mass. 2022) (concluding, "the independent contractor statute [the ABC statute] applies to the franchisor-franchisee relationship and is not in conflict with the franchisor's disclosure obligations set forth in the FTC Franchise Rule.").

129. Most states do apply the "ABC" test in their analyses for unemployment insurance eligibility under the National Labor Relations Act and the Fair Labor Standards Act. *See* Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 L. & CONTEMP. PROBS. 107, 122 (2018). Professor Oei notes, "determination of worker classification is done separately for each area of law. However, there is overlap in the substantive considerations that each field takes into account, although there may be differences at the margin." *Id.*

D. *The IRS Control Test*

Finally, the Internal Revenue Service (IRS) employs its own test, primarily used in federal tax law, which centers on the fundamental control test.[130] The IRS recently released Publication 15-A, outlining new and revised criteria for independent contractors and employers and their tax concerns.[131] While Publication 15-A does not change the previous IRS criteria, it offers more focused guidance moving forward.[132] For example, the longstanding "20 factor" test remains valid.[133] As the name indicates, that test includes 20 criteria used to evaluate whether a worker is an employee or an independent contractor.[134] A worker does not have to meet all 20 criteria, and no single factor is outcome determinative.[135] However, the IRS's overarching concern, for purposes of distinguishing between employees and independent contractors, is now the hirer's level of control and ability to direct the worker's actions.[136] Starting January 1, 2020, the IRS began grouping factors into three broad "areas" of control:

> (1) Behavior control - these factors look at whether the business has a right to direct and control how the workers do the tasks for which they were hired;
>
> (2) Financial control - these factors assess the facts that show whether the business has a right to control the business aspects of the worker's job, including how the worker is paid, the worker's investments in the tools used, and how business expenses are reimbursed; and

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130. I.R.S. Pub. No. 15-A, *Employer's Supplemental Tax Guide* (Dec. 23, 2019), https://www.irs.gov/pub/irs-pdf/p15a.pdf; David Houston, *The "New" IRS Independent Contractor Test — The More Things Change the More They Stay the Same*, Fraser Trebilcock Blog (Jan. 30, 2020), https://www.fraserlawfirm.com/blog/2020/01/the-new-irs-independent-contractor-test-the-more-things-change-the-more-they-stay-the-same/.

131. Houston, *supra* note 130.

132. *Id.*

133. Rev. Rul. 87-41, 1987-1 C.B. 296; Koppel, *supra* note 88.

134. Or. Dep't of Agric., *IRS 20 Factor Test – Independent Contractor or Employee?*, https://www.oregon.gov/oda/shared/Documents/Publications/NaturalResources/20FactorTestforIndependentContractors.pdf (last visited Mar. 26, 2023).

135. *Id.*

136. Houston, *supra* note 130.

> (3) Type of relationship - these factors assess the facts that show the nature of the relationship, including the terms and conditions of the written contract, the length of the relationship, and whether the services involve regular business activity of the employer.[137]

It is questionable why the IRS uses its own worker classification test despite its similarities to the common law test.[138] Perhaps the reason lies in the IRS's goal to properly assess tax liability and collect revenue. If a worker is deemed an employee, the employer usually must withhold federal income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee.[139] However, if a worker is deemed an independent contractor, the business is usually not liable for these taxes.[140] Focusing on the Social Security tax[141] illustrates the practical impact of worker classification. Currently, the Social Security tax rate is 12.4% of income.[142] If a worker is classified as an employee, both the employee and employer split the tax burden, with the employer withholding 6.2% from the employee's paychecks (i.e., the employee's tax contribution) and matching the remaining 6.2% of the tax liability.[143] Conversely, independent contractors must pay the full 12.4% Social Security tax on their income as part of the "Self-Employment tax."[144] With this simple example

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137. *Id.*

138. I.R.S. Pub. 15-A, *supra* note 130.

139. *Id.*

140. *Id.*

141. Formally, the Social Security tax is known as Old-Age, Survivors, and Disability Insurance (OASDI). *What Are the Major Federal Payroll Taxes, and How Much Money Do They Raise?*, Tax Pol'y Center, Urban Inst. & Brookings Inst., https://www.taxpolicycenter.org/briefing-book/what-are-major-federal-payroll-taxes-and-how-much-money-do-they-raise (last visited Sept. 5, 2022).

142. *Id.* Note, the overall Social Security tax is 12.4% of income, but as of 2021 a maximum of $142,800 can be taxed to cover Social Security. *Contribution and Benefit Base*, Soc. Sec. Admin., https://www.ssa.gov/oact/cola/cbb.html (last visited Sept. 5, 2022); *Topic No. 751 Social Security and Medicare Withholding Rates*, I.R.S. (Jan. 1, 2024), https://www.irs.gov/taxtopics/tc751.

143. *See* Donna Fuscaldo, *What Small Businesses Need to Know About FICA Tax*, Bus. News Daily (Oct. 26, 2023), https://www.businessnewsdaily.com/16185-fica-taxes.html.

144. *Self-Employment Tax (Social Security and Medicare Taxes)*, I.R.S., (Aug. 3, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes. However, it is not all bad news for independent contractors. First, independent contractors are able to deduct up to half of their Self-Employment tax from their adjusted

in mind, it is not hard to imagine why businesses seek to have workers classified as independent contractors—it significantly benefits their bottom line.[145] Still, despite the IRS's attempt to offer more focused guidance, the test's inherent flaws only contribute to the confusion between employee and independent contractor status. As tax expert Michael D. Koppel points out, proper classification can only be determined after a case-by-case analysis in court.[146]

III.
Joint Employment Law

The franchise model is built on the premise that the franchisor has developed a system that it licenses to *independent*

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gross income. Additionally, independent contractors may be eligible to claim the Earned Income Tax Credit (EITC). *Id.; see also* 26 U.S.C. § 199A. I.R.C. § 199A provides that individuals who are independent contractors can qualify for a 20% tax deduction on their independent contractor income as long as certain eligibility requirements are met. With this additional incentive, several outcomes are possible: (1) workers who are currently employees could abandon their employee jobs and do independent contractor jobs instead, (2) workers who are currently employees could try to re-characterize their current jobs as independent contractor work, or (3) firms could convert employee jobs into independent contractor jobs. Interestingly, independent contractors consistently report higher levels of job satisfaction than standard full-time workers, with over 80% of independent contractors satisfied with their employment type. In the "very-satisfied" category, independent contractors reported 56.8% versus 45.3% for traditional full-time employees. U.S. Gov't Accountability Off., GAO-15-168R, Contingent Workforce: Size, Characteristics, Earnings, and Benefits 24 (2015), https://www.gao.gov/assets/gao-15-168r.pdf.

145. In 2019 alone, federal payroll taxes generated $1.2 trillion (35.9% of federal revenues), and this figure rose to $1.3 trillion (32.5%) in 2021. *See Policy Basics: Federal Payroll Taxes*, Ctr. on Budget and Pol'y Priorities, https://www.cbpp.org/research/federal-tax/federal-payroll-taxes (Oct., 25 2022) (citing *Budget of the United States Government, Fiscal Year 2019*, Off. of Management & Budget, Historical Tables). Although the Biden Administration initially planned to rollback Trump era tax cuts and strengthen Social Security, they later decided to extend those cuts for households earning under $400,000, making future projections uncertain. *See* Richard Rubin, *Biden Seeks Extension of Trump Tax Cuts for Most Households*, Wall. St. J. (Mar. 9, 2023, 4:16 PM), https://www.wsj.com/articles/biden-seeks-extension-of-trump-tax-cuts-for-most-households-9109b53f.

146. Koppel, *supra* note 88; *see also* Alan Gassman, *What Is an Independent Contractor? Here's Why It Matters Under the Trump Tax Law*, Forbes (Oct. 5, 2018), https://www.forbes.com/sites/alangassman/2018/10/05/what-is-an-independent-contractor/?sh=198481861692.

contractors.[147] These contractors then own and operate their own individual businesses under the terms of the franchise agreement.[148] In many cases, franchisees establish a separate business entity under which they operate their franchise, such as a corporation or LLC. As one commentator puts it, "The view that the franchisor is somehow an employer of the franchisee, or *even a joint employer of those who work for the franchisee*, is inconsistent with the fundamental concept of franchising."[149] Such a determination presents, in effect, a high, if not insurmountable, bar to treating franchisors as jointly responsible for actions allegedly taken by persons working at or for a franchise entity. Third parties who are considering lawsuits or other challenges against franchise parties may justifiably view joint employment to be a critical factor that should be considered early in the process. If an entity (e.g., a franchisor) is in fact found to be a joint employer, this entity could be held liable for (1) the labor violations alleged by an employee against the other joint employer (e.g., the franchisee),[150] or (2) the negligent acts of a joint employee under *respondeat superior*.[151]

The conclusion that joint employment is antithetical to franchising is debatable. Those opposed to classifying franchisors as joint employers of their franchisees' workers argue that this status would "create an immense amount of legal risk" for

147. Barry M. Heller, *Employee and Independent Contractor Classification: Still the Top Legal Issue in Franchising*, DLA Piper (Mar. 29, 2021), https://www.dlapiper.com/en/insights/publications/intellectual-property-and-technology-news/2022/ipt-news-q1-2021/employee-and-independent-contractor-classification.

148. *Id.*

149. *Id.* (emphasis added).

150. Stephanie L. Adler-Paindiris et al., *Class Action Trends Report, Fall 2018: Are You My Employer?*, 70 Lab. L.J. 75, 76 (2018). For example, "[a] rental car company that uses the services of an outside agency to staff customer service call centers may be held liable under the FLSA if the staffing agency fails to pay overtime to those employees." *Id.* at 77.

151. For example, an employee at a franchised store outlet fails to maintain a safe, clean environment, resulting in a customer's injuries from a slip and fall. For a detailed analysis of bases for finding franchisor liability related to the behavior of franchisees, particularly focusing on issues related to trademark licensing and agency law principles, *see* Emerson, *supra* note 9, at 580–600; *see also* Robert W. Emerson, *An International Model for Vicarious Liability in Franchising*, 50 Vand. J. Transnat'l L. 245, 271–90 (2017) (discussing various approaches that the European Union and many nations have employed when analyzing possible cases of franchisor vicarious liability for a franchisee's actions or inaction).

franchisors.[152] These commentators theorize that if franchisors could be classified as joint employers based on the level of support provided to their franchisees, they would "back off providing that kind of indirect support to their franchisees to make a business successful."[153] Indeed, there is anecdotal support that some franchisors did pull back on support to franchisees in the wake of the *Browning-Ferris* decision in 2015, though it is unclear what the extent of this effect was and how pervasive it was in franchising as a whole.[154] The support and training provided by franchisors to franchisees is one of the primary appeals of the franchising system, and the concern is that discouraging this support would derail the franchising model entirely.[155]

However, this concern is likely overblown. While providing a higher level of support to franchisees indicates greater control, and thus makes a finding of joint employer status more likely, franchisors still have legal incentives to provide this support.[156] By entirely withdrawing support to franchisees, franchisors open themselves up to breach of contract liability to franchisees who entered into the franchise agreement expecting to receive this support.[157] Franchisors simply ceasing to offer integral services to avoid classification under a new joint employment standard is likely unreasonable in light of the legal liability to which it would expose these franchisors. Further, there are additional steps that franchisors can take to avoid being classified as joint employers, such as offering a wider range of approved suppliers for franchisees to pick from and making it clear that policies outlined in any manuals provided

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152. Aneurin Canham-Clyne, *IFA Forms Law Center to Fight Joint Employer Rules*, Restaurant Dive (Nov. 2, 2023), https://www.restaurantdive.com/news/international-franchise-asscoiation-forms-law-center-to-fight-joint-employer-rules/698618/; *see also Joint Employer*, International Franchise Association, https://www.franchise.org/advocacy/brand-standards/joint-employer#:~:text=For%20many%20franchisees%2C%20an%20expanded,less%20support%20from%20their%20brands.

153. Canham-Clyne, *supra* note 152.

154. Joyce Mazero et al., *Drawing Lines in Franchisor Support — Is It Necessary and Where Are the Lines to Draw in Today's Joint-Employment Environment?*, 38 Franchise L.J. 327, 347-49 (2019). The authors, Mazero et al., collected responses from 32 franchisors or franchisees, and many of the respondents noted that there had been a withdrawal of some support functions in their franchise systems following the Browning-Ferris decision. *Id.*

155. *See supra* notes 5–47, and accompanying text.

156. Mazero et al., *supra* note 154, at 327.

157. *Id.* at 329.

to franchisees are truly suggestions.[158] For franchisors who wish to avoid joint employer classification, ceding more operational control to franchisees likely remains an option.

Even if a greater presumption of joint employment in franchising increases some costs for franchisors, there is a strong argument that this burden is outweighed by the benefits to those employed within the franchise system. Various studies conducted in the past decade suggest that billions of dollars in wages and other benefits have been illegally withheld from low-wage employees across a wide range of industries, with the effects being particularly bad in franchised businesses, such as fast-food restaurants.[159] One of the root causes of this problem is the lax joint employment standard traditionally applied to the franchise context, which has made it difficult for employees to protect themselves from wage theft and other related labor violations in the franchise context.[160] Under the existing joint employment regime, many large franchisors were able to resist bargaining with franchise workers, and largely avoided liability for labor violations.[161] By classifying franchisors as joint employers of franchise workers, the franchisors can, it has been contended, be made to engage in collective bargaining; that, in turn, offers opportunities for workers to secure greater protections and hold franchisors accountable for any labor violations they may commit.[162] While this higher standard will likely come with additional costs to franchisors, these costs are necessary in exchange for the millions or even billions of dollars in additional wages and other benefits that workers across the country could potentially receive through more equitable bargaining.

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158. *See id.*

159. Alex Park, *The Fast Food Industry Runs on Wage Theft,* The New Republic (May 26, 2022), https://newrepublic.com/article/166611/fast-food-wage-theft; David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, Econ. Pol'y Inst. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

160. Marni von Wilpert, *States with Joint-Employer Shield Laws Are Protecting Wealthy Corporate Franchisers at the Expense of Franchisees and Workers*, Econ. Pol'y Inst. (Feb. 13, 2018), https://www.epi.org/publication/states-with-joint-employer-shield-laws-are-protecting-wealthy-corporate-franchisers-at-the-expense-of-franchisees-and-workers/.

161. *Id.*

162. *See* Robert Baker & Robert Entin, *NLRB's Final Rule Revamps Definition of Joint Employers–What Employers, Franchisors, and Staffing Agencies Should Know*, JD Supra (Oct. 27, 2023), https://www.jdsupra.com/legalnews/nlrb-s-final-rule-revamps-definition-of-5943094/.

Besides the omnipresent question of whether a worker is an independent contractor or employee, there is the related issue of whether a franchisor and franchisee are joint employers. A joint employer relationship exists when control over an employee is held jointly by more than one entity.[163] While it is conceivable for a franchisor to be held liable as a joint employer,[164] the debate does highlight a fundamental contradiction between a "classic" franchise model and modern concepts of joint employment and independent contracting.

If franchisees do simply "get what they bargain for," then—under the traditional approach—they may be unable to achieve meaningful bargaining power by joining a union.[165] While employees may unionize under the NLRA,[166] franchisees would effectively remain in a lower class, partly because of their own choices under the franchise contract. Other employees could pursue legal remedies against a joint employer that are unavailable to similarly affected employees or other third parties working in a franchise setting.[167]

There are two types of joint employment: horizontal and vertical. Horizontal joint employment is where an employee has two or more employers who are sufficiently associated or related to the employee such that they jointly employ the worker as a "single enterprise."[168] A vertical joint employment relationship, on the other hand, exists where an employee

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163. *See, e.g.*, Adler-Paindiris et al., *supra* note 150, at 76. The various tests employed to reach this determination are the subject of this section.

164. *See infra* Parts III.A & III.B.

165. Independent contractors are prohibited from forming unions under the National Labor Relations Act. National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151–169 (2018). In franchising, there thus remains a challenge for franchisees seeking to use collective power to counter or negotiate with their franchisor. *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1558–62 (1990) (proposing the enactment of right-of-association statutes and of antitrust exemptions for franchisee associations, thus providing franchisees, individually and as a group, with protections from some franchisor practices to undermine the development and influence of their associations; the franchisees would have a recognized right to organize and to push for, *inter alia*, collective bargaining with their franchisors, although without lawmakers having taken the final step of treating franchisee associations as having a right, comparable to that of certified labor unions, to compel collective bargaining).

166. National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151–169 (2018). The NLRA prohibits employers from interfering with the right to organize and collectively bargain.

167. *See* Adler-Paindiris et al., *supra* note 150, at 79.

168. *Id.* at 79–80.

has an employment relationship with one employer, such as a staffing agency, subcontractor, labor contractor, or other intermediary employer. However, the economic realities show that the worker is economically dependent on, and thus employed by, another entity involved in the work.[169] This latter employer, who typically contracts with the intermediary employer to receive the benefit of the employee's labor, would be a potential joint employer.[170]

In the context of franchising, employment relationships often involve horizontal association between the franchisee and franchisor. Employees of a franchise work in the franchisee's business but are also associated with the franchisor,[171] for instance, they wear uniforms bearing the franchisor's logo and name. Vertically, these employees are economically dependent on the franchisee, as the franchised unit's success is the source of their income; then again, they are also dependent on the franchisor, as any financial or public relations issues can jeopardize the employee's livelihood.[172]

The franchise model carries a large portion of potential joint employers. Often, indicia of joint employment arise when the franchisor seeks to protect its brand.[173] Franchisors go to great lengths to protect their brand—arguably their most valuable asset—by imposing standards on the franchisee that serve to both create a uniform experience for the customer and

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169. *Id.* at 77; *see also* Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1, 39–40 (2018) (noting that recent developments in case law have made vertical employment even easier to find than horizontal employment, and that vertical joint employment now seemingly shifts the burden of persuasion to employers who will have to prove they are completely dissociated).

170. Adler-Paindiris et al., *supra* note 150, at 75.

171. *See* Allen Smith, *Are You a Joint Employer?*, SHRM (Jan. 21, 2016), https://www.shrm.org/topics-tools/employment-law-compliance/joint-employer.

172. Adler-Paindiris et al., *supra* note 150, at 75. One manifestation of this sequence of events is the poor publicity given to a franchisor, perhaps due to a founder's political views, which in turn impacts the earnings of franchisees, which may subsequently affect the pay and other job conditions of those franchisees' employees. *See* Robert W. Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL'Y 353, 353–56, 370 (2014) (discussing prominent examples including, *inter alia*, Chick-fil-A, Papa John's, Denny's, and Citgo).

173. Michael Brennan et al., *Joint Liabilities for Franchisors: Employment, Vicarious Liability, Statutory and Other Liabilities*, 14 INT'L J. FRANCHISING L. 3, 16 (2016).

build brand loyalty, benefiting both the franchisor and franchisee.[174] These standards are a double-edged sword, however, as the more control the franchisor exerts over the franchisee, the more likely it is that joint employment status exists.[175] For example, the high degree of control exerted by McDonald's over its franchisees allows McDonald's to maintain system-wide brand integrity and efficiency. However, this involvement in the franchisees' operations has served as the basis for the NLRB to establish McDonald's as a joint employer of every franchisee's employees.[176]

The designation of joint employer status can have significant financial implications for businesses, making it vital for them to determine their status accurately. However, the joint employment determination is currently lacking clarity, similar to the employee-independent contractor classification. Nevertheless, there may be new developments in this area as the Federal Trade Commission (FTC) issued a "Request for Information" (RFI) on March 10, 2023, seeking public input on franchise agreements and franchisor business practices.[177] The RFI focuses specifically on how franchisors exert control over franchisees and their workers, which, as discussed below,[178] is a factor in determining joint employer status.[179] The FTC solicited input from a variety of parties, including franchisors, franchisees, government entities, economists, attorneys, academics, consumers, and current and former employees.[180] The RFI, with time extensions for more input, aims to gather insight into how franchisors disclose certain aspects and contractual

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174. *Id.*

175. John T. Bender, *Barking Up the Wrong Tree: The NLRB's Joint-Employer Standard and the Case for Preserving the Formalities of Business Format Franchising*, 35 Franchise L.J. 209, 211 (2015); for example, it is one thing for a franchisor to recommend operation policies or to provide software and payroll systems to its franchisee, but it is another to mandate policies that directly impact the franchisee's employees' terms and conditions of employment. Adler-Paindiris et al., *supra* note 150, at 79.

176. Alisa Pinarbasi, *Stop Hamburglaring Our Wages: The Right of Franchise Employees to Union Representation*, 47 U. Pac. L. Rev. 139, 155 (2016). Still, this remains uncertain, as Labor Board rulings have varied over the years.

177. *See FTC Seeks Public Comment on Franchisors Exerting Control Over Franchisees and Workers*, Fed. Trade Comm'n (Mar. 10, 2023) (hereinafter *FTC Seeks Public Comment*), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-seeks-public-comment-franchisors-exerting-control-over-franchisees-workers.

178. *See infra* Section III.A.

179. *See FTC Seeks Public Comment*, *supra* note 177.

180. *Id.*

terms of franchise relationships amidst growing concerns about unfair and deceptive practices in the franchise industry.[181]

A. *A Right-to-Control Test*

As with the employee-independent contractor determination, a patchwork of tests is used to determine joint employer status. The most common of these is the right-to-control test, which generally asks whether the putative employer has the right to control the means and manner of the employee's work.[182] Factors in this analysis typically look at whether the purported employer has control over the hiring and firing, compensation and training, and day-to-day activities of the employee.[183] Moreover, the court will look at the tools used to perform the work, who owns them, and the length of time the contractual relationship has been in place.[184] In the franchising context, courts have generally held that the "master-servant" relationship required for joint employer vicarious liability develops only when the franchisor maintains extensive controls over the daily operations of the franchisee, distorting the traditional franchise relationship.[185]

In April 2020, the NLRB, whose standard is the model for many jurisdictions, took steps to clarify and simplify this analysis by issuing a final rule regarding the right-to-control test.[186] Before discussing the most recent version of the test, however, a brief history of the NLRB's rule is needed. Prior to 2015, the NLRB classified companies as joint employers only if the companies had control over their workers' essential employment terms and conditions *and actually exercised* such control.[187] This

181. *Id.*
182. Adler-Paindiris et al., *supra* note 150, at 82.
183. *Id.*
184. *Id.*
185. *See, e.g.*, Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781, 786 (3d Cir. 1978) (noting that, while some degree of control is inherent in the franchisor-franchisee relationship, whether sufficient control exists to trigger a master-servant relationship depends upon a case-by-case assessment of the "nature and extent" of such control).
186. Courtney M. Malveaux & Richard F. Vitarelli, *NLRB Joint-Employer Rule Effective April 27, 2020*, Jackson Lewis (Mar. 31, 2020), https://www.jacksonlewis.com/publication/nlrb-joint-employer-rule-effective-april-27-2020.
187. *NLRB Reverses* Browning-Ferris *Ruling, Says Obama-Era Board's Retroactive Application of Joint Employer Standard Unjust*, Kahn, Dees, Donovan & Kahn (July 30, 2020), https://kddk.com/2020/07/30/nlrb-reverses-browning-

changed in 2015 with the *Browning-Ferris Industries of California, Inc.*[188] decision. Under *Browning-Ferris*, the standard expanded, and companies could be designated as joint employers if they had even indirect control, or the potential to control, another company's workers.[189] Dissatisfied with the *Browning-Ferris* interpretation of the rule, the NLRB briefly reversed course and reinstated the prior standard in its *Hy-Brand Industrial Contractors, Ltd.*[190] decision. The change was only temporary, however, as the *Hy-Brand* ruling was vacated, and thus the *Browning-Ferris* decision remained controlling law.[191]

When the NLRB's new final rule became effective on April 27, 2020, the pre-*Browning-Ferris* standard was, in most respects, reaffirmed.[192] A business again had to possess *and exercise* "substantial direct and immediate control" over essential terms or conditions of employment.[193] Critically, the rule defined what "substantial direct and immediate control" is.[194] According to the NLRB, it was control "that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees.[195] Such control is not 'substantial' if it is only exercised on a sporadic, isolated, or *de minimis* basis."[196] The 2020 rule also clarified that the essential terms and conditions of employment include wages, benefits, hours of work, hiring, discharge, supervision, and direction.[197] Further, the party asserting joint employment

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ferris-ruling-says-obama-era-boards-retroactive-application-of-joint-employer-standard-unjust/.

188. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599 (2015).

189. Mintz, *The NLRB's Final Joint-Employer Rule Will Soon be in Effect*, JDSUPRA (Apr. 24, 2020), https://www.jdsupra.com/legalnews/the-nlrb-s-final-joint-employer-rule-34561/.

190. Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156, at 1 (2017).

191. Hy-Brand Indus. Contractors, Ltd., 366 N.L.R.B. No. 26, at 1 (2018).

192. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020) (codified at 29 C.F.R. § 103.40).

193. 29 C.F.R. § 103.40(a) (2022).

194. Mark G. Kisicki, *Long-Awaited NLRB Joint-Employer Rule Sets Employer-Friendly Standard for Joint-Employer Determinations*, OGLETREE DEAKINS (Feb. 27, 2020), https://ogletree.com/insights-resources/blog-posts/long-awaited-nlrb-joint-employer-rule-sets-employer-friendly-standard-for-joint-employer-determinations/.

195. *Id.*

196. *NLRB Issues Joint-Employer Final Rule,* NLRB OFF. OF PUB. AFFS. (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

197. *NLRB Finalizes New Joint Employer Standard*, HORTON MGMT. L. (Mar. 6, 2020), https://hortonpllc.com/nlrb-finalizes-new-joint-employer-standard/

bears the burden of proving that a joint employer relationship exists.[198]

This iteration of the rule is clearly franchisor friendly as it narrows the definition of joint employer to those who actually exercise control over employees. However, in September 2022, the NLRB, now holding a 3-2 Democratic majority, released a Notice of Proposed Rulemaking outlining its proposed changes to the joint-employer standard under the NLRA.[199] This sea change in interpretation aims to replace the joint-employer rule that came into effect in April 2020.[200] On October 26, 2023, the NLRB issued a final version of this rule,[201] which was to take effect for cases filed after February 26, 2024.[202] Under the new final rule, it would be much easier for entities to be deemed joint employers. In fact, the changes would ground the joint-employer standard in established common law agency principles, and consider both direct and indirect control over essential terms and conditions of employment when analyzing joint-employer status.[203] For example, the rule defines two or more employers as joint employers if they "share or codetermine

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(noting that exercising control over wages and actually determining the wage rates is an example of direct and immediate control which would lead to a finding of joint employment).

198. 29 C.F.R. § 103.40(a) (2022).

199. NLRB, *NLRB Issues Notice of Proposed Rulemaking on Joint-Employer Standard* (Sept. 6, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-joint-employer-standard (hereinafter "NLRB, Joint-Employer Rulemaking"); Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

200. NLRB, Joint-Employer Rulemaking, *supra* note 199.

201. This rule was challenged in federal court. On March 8, 2024, in Chamber of Com. of U.S. v. NLRB, No. 6:23-cv-00553, 2024 U.S. Dist. LEXIS 43016 (E.D. Tex. Mar. 8, 2024), the court vacated the rule, concluding that it was arbitrary and capricious. *Id.* at *50. The court found that step one of the rule's joint employment test swallows step two and, based on the language, another section of the rule may establish joint employment without first proving the first step. *Id.* at *37–38, *40–41. The court's ruling, along with its declaration that the NLRB's recission of the agency's 2020 rule was arbitrary and capricious, likely means that the NLRB's 20 C.F.R. § 103.40 (2020) promulgation is controlling for now. *Id.* at *51. The ruling very likely will be appealed. David J. Pryzbylski & Scott J. Witlin, *Hold Please: Texas Judge Blocks Labor Board's Joint-Employer Rule*, The Nat'l L. Rev. (Mar. 11, 2024), https://www.natlawreview.com/article/hold-please-texas-judge-blocks-labor-boards-joint-employer-rule.

202. NLRB, *Board Issues Final Rule on Joint-Employer Status* Nat'l Lab. Rel. Bd. (Oct. 26, 2023), https://www.nlrb.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status; Standard for Determining Joint Employer Status, 88 Fed. Reg. 81344 (Nov. 22, 2023).

203. *Id.*

those matters governing employees' essential terms and conditions of employment,"[204] which are defined exclusively as:

> (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.[205]

Further, under the new rule, a business does not need to actually exercise control over any of the seven listed factors to be found a joint employer; it only needs to be shown that the business had the authority to do so.[206]

About the only strong pro-franchisor procedural position remaining under the proposed rule might be the burdens of proof. While the ABC Rule presumes employment over independent contractor status,[207] the legal test concerning joint employment is somewhat different. There is the usual civil standard (i.e., burden) of proof, a preponderance of evidence; and this therefore requires the party asserting that someone is a joint employer carry the burden of proof.[208] Typically, in the

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204. ". . . means for an employer to possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment." Standard for Determining Joint-Employer Status, *supra* note 199, at 54658 (offering the dissenting view of NLRB board members Marvin E. Kaplan and John F. Ring, and quoting from the proposed new version of 29 CFR § 103.40(c)).

205. NLRB, *supra* note 201; *See also The Never-Ending Story? NLRB Proposes New Rule Shifting Back to Broad Definition of 'Joint Employer*, 'Fisher Philips (Sept. 7, 2022), https://www.fisherphillips.com/news-insights/the-never-ending-story-nlrb-proposes-new-rule-shifting-back-to-broad-definition-of-joint-employer.html.

206. Todd Lebowitz, *NLRB Vastly Expands Joint Employer Definition*, JD Supra (Oct. 30, 2023), https://www.jdsupra.com/legalnews/nlrb-vastly-expands-joint-employer-2321926/.

207. To conclude, instead, that there is an independent contracting relationship, the three, "ABC" elements are needed. *Supra* notes 105–09 and accompanying text. This, of course, is counter to the position franchisors desire, to avoid any number of administration and financial burdens, such as taxes and vicarious liability.

208. *See* 29 C.F.R. §103.40(g). The final rule of October 2023 did not alter the standard used under the 2020 rule and earlier precedent. *See also*

franchising context, this means that employees at a franchise would have to show they are more than just franchisee employees, but also have a second employer, the franchisor. However, under the new rule for determining joint employer status, the tests, such as for control over the employee, all would seem to favor the party asserting a franchisor's status as joint employer, and meeting the procedural burden of proof is just a matter of providing evidence even slightly greater than a 50% probability.

Presumably, reaching the top of a tiny summit (meeting that most basic of civil burdens of proof) is all the easier when the climb itself (the finding and presenting of evidence) has been made so smooth, and is along such a shiny new pathway (the presumptions to be invoked). Potential but unexercised indirect control could be sufficient to consider a business a joint employer for labor relations purposes, without requiring actual, direct control;[209] the new rule would extend the analysis to evaluate evidence of reserved and indirect control (or control through an intermediary or via a contractually reserved but never exercised right of control).[210] Accordingly, this rule was set to alter the liability landscape significantly, with its effects suppose to be felt as soon as early 2024.[211] However, the new standard presented under the rule has been attacked by proponents of franchising,[212] and, following the introduction of

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Standard for Determining Joint-Employer Status, *supra* note 199, at 54651 (confirming the case law in *Browning-Ferris* and citing 29 CFR § 103.40(g) for the proposition that "[a] party asserting that an employer is a joint employer of particular employees has the burden of establishing that relationship by a preponderance of the evidence").

209. *See* 29 C.F.R. §103 at 73947. Moreover, neither a party's possession of authority to control, nor its exercise of the power to control is defined in the proposed rule.

210. By following this approach, the proposed rule eliminates the requirement that control be exercised directly and immediately. Instead, the new rule would follow the *Browning-Ferris* formula.

211. *See supra* note 187 and accompanying text. The rule was to become effective on February 26, 2024, meaning that the standard would have been applied to cases filed after that date. Standard for Determining Joint Employer Status, 88 Fed. Reg. 81344 (Nov. 22, 2023). However, with the Chamber of Com. of U.S. v. NLRB, No. 6:23-cv-00553, 2024 U.S. Dist. LEXIS 43016 (E.D. Tex. Mar. 8, 2024), the rule was, at least for the time being, vacated.

212. The International Franchise Association (IFA) called on Congress to overturn the rule, arguing that among other things, the rule will decrease the independence of franchisees because franchisors will be forced to exercise more control in order to avoid liability. *See* Mary Vinnedge, *IFA Urges Congress to Undo Revised Joint Employer Rule*, FranchiseWire (Oct. 27, 2023 at 5:00 AM), https://www.franchisewire.com/ifa-urges-congress-to-undo-re-

a Congressional Review Act to overturn the rule, it remains uncertain if and when the rule will actually take effect.[213] Indeed, all may hinge on the 2024 election and the consequential long-term makeup of federal courts, the NLRB, and - most important—actual statutory changes, such as from a united Democratic Congress and President.[214]

B. *The FLSA Standard*

Another test that is commonly applied in joint employment cases is the "economic realities" test. This test looks at the economic or financial realities of the relationship between a worker and the putative joint employer to determine whether that worker is financially dependent upon that employer.[215] Essentially, it measures the worker's economic independence vis-à-vis an alleged joint employer,[216] and it is primarily used in

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vised-joint-employer-rule/; *see also New Report Shows Expected Consequences of Proposed Joint Employer Rule kn Franchised Businesses*, Int'l Franchise Ass'n (Sept. 7, 2023), https://www.franchise.org/media-center/press-releases/new-report-shows-expected-consequences-of-proposed-joint-employer-rule.

213. The same day that the NLRB issued the final rule, Senators Bill Cassidy and Joe Manchin announced they would introduce a Congressional Review Act (CRA) to overturn the rule. *Ranking Member Cassidy, Manchin Announce CRA to Overturn New Biden Rule Threatening American Franchise Model, Local Businesses*, U.S. S. Comm. On Health, Educ., Lab. & Pensions (Oct. 26, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-manchin-announce-cra-to-overturn-new-biden-rule-threatening-american-franchise-model-local-businesses-1. The CRA needs 51 votes in the Senate to pass, and the initiative has the support of the IFA. *See* Matt Haller, *Send a Message to Congress (Now!) To Overturn the NLRB's New Joint Employer Rule*, Franchising.com (Oct. 30, 2023), https://www.franchising.com/articles/send_a_message_to_congressnowto_overturn_the_nlrbs_new_joint_employer_rule.html.

214. *See* Diego Areas Munhoz, *Senate Rejects NLRB Joint Employer Rule as Biden Promises Veto*, Bloomberg Law, Apr. 10, 2024, https://news.bloomberglaw.com/daily-labor-report/senate-rejects-nlrb-joint-employer-rule-as-biden-promises-veto (noting that the House of Representatives and Senate both narrowly passed resolutions to block the 2022 NLRB joint employer rule under the Congressional Review Act; however, President Biden was certain to veto the bill and neither House nor Senate has any prospect of overriding a veto with the necessary two-thirds vote).

215. *See* Griffin T. Pivateau, *The Prism of Entrepreneurship: Creating a New Lens for Worker Classification*, 70 Baylor L. Rev. 595, 606 (2017) (noting that the economic realities test is most commonly used by courts deciding cases brought pursuant to the FLSA); *see also* Adler-Paindiris et al., *supra* note 150, at 77.

216. Pivateau, *supra* note 213.

cases involving the FLSA.[217] And while this test does retain a control element, it considers both functional and formal control and considers them in the context of the relationship as a whole.[218]

The test was endorsed by an Obama-era DOL, which stated that a finding of joint employment "hinges on numerous factors that look at the 'economic realities' of the employment relationship, such as the nature of the work being performed, whether workers were integral to a company's business, and whether companies could potentially control working conditions."[219]

Dissatisfied with the wide-ranging application of the test, the DOL under President Trump announced a final rule in January 2020 aimed at significantly limiting the circumstances in which joint employment status would apply.[220] Under this rule, the DOL applies a four-factor balancing test considering whether the putative joint employer (1) hires or fires the employee, (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records.[221] Like the economic realities test used in independent contractor cases, the test here requires that a potential employer actually exercise control over the worker, rather than simply possess the *capacity* to exercise control.[222]

But this version of the rule was short-lived. Not long after it was issued, U.S. District Judge Gregory H. Woods struck down

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217. Jim Paretti et al., *Department of Labor Proposes to Roll Back Joint Employment, Independent Contractor Rules*, LITTLER (Mar. 11, 2021), https://www.littler.com/publication-press/publication/department-labor-proposes-roll-back-joint-employment-independent.

218. McArdle-Bracelin v. Cong. Hotel, Inc., 2022 WL 486805, at *3–4 (N.D.N.Y. Feb. 17, 2022).

219. Daniel Wiessner, *DOL, Backed by Biz Groups, Defends 'Helpful' Joint Employer Rule from States' Challenge*, REUTERS LEGAL (July 20, 2020), https://today.westlaw.com/Document/I48ec8490cadb11ea853294a23e704d3f/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&OWSessionId=c7b59be016da4f5eb9827c111c3cb3d7&skipAnonymous=true&bhcp=1.

220. Carissa Davis, *The DOL Has Rescinded the Recently Enacted Federal Test for Joint Employment Under the FLSA*, SHERMAN & HOWARD (Aug. 3, 2021), https://shermanhoward.com/the-dol-has-rescinded-the-recently-enacted-federal-test-for-joint-employment-under-the-flsa/.

221. Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Mar. 16, 2020).

222. *Id.*

major parts of the rule, finding its narrow interpretation of the FLSA contrary to the FLSA.[223] This decision was appealed to the Second Circuit, but given that President Biden's DOL formally rescinded the rule on July 30, 2021,[224] the Court dismissed the appeal as moot, while also vacating the district court's ruling.[225] At present, uncertainty remains, with no official DOL guidance having come down since the Second Circuit's dismissal. Consequently, the state of joint employment law under the FLSA remains unsettled, with some courts applying an expansive version of the test, while others narrow the scenarios wherein joint employment exists.[226]

IV.
A Changing World

Considering the multiple major tests and the numerous jurisdictional variations, it is evident that both independent contractor and joint employment law require clarification. Although guideposts such as the NLRA and FLSA have undergone periodic updates, they are rooted in decades-old concepts of the workplace. Similarly, while independent contractor and joint employment law have benefited from occasional reinterpretation, recent events necessitate further clarification. Specifically, the rise of e-commerce and the gig economy, along with the impact of the COVID-19 pandemic, have fundamentally changed the workplace and the environment in which franchises operate. To address the resulting issues from these unprecedented changes, the ideal solution would place one virtue above all others: simplicity.

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223. New York v. Scalia (Scalia II), 490 F. Supp. 3d 748, 796 (S.D.N.Y. 2020) (striking all of 29 C.F.R. § 791.2 except for subsection (e)).

224. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939 (July 30, 2021) (to be codified at 29 CFR § 791), https://www.federalregister.gov/documents/2021/07/30/2021-15316/rescission-of-joint-employer-status-under-the-fair-labor-standards-act-rule.

225. Jon Steingart, *2nd Circ. Tosses Review of DOL's Dead Joint Employer Rule*, LAW36 (Oct. 29, 2021), https://www.law360.com/employment-authority/articles/1436183/2nd-circ-tosses-review-of-dol-s-dead-joint-employer-rule.

226. Daniel Wiessner, *DOL rescinds Trump-era rule on joint employment*, Reuters, July 29, 2021, https://www.reuters.com/legal/transactional/dol-rescinds-trump-era-rule-joint-employment-2021-07-29/. New York, for example, construes the FLSA's definition quite broadly, noting that it includes "parties who might not qualify as [employees] under a strict application of traditional agency principles[.]" *McArdle-Bracelin*, 2022 WL 486805 at *2 (citations omitted).

A. *E-commerce*

An emerging issue for franchise systems in the twenty-first century is the advent of e-commerce and its proper implementation across franchises. E-commerce is business conducted through the use of electronic devices, often utilizing the internet, as opposed to traditional paper-based exchanges.[227] The rapid acceptance and promulgation of e-commerce stems from the recognition of its potential to allow a firm to augment its business potential and identity by building and managing online relationships with customers, suppliers, employees, and partners.[228] The implementation and growth of e-commerce and the increase of companies embracing this approach to conduct business offers various benefits. This includes providing on-demand customer service support, thereby granting customers access to products throughout the world, and allowing customers direct access to information about products and services at any time.[229]

With regard to the implementation of e-business doctrines and technologies into traditional models, the current literature suggests focusing on internal integration and external diffusion.[230] Internal integration can be understood as "the degree of inter-connectivity among organizational activities and [information systems][231] applications," with its aim being to enhance communication along the value chain and thus increase the

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227. *Electronic Commerce (E-commerce)*, L. Dictionary, https://thelawdictionary.org/electronic-commerce-e-commerce/ (noting that the public largely participates in e-commerce, and that e-commerce devices include "computers, telephones, fax machines, barcode readers, credit cards, [ATMs]," etc.).

228. Laura Lucia-Palacios et al, *E-business Implementation and Performance: Analysis of Mediating Factors*, 24(2) Internet Rsch. 223, 225-227 (2014) (contemporary definitions recognize that e-business can "potentially transform a firm into a networked entity with seamless supply chains and value creation process by helping to build and manage relationships with customers, suppliers, employees and partners"). Mohanbir Sawhney & Jeff Zabin, *The Seven Steps to Nirvana*, McGraw-Hill (2001). *See also* Hsiu-Fen Lin & Szu-Mei Lin, *Determinants of E-Business Diffusion: A Test of the Technology Diffusion Perspective*, 28 Technovation 135, 135 (noting that, in contrast to traditional technological innovation, "e-business represents a new way to integrate Internet-based technologies with core business potentially affecting the whole business").

229. Lucia-Palacios et al., *supra* note 227, at 227.

230. *Id.*

231. Information systems can be defined as "complementary networks and interconnected components that amass, disseminate, and otherwise make data useful to bolster management's decision-making processes." *What Are Information Systems, and How Do They Benefit Business?*, Wash. State Univ.,

efficiency of the organization as a whole.[232] External diffusion refers to the degree to which an organization "integrates its trading partners and transactions with them" through e-business systems,[233] and it is positively affected by internal integration.[234] In other words, internal integration is the degree to which an organization can, utilizing information technologies, stitch together its constituent parts to streamline the sharing of information, whereas external diffusion is a measurement of the same process concerning entities external to the business.[235]

A study of franchisors across the United States and Spain illustrates the importance of e-commerce and e-business to franchises.[236] This study tested organization performance effects on differentiation, enterprise agility, customer relationship development, and partner attraction.[237] It aimed to test the effects of e-business implementation for franchisors in terms of both internal integration and external diffusion.[238] In all, the study surveyed 600 Spanish and 1,218 U.S. franchises and collected data from their top executives.[239] In the United States, the study yielded interesting results, finding that external diffusion has a positive influence on "differentiation,[240] agility,[241] relation-

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Carson Coll. of Bus. (June 8, 2020), https://onlinemba.wsu.edu/blog/what-are-information-systems-and-how-do-they-benefit-business/.

232. Hsiu-Fen Lin & Szu-Mei Lin, *supra* note 226, at 139.

233. Lucia-Palacios, *supra* note 226, at 227 (citing Hsiu-Fen Lin & Szu-Mei Lin, *supra* note 228).

234. Hsiu-Fen Lin & Szu-Mei Lin, *supra* note 226, at 139.

235. *Id.*

236. Lucia-Palacios, *supra* note 226, at 223.

237. *Id.*

238. *Id.* at 224.

239. *Id.* at 231 (noting that many franchise chains are not big enough to have a dedicated IT department, and thus it is usually the CEO who determines whether or not to innovate).

240. Carol M. Kopp, *Product Differentiation: What It Is, How Businesses Do It, and the 3 Main Types*, Investopedia (updated July 6, 2021), https://www.investopedia.com/terms/p/product_differentiation.asp ("differentiation" involves strategic business planning, with elements of design, marketing, packaging, and pricing each creating aspects of a company that "distinguish [the] company's products or services from the competition [and, when successful,] lead[] to brand loyalty and an increase in sales.").

241. Enterprise "agility" is not easily defined, nor does it necessarily have a direct impact on business performance. Lucia-Palacios, *supra* note 226, at 239. "Agility," in the business context, "is a complex construct that could be divided into the ability to sense and to respond to market changes." *Id.* At most, agility's impact on business success, or not, is likely to be indirect. *Id.* (citing Paul A. Pavlou & Omar A. El Sawy, *From IT Competence to Competitive Advantage in Turbulent Environments: The Case of New Product Development*, 17

ship management, and partner attraction."[242] Furthermore, the researchers found that the economic health of American franchises is supplemented by the successful management of the franchisor's relationship with its franchisee and that this positive relationship can be furthered using information technologies.[243]

In sum, the implementation and adoption of new technologies has a proven ability to provide franchisees greater insights into the markets where they operate and positively impact intra-franchise relationships—clearly benefiting the franchise network as a whole. So, franchisors should strive to adopt and implement technologies, especially in external processes (i.e., their franchisees), if they hope to remain competitive in a world that is increasingly guided by information technologies.[244]

B. *The Gig Economy*

1. *Pros and Cons*

The rise of the gig economy[245] has also significantly influenced franchises and the laws surrounding them. This increasingly popular[246] form of employment tends to refer to

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INFO. SYS. RES. 198 (2006); Arun Rai et al., *Firm Performance Impacts of Digitally Enabled Supply Chain Integration Capabilities*, 30 MIS Q. 225 (2006)).

242. Lucia-Palacios, *supra* note 226, at 237.

243. *Id.* at 239. The relationship between franchisor and franchisee is extremely important. To ensure a healthy franchise system, franchisors support a franchisee's business through payroll support, employee training, revenue management, and brand value. This support is frequently expressed as "being in business for yourself, but not by yourself." Mazero et al., *supra* note 154, at 328.

244. Lucia-Palacios, *supra* note 226, at 239; *see also* Hsian-Ming Liu & Hsin-Feng Yang, *Network Resource Meets Organizational Agility*, 58 MGMT. DECISION, 58, 68 (2020) (noting that a bridging function across interfirm networks can have the potential to provide entrepreneurial advantages and opportunities to those in the network, responding to the needs of customers and challenges from its competitors). *See infra* Part IV.B.

245. This alternative style of work can be best understood as "[n]ontraditional, short-term . . . contract work" à la Uber, TaskRabbit, or DoorDash. Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/. *See also* Peter Buckley, *Bill AB5 and the Gig Economy*, 29 U. MIA. BUS. L. REV. 49, 51–54 (2021).

246. As of early 2021, gig work was the "primary source of income" for one in ten workers, Lauren Wingo, *What is a Gig Worker?* CO— (Mar. 16, 2021), https://www.uschamber.com/co/run/human-resources/what-is-a-gig-worker, and, as of December of that year, 16% of Americans had reported

"people using apps to earn money from assets they own or their ability to do a certain type of work."[247] This popularity is due, at least in part, to the freedom this form of employment offers—workers are largely able to set their own hours and may dictate the means by which a project is completed.[248] While it is often considered desirable to be one's own boss, there are concomitant drawbacks including low wages, lack of overtime, no association with unions, and out-of-pocket health insurance costs.[249]

One of the most apparent benefits to businesses operating under this model is the ability to draw from a pool of readily available workers in exact proportion to the work available, allowing them to reduce labor costs during fluctuations in demand.[250] What is more, the risk of litigation due to worker negligence is reduced because, in the gig economy, a worker is typically not an employee of the firm.[251] Despite these advantages, however, businesses are hesitant to enter the gig economy due to the nature of the industry,[252] as well as the risk that the firm will not be able to exert a high degree of control over the worker.[253] When a business hires traditional employees, the firm can con-

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earning at least some money from an online gig platform, Anderson et al., *supra* note 243.

247. Anirudh Mnadagere, *Examining Worker Status in the Gig Economy*, 4. J. Int'l & Compar. L. 389, 389 (2017).

248. *Id.* at 390.

249. Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 Rutgers U. L. Rev. 1729, 1734 (2017). Drivers for companies like Uber and Lyft have reported that, depending on the fluctuating price of gas, their average net earnings hover around nine to twelve cents per mile. Ryan Arbogast, *"Every Time I Get Behind the Wheel, I lose Money;" Uber Driver Weighs in [on] Gas Crisis*, WKBW 7 News Buffalo (Feb. 18, 2022), shorturl.at/txz46.

250. Malik, *supra* note 247, at 1735.

251. *See e.g.*, Sarah Kessler, *The Gig Economy Won't Last Because it is Being Sued to Death*, Fast Company (Feb. 17, 2015), https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death.

252. The issues associated with the gig economy, and the corresponding symptoms of these issues, are legion: class action lawsuits, ominous rumblings of regulatory intervention, aggrieved letter-writing campaigns, etc. *Id.* These and other problems yet (or never) to be worked out somewhat deflate the billion-dollar-plus valuations that companies like Uber have been able to conjure up.

253. *Id. See also* Stephen Fishman, *Pros and Cons of Hiring Independent Contractors*, Nolo.com, https://www.nolo.com/legal-encyclopedia/pros-cons-hiring-independent-contractors-30053.html (last visited July 10, 2022) (arguing that while there are some benefits to hiring independent contractors, the disadvantages must be addressed in order to make an informed hiring decision).

trol its brand more closely and build consumer loyalty through strict standards of quality.[254] The use of gig workers frustrates this to a certain extent, but allows the business to save on costs such as withholding taxes and retirement contributions.[255]

2. *Assembly Bill No. 5 and Changes to Worker Status in California*

While the gig economy offers numerous benefits, it also challenges the already blurry line between employee and independent contractor.[256] To combat this, California has taken steps to clarify the employment status of gig workers. Effective January 1, 2020, the California legislature enacted Assembly Bill No. 5 (A.B. 5), which expands the Supreme Court of California's decision in *Dynamex Operations West, Inc. v. Superior Court*[257] and codifies the common law ABC test.[258] Under A.B. 5, workers who are "suffered or permitted to work" under wage orders

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254. Malik, *supra* note 247, at 1735.

255. John Sullivan, *What's Wrong with Hiring a Gig Workforce? Pretty Much Everything*, DRJOHNSULLIVAN.COM, (July 8, 2019), https://drjohnsullivan.com/articles/whats-wrong-with-hiring-a-gig-workforce-pretty-much-everything/ (noting, among ten problems with using gig workers instead of a permanent workforce, "Low gig worker engagement will hurt productivity"). *But see* C. Whitfield Caughman et al., *Employment Law Issues in a Global "Gig" Economy*, ACC DOCKET (Apr. 3, 2019), https://docket.acc.com/employment-law-issues-global-gig-economy (recognizing that an outsourced contractor may still be required to adhere to industry standards for safety and control, which have been recognized as legitimate within subcontracting relationships).

256. *See* Matter of Vega, 149 N.E.3d 401, 405 (2020) (holding that Postmates exercised the necessary control over the couriers to make the couriers employees, not independent contractors operating their own businesses); Razak v. Uber Techs. Inc., 951 F.3d 137, 144 (3d Cir. 2020) (vacating and remanding the lower court's decision to grant summary judgment because the court found that there was a genuine issue of material fact as to whether Pennsylvania UberBLACK drivers are independent contractors or employees).

257. *Dynamex*, 416 P.3d 1 (Cal. 2018).

258. Assemb. B.5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621). A.B. 5 is an expansion of the previous *Dynamex* ruling in that it extends application of the ABC test beyond wage orders to all claims brought pursuant to the Labor and Unemployment Insurance Codes. *Beyond Dynamex – Assembly Bill 5 Codifies, Expands, and Creates Exceptions to the Landmark California Supreme Court Decision*, HOPKINS CARLEY, https://www.hopkinscarley.com/blog/client-alerts-blogs-updates/employment-law-client-alerts/beyond-dynamex-assembly-bill-5-codifies-expands-and-creates-exceptions-to-the-landmark-california-supreme-court-decision (last visited Oct. 12, 2022).

are now classified as employees *unless* the employer can establish the three factors of the ABC test.[259]

Pursuant to A.B. 5, the ABC test will now be uniformly applied across industries in a much-needed effort to streamline classification issues. It does contain, however, two notable exceptions. First, there are some professions that are entirely exempted from A.B. 5, including engineers, attorneys, architects, barbers, freelance writers, and travel agent services, to which the multi-factor *Borello* test will still be applied.[260] These exemptions point to traditional distinctions between independent contractors and employees. Second, the California Assembly Committee on Labor and Employment considered market strength, rate setting, the relationship between contractor and client, and technological neutrality in laying out the classes of workers that are exempt from A.B. 5.[261]

3. *Proposition 22*

In May 2020, allegations against Uber and Lyft for misclassifying their drivers as independent contractors were brought by California Attorney General Xavier Becerra and city attorneys from San Francisco, Los Angeles, and San Diego.[262] The lawsuit alleges that Uber's and Lyft's business models led the company to hire its drivers as independent contractors, rather than employees.[263] The attorneys sought to compel the ride-sharing platforms to conform to the mandates of A.B. 5 and provide back wages, meal and rest period premiums, business expenses, and civil penalties, all of which could total in excess of hundreds of millions of dollars.[264] While this claim does not raise any new issues, it does provide a leg up to potential plaintiffs in

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259. *See supra* Part II.

260. Roxanne M. Wilson & Jeffrey B. Weston, *Hiring ABCs*, 44 L.A. L. 14, 17 (June 2021); *see also Independent contractor versus employee*, State of Cal. Dep't of Indus. Rels. (Jan. 2023), https://www.dir.ca.gov/dlse/faq_independentcontractor.htm#:~:text=What%20difference%20does%20it%20make,employees%2C%20but%20not%20independent%20contractors. (The Borello test includes thirteen factors to be considered in evaluating a relationship between a worker and the hiring party, none of which are dispositive to the analysis).

261. *See* Cal. Assemb. B. 5., *supra* note 256.

262. Kate Conger, *California Sues Uber and Lyft, Claiming Workers are Misclassified*, N.Y. Times (July 14, 2020), https://www.nytimes.com/2020/05/05/technology/california-uber-lyft-lawsuit.html.

263. *Id.*

264. *Id.*

the future, as the Attorney General and the various city attorneys have resources available to them that individual litigants ordinarily do not.[265]

While these issues were still pending in court, Uber and Lyft took to the ballot box to lobby against A.B. 5, seeking to carve out an exemption for their drivers.[266] Although it cost Uber and Lyft over $200,000,000—making it the most expensive initiative in California's history—Proposition 22 was ultimately passed. Thus, gig economy companies can continue classifying their drivers as independent contractors, albeit with some benefits traditionally afforded to employees, such as minimum wage guarantees and health insurance subsidies to qualifying drivers.[267]

4. *The Department of Labor's Proposed Rule*

In October 2022, Biden's DOL made good on promises he had made repeatedly throughout his 2020 Presidential campaign to support organized labor and workers' rights.[268] The DOL proposed a new rule to be applied by federal agencies in determining whether a worker is an employee or independent

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265. *Id.*

266. *Id.*

267. *See* Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. Times (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california- uber-lyft-prop-22.html; Suhauna Hussain et al., *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. Times (Nov. 13, 2020), latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22; Adam Y. Siegel & Benjamin A. Tulis, *Proposition 22 Passes – What Does It Mean for the Gig Economy in California?* Lexology (Nov. 6, 2020), https://www.lexology.com/library/detail.aspx?g=6047a367-e14d-4a27-bf21-6adc24d222f6. On August 20, 2021, Alameda County Superior Court Judge Frank Roesch ruled, among other things, that Proposition 22 violated the California constitution by restricting the state legislature's power to regulate workers' compensation rules and also by failing to meet the state constitutional provision requiring initiatives to be limited to a "single subject." *See* Castellanos v. State of California, No. RG21088725, 2021 WL 3730951 (Cal. Super., Alameda Cnty. Aug. 20, 2021). On March 13, 2023, the California Court of Appeal, in a 2-1 ruling, overturned Judge Roesch's determinations, above, and thus upheld Proposition 22. Castellanos v. State of California, 89 Cal. App. 5th 131,(Cal. Ct. App. Mar. 13, 2023), https://www.courts.ca.gov/opinions/documents/A163655.PDF. Certainly, the decision will be appealed to the California Supreme Court.

268. *See* Andrew Solender, *Biden Vows To Be 'Strongest Labor President You've Ever Had' At Union Event*, Forbes (Sep. 7, 2020), https://www.forbes.com/sites/andrewsolender/2020/09/07/biden-vows-to-be-strongest-labor-president-youve-ever-had-at-union-event/?sh=dab4e295d5dd.

contractor under the FLSA, which promises to have significant impacts on gig workers.[269] Whereas the current rule, an artifact of the Trump era, places greater weight on certain "core factors," including control over the worker, the proposed rule would return to a "totality-of-the-circumstances" analysis, which would afford federal agencies increased mobility in conducting holistic analyses of a given worker's specific circumstances.[270] Such an analysis could be of great benefit to gig workers who, given the non-traditional nature of their jobs, tend to evade uniform systems of classification.[271]

While this proposed DOL rule is distinct from the NLRB's current request for briefing on the correct standard to be employed in this analysis,[272] it demonstrates the importance with which the current administration views these issues. Indeed, the DOL proposal starts with an admonition: "To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the [Fair Labor Standards] Act are inconsistent or in conflict with the interpretation stated in this part, they are hereby rescinded."[273] From a franchising perspective, the most obvious criticism of the DOL proposed rule is that the initial discussion, over 70,000 words with 599 footnotes and lengthy analysis of many topics, never

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269. Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 101; *see* John C. Fox, *OFCCP Week in Review: January 9, 2023*, Direct Emps. Ass'n (Jan. 9, 2023), https://directemployers.org/2023/01/09/ofccp-week-in-review-january-9-2023/#omb-fall-2022-regulatory-agenda.

270. Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 101, at 62232.

271. For example, whereas 80% of gig drivers work fewer than 20 hours each week, and 70% drive fewer than 20 weeks per year, some derive their entire income as gig drivers. Curran McSwigan, *Explainer: Benefits Models for Gig Workers*, Third Way (Apr. 12, 2022), https://www.thirdway.org/report/explainer-benefits-models-for-gig-workers. Accordingly, a standard that can be applied on a case-by-case basis might help to ensure fewer drivers fall between the cracks, losing deserved benefits.

272. Rachel M. Cohen, *The coming fight over the gig economy, explained*, Vox (Oct. 12, 2022), https://www.vox.com/policy-and-politics/2022/10/12/23398727/biden-worker-misclassification-independent-contractor-labor?link_id=17.

273. Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 101, at 62274.

once even mentioned franchises or any other franchise derivative term such as franchisees, franchisors, or franchising.[274]

5. *The Implications for Franchises*

Both the *Dynamex* decision and A.B. 5 threaten to impose greater liability in economic sectors that rely more heavily on independent contractors. Franchising is one such sector, and it is large: There are more than 77,000 franchise establishments employing over 755,000 people in California.[275] Operating as something of a zero-sum game, benefits promised to workers under A.B. 5 come at the threat of additional costs for franchises operating in California; A.B. 5 apparently created a presumption of employment between franchisees and franchisors.[276] This, in conjunction with the California legislature's refusal to create an exemption for franchises, has led many to question the viability of franchise operations in that state.[277] While A.B. 5 is limited to app-based rideshare and delivery companies, the passage of the law and the support it received may pave the way for franchises, as well as other companies dependent upon independent contractors for their labor force, to pursue similar classification of their franchisees or workers.[278]

Indeed, some franchisors have already taken steps to avoid the application of A.B. 5. The largest, oldest, most powerful trade group in franchising, the International Franchise Association (IFA), brought a pre-enforcement challenge, claiming A.B. 5 was pre-empted by both the FTC Franchise Rule and

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274. Likewise, the NLRB's Notice of Proposed Rulemaking, Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022), *see supra* note 199, has 128 footnotes and nearly 30,000 words. Yet franchising is rarely mentioned in this Notice – only at length in one paragraph.

275. IHS Markit Economics, *Franchise Business Economic Outlook for 2018*, IFA Foundation (Jan. 2018), https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2018.pdf.

276. Jess A. Dance, *Evolving Worker Classification Standards and the Future of Franchising*, Nat. L. Rev. (Nov. 11, 2020), https://www.natlawreview.com/article/evolving-worker-classification-standards-and-future-franchising.

277. *Id.* For more on developments in California, *see* Dean T. Fournaris & Robert S. Burstein, *The California FAST Act: Suspended but High Risk Remains Straight Ahead*, 42 Franchise L.J. 209 (2023) (discussing the California Fast Food Accountability and Standards Recovery Act of 2022, also known as Assembly Bill 257, now suspended pending the results of a voter referendum to occur in the November 2024 state-wide election; also discussing subsequent California bills and, *inter alia*, the future of franchisor joint and several liability for franchisee actions).

278. Siegel & Tulis, *supra* note 265.

the Lanham Act.[279] The IFA sought federal intervention and brought dormant commerce clause and regulatory taking claims.[280] The court refused to reach the merits of these allegations, dismissing the case for lack of Article III standing.[281] Specifically, the court held that the IFA had failed to establish a "reasonable or imminent threat of prosecution,"[282] and thus had not presented a case sufficiently ripe for judicial review. The court further held the IFA had not established a concrete intent to violate A.B. 5, and that prudential concerns also militated in favor of dismissal.[283]

This decision effectively instructs that these claims will have to wait until the ABC test is actually applied to a franchise. Recently, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of a trial court that a group of franchisees were not employees of their franchisor.[284] The franchisees argued that California law required them to be classified as employees instead of independent contractors.[285] However, the trial court rejected their argument based on the fact that the franchisees were engaged in a different business line and held themselves out to be business owners.[286]

On appeal, the franchisees argued that the "ABC" test for California wage violations adopted in *Dynamex* should have been applied.[287] The Ninth Circuit agreed that the ABC test should have been used since the claims accrued after 2020 and are therefore governed by A.B. 5.[288] However, despite the error, the court deemed it harmless given the extensive factual findings made by the trial court.[289] These findings showed that the three parts of the ABC test were met, thereby supporting the

279. Int'l Franchising Ass'n v. California, No. 20-cv-02243-BAS-DEB, 2022 WL 118415 (S.D. Cal. Jan. 12, 2022); Daniel J. Oates & Susan E. Tegt, *Annual Franchise and Distribution Law Developments 2022*, ABA Forum on Franchising (2022).

280. *Int'l Franchising Ass'n*, 2022 WL 118415, at *1.

281. *Id.*

282. *Id.* at *5.

283. *Id.* at *5–6.

284. Haitayan v. 7-Eleven, Inc., No. 21-56144, 2022 WL 17547805, at *1 (9th Cir. Dec. 9, 2022).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

conclusion that the franchisees were not employees of their franchisor.[290]

C. *COVID-19: Effects and Implications*

1. *Legislative Initiatives*

As it has for many things in the world, the COVID-19 pandemic has had, and continues to have, a significant impact on independent contracting and joint employment in the franchising context. One area in which this impact can be seen is legislation. For example, two key pieces of legislation were passed and signed into law, providing relief not only to traditional employees but also to independent contractors and gig workers. The U.S. Coronavirus Aid, Relief, and Economic Security (CARES) Act brought sweeping aid to families and businesses, and it included independent contractors and self-employed individuals who were not normally eligible for unemployment compensation.[291] Further, the Families First Coronavirus Response Act (FFCRA) offered expanded paid sick and family leave available to independent contractors—relief that was previously unavailable to this class of workers.[292]

Under the CARES Act, independent contractors were entitled to economic assistance during the pandemic if they were able and willing to work or telework for pay but were unable to do so due to pandemic-related reasons.[293] The qualifications were stringent, however, requiring workers to have worked for a minimum amount of time and earned a minimum amount of

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290. *Id.*

291. *Guide to Independent Contractors' CARES Act Relief*, U.S. Chamber of Com. (Oct. 13, 2020), https://www.uschamber.com/report/independent-contractors-guide-cares-act-relief.

292. Although independent contractors are not usually included in paid sick leave benefits, the FFCRA entitles eligible self-employed individuals to a paid sick or family leave tax credit. *See* Nathan Gibson, *Benefits for Independent Contractors Under the Coronavirus Aid, Relief and Economic Security (CARES) Act and the Families First Coronavirus Response Act (FFCRA)*, Employee or Independent Contractor? (Apr. 14, 2020), https://nathansgibson.org/benefits-for-independent-contractors-under-the-coronavirus-aid-relief-and-economic-security-cares-act-and-the-families-first-coronavirus-response-act-ffcra/#:~:text=Although%20independent%20contractors%20are%20not,or%20family%20leave%20tax%20credit.

293. Emma Janger et al., *Making Unemployment Insurance Work for Working People*, 68 UCLA L. Rev. 102, 107 (2020).

wages prior to losing their job to qualify for the program.[294] For independent contractors who were only partially unemployed, pandemic unemployment assistance (PUA) was also available.[295] This allowed them to obtain some measure of relief retroactively from January 27, 2020, through December 31, 2020.[296]

The FFCRA was enacted on March 18, 2020, and became effective on April 1, 2020.[297] It offered both paid sick time under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.[298] Previously, relief under each of these Acts was limited to employees, but given exigent circumstances created by the pandemic, self-employed individuals became eligible as well.[299] The FFCRA defines such individuals in Sections 7002(b) and 7004(b) as those who "regularly carr[y] on a trade or business . . . and would be entitled to receive paid leave . . . if [they] were an employee of an employer (other than himself or herself)."[300] Independent contractors were eligible for paid sick leave for up to ten days if they were unable to work or telework due to COVID-19-related government quarantine or isolation orders, self-quarantine advice from a healthcare provider, or the contractors' experiencing symptoms of COVID-19 and seeking medical attention.[301]

While the federal government thus provided a much-needed form of "unemployment" relief for freelancers, gig workers, and other independent contractors, state agencies for the most part failed to conform their online processes to expedite the

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294. *Id.*

295. *Unemployment Insurance Provisions In The Coronavirus Aid, Relief, And Economic Security (Cares) Act*, NELP (Mar. 27, 2020), https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/.

296. *Id.* Under the initial CARES Act ("CARES I"), independent contractors who had income from both self-employment and wages paid by an employer were still eligible for PUA. However, the worker was usually only eligible for state-issued benefits. With the passage of the second stimulus bill ("CARES II"), this restriction was removed and eligible workers received federal PUA benefits also.

297. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

298. *See id.*

299. Richard Reibstein, *March and April 2020 Independent Contractor Misclassification and Compliance News Update*, JDSUPRA (May 11, 2020), https://www.jdsupra.com/legalnews/march-and-april-2020-independent-96614/.

300. *Id.*

301. *Id.*

relief to these "self-employed individuals."[302] Instead, most state workforce agencies required independent contractors to first apply for unemployment benefits as employees.[303] Only after being denied as non-employees were they permitted to proceed with the process as self-employed.[304]

Beyond these measures, two additional stimulus bills were signed into law that extended unemployment assistance to independent contractors, as well as other self-employed individuals.[305] The first bill, colloquially named "CARES Act II," contained the "Continued Assistance for Unemployed Workers Act of 2020."[306] This Act extended the original CARES Act unemployment provisions from December 31, 2020, through to March 14, 2021.[307] The second bill, the American Rescue Plan Act of 2021, once again extended many of the CARES Act unemployment and FFCRA provisions from March 14, 2021, until September 6, 2021.[308]

In all, these legislative efforts granted independent contractors and self-employed individuals protections that they have rarely been afforded.[309] These acts bring hope that continued support will be provided for the self-employed and the gig economy as a whole.[310] With greater financial security and growth in these areas, there may be an increase in highly skilled individuals entering these industries. This could benefit businesses by providing reliable and skilled labor, increasing flexibility and

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302. *Id.*

303. *Id.*

304. *Id.*

305. Jessica Menton, *COVID-19 Relief Package: $1,400 Checks, $300 Bonus for Federal Unemployment Benefits*, USA TODAY, Mar. 9, 2021, https://www.usatoday.com/story/money/2021/03/09/stimulus-checks-unemployment-benefits-covid-relief-package-economy/6894224002/.

306. Richard Reibstein, *CARES Act, Take 2: Pandemic Unemployment Assistance Extended for Independent Contractors*, LOCKE LORD, Dec. 27, 2020, https://www.independentcontractorcompliance.com/2020/12/27/cares-act-take-2-pandemic-unemployment-assistance-extended-for-independent-contractors/.

307. *Id.*

308. Stephen Fishman, *Financial Relief for Independent Contractors During Coronavirus Outbreak*, NOLO, https://www.nolo.com/legal-encyclopedia/relief-for-independent-contractors-during-coronavirus-outbreak.html (last visited Feb. 15, 2023).

309. *See supra* Part IV.B; *see also Unemployment Insurance Provisions In The Coronavirus Aid, Relief, And Economic Security (Cares) Act*, *supra* note 293 (explaining that individuals who would otherwise not qualify for unemployment compensation may be permitted to qualify for Pandemic Unemployment Assistance due to economic consequences of the COVID-19 pandemic).

310. *Id.*

efficiency while affording workers greater protections such as wage and insurance protections.[311]

2. *Misclassification of Worker Status*

While the recent legislative acts provide necessary relief to workers around the country, they perpetuate the issue of independent contractor classification discussed earlier in this article. Here, however, a new issue has emerged in the form of procedural misclassification. Independent contractors who filed PUA applications often failed to designate themselves as self-employed, resulting in hurried claims officers presuming them to be employees due to time constraints.[312] This highlights the importance of thoroughly reviewing the nature of the relationship between the hiring business and the independent contractor to avoid misclassification.[313] Misclassification can expose a business to greater legal obstacles for reclassification and the business may even forfeit the right to challenge the ruling altogether if it fails to timely dispute the finding.[314] Accordingly, businesses must take prompt action to contest misclassifications in order to avoid erroneous tax liability and audits into the classification of their workers.[315]

3. *The Impact on Franchise Structure and Environment*

Beyond these legislative initiatives, COVID-19 has had a significant impact on the franchise industry. As a result of the pandemic, nearly 20,000 franchise locations were forced to shut down their operations in 2020, leading to a loss of 900,000 jobs.[316] Nevertheless, this unfortunate development has opened

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311. *COVID-19: Your Contingent Workforce May Be Changing Forever*, Openforce (May 7, 2020), https://oforce.com/for-contracting-companies/covid-19-your-independent-contractor-workforce-may-be-changing-forever/.

312. Richard Reibstein, *CARES Act II – Independent Contractors Gain 11-Week Extension of Unemployment Assistance and Paid Sick and Family Leave Benefits*, Jdsupra (Dec. 23, 2020), https://www.jdsupra.com/legalnews/cares-act-ii-independent-contractors-22342/.

313. *Id.*

314. *Id.*

315. *Id.*

316. Emman Velos, *Franchise Marketing Statistics You Should Know in 2021*, Thrive (July 29, 2021), https://thriveagency.com/news/franchise-marketing-statistics-you-should-know-in-2021/. This is in stride with the state of the affairs generally in 2020, which saw 60% of extant companies fail as a result of the pandemic. *Id.*

new opportunities for individuals looking to enter the franchise market. As economic conditions began to improve, the franchise market readily recovered.[317] For example, the third quarter of 2021 witnessed a surge in franchise investment, attributed to various factors such as pent-up demand, favorable economic conditions, and increased vaccination rates, enabling a return to work.[318] This resulted in an impressive $3 trillion business investment and a growth of almost 3% in the number of franchised establishments.[319] Overall, after experiencing shutdowns in 2020, franchises made a remarkable comeback with output surging over 16% in 2021, resulting in a total output of almost $788 billion.[320]

While there are always risks associated with starting a new business, franchises offer certain advantages that allow them to remain competitive despite market vagaries, including (1) a proven, stable, uniform business model; (2) ready capital with which to purchase supplies and inventory; (3) an informed and experienced support system; and (4) the ability to split certain operation costs such as marketing.[321] For these and other reasons, the franchise business model will certainly continue to be popular, even in a post-COVID era.[322]

For those franchisees that do remain or enter the market, they should be aware that COVID-19 has multiplied the influence e-commerce and the gig economy have on business. For example, consumers began avoiding showrooms to purchase appliances, opting instead for touch-free delivery that promised

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317. *Id.*

318. *A Look Back: How Franchises Fared in 2021*, Int'l Franchise Assoc., https://www.franchise.org/blog/a-look-back-how-franchises-fared-in-2021 (last visited Mar. 31, 2023).

319. *Id.*

320. *2022 Economic Forecast Shows Franchising Leads U.S. Recovery*, Int'l Franchise Assoc., https://www.franchise.org/media-center/press-releases/2022-economic-forecast-shows-franchising-leads-us-recovery (last visited Mar. 31, 2023).

321. Rebecca Papi & Dickinson Wright, *Post-COVID Opportunities and Legal Considerations to Franchise Resale*, JDSupra (May 4, 2020), https://www.jdsupra.com/legalnews/post-covid-opportunities-and-legal-66898/.

322. History provides further proof of the strength of the franchise business model. While many businesses failed during the Great Recession of 2008, franchises fared better than most retail chains and small businesses. *A Look at How Franchises Impact the U.S. Economy*, Franchise Direct (Jul. 26, 2022), https://www.franchisedirect.com/information/a-look-at-how-franchises-impact-the-economy.

both ease and peace of mind.[323] This is in accordance with an increasing trend among consumers to turn to the internet for their essentials, including groceries, prescriptions, and medical supplies.[324] In fact, brick-and-mortar department stores saw a 25% decline in sales in the first quarter of 2020, followed by a 75% decline in the second.[325] Thus, it is no surprise that, according to IBM's U.S. Retail Index, the pandemic accelerated the shift to digital storefronts by roughly five years,[326] meaning that companies have been forced to adapt—or else.[327]

As a result of this shifting economic landscape, businesses will likely seek cost-saving initiatives, and thus it is likely we will begin to see an increase in independent contracting in areas of the economy where gig labor has not been historically prevalent.[328] Numerous examples serve to support this proposition. Instacart, a grocery delivery service, has more than doubled

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323. *COVID-19: Your Contingent Workforce May Be Changing Forever*, *supra* note 309.

324. *Id.* A great example of the increasing popularity of online shopping and delivery is delivery giant Instacart. Instacart has more than doubled its workforce to over 500,000. Cathy Bussewitz & Alexandra Olson, *More American Gig Workers Facing Competition for Work as COVID-19 Ravages Economy, All While Trying to Avoid Virus Themselves*, Chi. Trib. (July 5, 2020, 12:14 PM), https://www.chicagotribune.com/coronavirus/ct-nw-covid-19-gig-workers-20200705-ssoy3lggwngnvdkoobxiq26wj4-story.html. Similarly, Uber Eats grew 53% in the first quarter of 2020, gaining more than 200,000 new delivery drivers. *Id.*

325. Sarah Perez, *COVID-19 Pandemic Accelerated Shift to E-commerce by 5 years, New Report Says*, TechCrunch (Aug. 24, 2020, 11:42 AM), https://techcrunch.com/2020/08/24/covid-19-pandemic-accelerated-shift-to-e-commerce-by-5-years-new-report-says/.

326. *Id.*

327. *COVID-19: Your Contingent Workforce May Be Changing Forever*, *supra* note 309. There is a stark difference between innovation during normal times, in which companies pilot digital initiatives with the intent of learning from them one dimension at a time. However, companies in crisis mode must pilot digital programs at massive scale. While there are many challenges that this presents, it also brings opportunities, such as real time feedback on the organization's approach. *See* Simon Blackburn et al., *Digital Strategy in a Time of Crisis*, McKinsey & Co. (Apr. 22, 2020), https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-strategy-in-a-time-of-crisis.

328. *See* Arthur H. Kohn et al., *The Gig Is Up? COVID-19 & Remote Work Trend Toward Growth in Gig Labor*, Cleary Gottlieb (June 1, 2020), https://www.clearymawatch.com/2020/06/the-gig-is-up-covid-19-remote-work-trend-toward-growth-in-gig-labor/. Kohn et al. further note that, in the medium and long term, the pandemic may support trends toward gig-based employees in sectors not yet significantly gig-based, such as white-collar, business industries. *Id.*

its fleet of shoppers to around 500,000.[329] Similarly, with many restaurants and bars closed or still in the process of reopening, food delivery services like Uber Eats rocketed into eminence, establishing a dominant position in the market and forcing businesses that never considered delivery to either sign on or else suffer the headache of attempting delivery themselves.[330] For most, there really is no other option.[331]

This growing shift among consumers toward what has been termed "convenience culture"[332] is best demonstrated through the success of the now-ubiquitous, and aforementioned, Uber Eats, which grew by 53% in the first quarter of 2020, gaining more than 200,000 new delivery drivers.[333] Compare this to the franchise industry, which saw the evaporation of 940,000 jobs in 2020, and the picture of what's to come is placed in greater relief. [334]

4. *Virtual Restaurants and "Ghost" Kitchens*

The accelerated shift to a world overwhelmingly dominated by e-commerce and the gig economy only exacerbates the shortcomings of independent contractor and joint employment law discussed previously. No better is this need for improvement and clarity illustrated than in the rapid growth of virtual restaurant brands. Under this business model, a virtual brand operator develops, acquires, or licenses a restaurant brand and

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329. Bussewitz & Olson, *supra* note 322.

330. *Id.*; *see also* Laura LaBerge et al., *How COVID-19 Has Pushed Companies Over the Technology Tipping Point—and Transformed Business Forever*, McKinsey & Co. (Oct. 5, 2020), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-covid-19-has-pushed-companies-over-the-technology-tipping-point-and-transformed-business-forever (noting that, according to a Global Survey of executives, companies have accelerated supply-chain interactions and internal operations by three to four years due to the COVID-19 pandemic).

331. Deepti Sharma, *The True Cost of Convenience*, Eater (Jan. 22, 2021, 11:03 AM), https://www.eater.com/22228352/convenience-of-delivery-apps-destroying-restaurants-uber-eats-doordash-postmates (explaining how restaurant owners who resist aggressive tactics by third-party delivery platforms are sometimes added to the service anyway without the owner's permission).

332. *Id.*

333. Bussewitz & Olson, *supra* note 322.

334. Dani Romero, *Why franchises fare as badly as small restaurants amid COVID, Delta variant surge*, Yahoo Finance (Sept. 5, 2021), https://news.yahoo.com/why-franchises-are-faring-as-badly-as-small-restaurants-amid-delta-variant-surge-160127931.html.

creates a menu offering—and thus a virtual brand is born.[335] This process, the genesis of the virtual brand, can be fairly traditional, simply involving the development of a limited menu that is then appended to an existing restaurant. This is the case with It's Just Wings, which has seen roaring success selling wings out of active Chili's and Maggiano's locations since June 2020.[336] Alternatively, a virtual brand may simply snag a social media personality and, leveraging the person's fame, develop a focused menu that typically possesses the related virtues of being easy to produce, highly marketable, and deliverable.[337]

Once a virtual brand has been developed, the virtual brand operator then engages a brick-and-mortar restaurant to process and prepare orders.[338] From there, the entity that prepares the food either delivers it themselves or through a third-party straight to the customer.[339] This innovative model spares the virtual brand operator the expenses traditionally involved with food preparation and enables restaurants to leverage underutilized kitchen space and expand their offerings.[340]

While the term "virtual restaurant" is often used synonymously with "ghost kitchen," the two are discrete.[341] Whereas a virtual restaurant, as explained, operates out of an active restaurant, ghost kitchens are delivery-only, having no connection to a dine-in space and potentially running one or several online

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335. Lisa Jennings, *Are Virtual Restaurant Brands the New Frontier for Franchising?* Nation's Restaurant News (Aug. 18, 2021), https://www.nrn.com/delivery-takeout-solutions/are-virtual-restaurant-brands-new-frontier-franchising.

336. Jonathan Maze, *Chili's owner has some big plans for It's Just Wings*, Restaurant Business (Oct. 28, 2020), https://www.restaurantbusinessonline.com/financing/chilis-owner-has-some-big-plans-its-just-wings. The company claimed that It's Just Wings, as of late 2020, was already generating $150 million per year.

337. Take, for example, Virtual Dining Concepts' partnership with Jimmy Donaldson, a hyper-successful YouTuber better known as MrBeast. *Our Brands,* VDC, https://joinvdc.com/brands/. Together, the pair developed MrBeast Burger, which sports a menu comprised of a handful of burgers and sandwiches, fries, and a cookie. *Mr. Beast Burger Menu,* MrBeast Burger, https://mrbeastburger.com/menu/.

338. Mike Isaac & David Yaffe-Bellany, *The Rise of the Virtual Restaurant*, N.Y. Times (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/technology/uber-eats-ghost-kitchens.html.

339. *Id.*

340. Jennifer Marston, *Anatomy of a Digital Restaurant*¸ The Spoon (May 2, 2021), https://thespoon.tech/anatomy-of-a-digital-restaurant/.

341. *See* Jeff Stump, *Ghost Kitchen vs. Virtual Kitchen: What's the Difference?*, CloudKitchens (Nov. 7, 2023), https://cloudkitchens.com/blog/ghost-kitchen-vs-virtual-kitchen/.

brands out of the same facility.[342] And while such a business model might seem the stuff of parody,[343] it serves to eliminate some of the tension that currently exists as the restaurant industry tries to assimilate itself with the rise of e-commerce.[344] Traditional restaurants that sign on with DoorDash or Uber Eats have widely reported difficulty turning a profit, with the third parties taking as much as 30% off the top of every order while forbidding restaurants from passing these costs onto customers.[345] This may prove prohibitive in an industry plagued by razor-thin margins.[346] A ghost kitchen, on the other hand, has significantly reduced overhead as it need only provide a kitchen space and a skeleton crew of cooks.[347] Accordingly, they can better bear a Postmates-sized hole in their profits, and as such, this model may signal what is to come: digital restaurants for a digital world.

While virtual restaurants and ghost kitchens involve highly innovative ideas, there is no question they foster a host of legal issues. Chief among these, particularly in the case of virtual restaurants, is determining whether the virtual brand operator is a franchisor. Virtual Dining Concepts (VDC), one of the largest virtual brand operators,[348] does not think so.[349] Under their model, restaurant operators select the turnkey brands they want, and VDC gives the restaurant a market license that requires no sign-on fee, and "has no obligation on [the restaurant's] side."[350] While VDC provides standardized marketing

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342. Henry De Groot, *The Invisible Workforce of Delivery-Only Kitchens*, Working Mass (Apr. 28, 2021), https://working-mass.com/2021/04/28/the-invisible-workforce-of-delivery-only-kitchens/.

343. One can imagine an article in The Onion on the subject, perhaps entitled *Fresh New Concept, Ghost Kitchen, Seeks to Modernize the Dining Experience by Eliminating Restaurant Entirely.*

344. Sharma, *supra* note 329.

345. *Should You Use Uber Eats Delivery at Your Restaurant?*, Host Merchant Service, https://www.hostmerchantservices.com/articles/should-you-use-uber-eats-delivery-at-your-restaurant/.

346. *See Bottom line impact of rising costs for restaurants*, Nat'l Rest. Assoc. (Aug. 24, 2022), https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/bottom-line-impact-of-rising-costs-for-restaurants/ (pointing to 2019 data showing the average profit margin for restaurants was 5% of gross sales and discussing how rising costs following the pandemic have only compressed this margin further).

347. De Groot, *supra* note 340.

348. *See* MrBeast Burger, *supra* note 337.

349. Jennings, *supra* note 333.

350. *Id.*

materials and recipes to participating restaurants, it does not appear to exercise the same level of organizational control as a typical franchisor would. In this space, brand operators are situated along a spectrum from franchise to non-franchise.[351] Whatever the designation for each operator may end up being, business models such as these represent a challenge that franchise and employment law must evolve to meet.

V.
Recommendations

There are a number of approaches to clarifying the independent contracting standards in the franchising context. When parties contest whether franchisees are in fact the franchisor's employees, and when parties dispute whether a franchisor is the joint employer of its franchisees' employees, there are ways to proceed fairly and efficiently. With lessons from abroad, uniform tests or guarantees, and fresh methodologies as well as legal presumptions, we can build stronger, more just franchise systems.

A. *Foreign Standards*

One option for addressing the shortcomings of current independent contractor and joint employment law is to supplement existing U.S. law with concepts that have proven successful abroad. To begin, a general survey of foreign franchise and employment law should be conducted. Many foreign jurisdictions, such as Canada, follow some variation of the common law "right to control" test.[352] However, beyond the right to control, there are additional approaches followed in these and other jurisdictions, including Civil Law nations, which warrant attention. Canada, for example, has adopted the "common employer" doctrine, so that "a sufficient nexus" between franchisee and franchisor could leave both parties responsible for something done by or to a franchise unit's employee.[353]

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351. *See id.*

352. *See* Canada Revenue Agency, *Employee or Self-employed*, Government of Canada, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110/employee-self-employed.html#toc8.

353. Brad Hanna & Mitch Koczerginski, International Franchising CAN/39–40 (Dennis Campbell ed., 2d ed. 2022) (acknowledging, however that applying this doctrine to franchisors "would likely be a stretch" because

1. *Examples from Abroad*

Consider *Sobeys Capital Incorporated/Sobeys Capital Incorporie*,[354] in which Sobeys, a national grocery chain with both company and franchised stores, had a collective bargaining agreement with the United Food and Commercial Workers International Union, Local 1518 (the "Union").[355] Sobeys informed the Union that it intended to franchise some stores and that the franchisees would succeed Sobeys as the employers under the collective agreement.[356] The Union subsequently sought a declaration under British Columbia's *Labour Relations Code* that Sobeys continued as a common employer.[357] With all three rulings, in 2020, 2021, and the ultimate decision on July 6, 2023, the British Columbia Labour Relations Board ruled that Sobeys exercised sufficient control over its franchisees to constitute a common employer relationship.[358]

Likewise, Canada's Supreme Court held that a franchisor exerting significant control over the operations of a part-time cleaning business franchisee was subject to employment standards.[359] Although the franchising arrangement was purported to be an independent contractor relationship, the franchisor could perform quality control checks over the franchisee without notice and at any time, and the franchisor was in charge of

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"franchisees are typically independent and not affiliated with their franchisors"). This potential, shared liability of the franchisor and the franchisee could be due to a wrong, such as a tort, committed *by* the employee (think of vicarious liability) or because of some other wrong, such as a tort or a contract breach (e.g., wrongful dismissal), carried out *against* the employee.

354. B.C. Lab. Rel. Bd. 97 (2020) (the "Original Decision"); B.C. Lab. Rel. Bd. 78 (2021) (the "Reconsideration Decision"); B.C. Lab. Rel. Bd. 105 (2023).

355. B.C. Lab. Rel. Bd. 97 (2020) (the "Original Decision").

356. *Id.*

357. B.C. Lab. Rel. Bd. 78 (2021) (the "Reconsideration Decision").

358. B.C. Lab. Rel. Bd. 105 (2023). The Board concluded, "individual franchisees and a franchisor can be declared common employers where it prevents the erosion of bargaining rights, the franchise arrangement has not resulted in a shift in the locus of power and the seat of real economic control from the franchisor, and the franchisees exert some control but not substantial control." *Id.* at para. 485 (p. 85). Andres Barker, Vice-Chair of the Board, elaborated further, "Sobeys and the Franchisees constitute more than one entity carrying on a business or activity through the franchising and operation of the . . . stores . . . [The] entities are under common control or direction, and there is a labour relations purpose for making a common employer declaration." *Id.* at para. 486 (p. 85).

359. Mod. Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, (2019) 2 S.C.R. 406 (Can.).

assigning the customers to the franchisee, who in turn: (1) could only use the franchisor's tools and equipment, (2) had to report any complaints directly to the franchisor, (3) was required to identify itself as a member of the franchisor's network, (4) was bound to a non-compete covenant, (5) was obliged to obey the franchisor's demands for the termination of employees that the franchisor deemed unacceptable, and (6) was limited to performing cleaning services for only the franchisor-assigned "clients."[360] The Canadian high court held that the existence of a franchise agreement cannot transform an employee into an independent contractor.[361] To understand the nature of the relationship, one must "examine the specific facts of the relationship."[362] The high court further emphasized that independent contractors take business risks pursuing profits, while employees do not; here, Canada's Supreme Court found that the franchisor took these risks and otherwise constituted an employer.[363]

Australia has heretofore employed the common law multi-factor test, which is comprised of no fewer than ten factors, including many found in the United States and other nations, such as control, ownership of tools and equipment, and whether or not the worker's labor is essential to and in the business of the hirer.[364] As a multi-factor test, a court essentially tallies all of the relevant factors on a case-by-case basis and determines whether a given worker falls more on one side of the spectrum or the other.[365] Indeed, a worker in Australia who is determined to be an independent contractor under the common law test may nevertheless be treated as an employee in limited contexts.[366] Presumably, this approach could apply to franchising.

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360. *Id.*
361. *Id.* at para. 38.
362. Hanna & Koczerginski, *supra* note 351, at CAN/40–41.
363. *Mod. Cleaning Concept Inc.*, *supra* note 357, at paras. 57–59.
364. McCullough Robertson Lawyers, *Employee or Contractor? A Guide for Public Practitioners*, CPA Austl., https://www.cpaaustralia.com.au/-/media/project/cpa/corporate/documents/achivies/deciding-between-an-employee-or-contractor.pdf, at 2-3 (last visited Aug. 9, 2023).
365. *Id.* at 2–3.
366. *Id.* at 3. For example, under the Superannuation Guarantee (Administration) Act 1992 (Cth) (Austl.), individuals who, despite being classified as independent contractors, operate under contracts that are "wholly or principally" for their labor, will be classified as employees for purposes of that Act. *Id.* at 3–4.

Germany's labor laws, by contrast, have developed through a complex interrelation between statutes and judicial holdings, emphasizing the protection of employees.[367] Under this regime, certain types of agreements between franchisor and franchisee may be considered employment contracts, even if the franchisee works for its own account and risk.[368] According to some German Federal Labor Court cases, quasi-employees (i.e., bona fide franchisees) differ from employees in that they are not personally dependent to the same degree as are employees—the essence of this distinction being in the quasi-employees' added ability to freely dispose of their time.[369] Thus, in Germany, employees are personally dependent upon their hirer and possess a duty to comply with instructions.[370] The franchisee, on the other hand, is merely *economically* dependent upon the hirer.[371]

An added wrinkle in German labor law is that a prima facie case of "mere" economic dependence can nevertheless be overridden by showing that the worker's social position is dependent upon the hirer, thus requiring the protection of labor law.[372] "Social position" in this context is effectively a

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367. Stefan Bretthauer, International Franchising GER/32 (Dennis Campbell ed., 2d ed. 2022).

368. *Id.* It is fair to say that, compared to the United States, many other nation's "legal cultures" have been more receptive to contract claims based on fairness rather than simply a strict interpretation of a clause's literal wording. Souichirou Kozuka & Albrecht Schulz, International Franchising: A Practitioner's Guide 163, 171 (Marco Hero ed., 2010) (noting that U.S. "legal culture is governed by an individualistic rationalism which relies on the wording of a contract," but acknowledging that judges are moving beyond the merely literal – "judges now tend to introduce elements of equity when deciding on contractual relationships, especially if they are based on standard form contracts"); *see* Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 Vand. J. Transnat'l L. 707 (2015) (citing precedent, procedures, and pursuit of justice as grounds for the U.S. legal system to incorporate something akin to the German judge's duty to provide *hinweispflicht* (hints and feedback) to parties and lawyers).

369. Bretthauer, *supra* note 365, at GER/33.

370. *Id.*

371. *Id.* The franchisee's lack of *personal* dependence on the hirer does leave the franchisee less bound to instructions and thus more likely to be judged "independent." *Id.* at GER/33–35; *see* Walter Ahrens, *Germany*, Getting the Deal Through: Labour & Employment Law 1, 10 (2023), https://www.morganlewis.com/-/media/files/special-topics/gtdt/2023/getting-the-deal-through-labour-employment-2023-germany.pdf?rev=11a5cf7577e64053b64a025948d9030e (discussing "personal dependence").

372. Bretthauer, *supra* note 365, at GER/33. This approach is also followed in other legal systems. *See* Louis Vogel & Joseph Vogel, French Distribution Law 555 (2020) (stating, "The franchisee must not be subordinate

worker's earning potential separate from the hiring entity, or that worker's ability to pursue gainful employment outside of the hirer's business.[373] For example, one so-called franchisee was, despite a superficial degree of economic independence (as opposed to a genuine measure of independence[374]), deemed an employee under German labor law because the franchise contract expressly indicated that the entirety of the franchisee's day was to be devoted to franchisee duties.[375] These determinations, given their dependence on the substance of the legal relationship rather than mere contractual formalities, are necessarily made on a case-by-case basis.[376] Consequently, German franchisors seeking to avoid employer status should afford their franchisees a certain degree of freedom, both informally (in practice) and contractually, and should hesitate before interfering with a franchisee's operations, working hours, and sources of supplies.[377]

France's franchise market, already first among European countries, continues to show steady growth.[378] French franchise relationships are primarily governed by the standard rules of contract law, and the legal franchise doctrine has, through the

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to the franchisor" continuing, "otherwise the franchise agreement should have anticipated the behavior (e.g., sunning)," and otherwise the franchise agreement should be "recharacterized as an employment agreement").

373. Bretthauer, *supra* note 365, at GER/33.

374. *Id.* at GER/34–35 (noting that franchise agreements "should always leave the franchisee as much scope for independent entrepreneurial activity as possible," with truly independent franchisees both "personally and economically independent," such as by determining their own prices and who they will hire and fire).

375. *Id.* at GER/33. By comparison, analysis of 100 U.S. restaurant systems' franchise contracts in 2013 and of 200 such systems' franchise contracts in 2023 revealed that only 45% in 2013 and 40% in 2023 required that the franchisee work full-time concerning the franchised business. Emerson, *Two-Standard Approach*, *supra* note 12, at 693; Emerson, *Franchise Contract Standards*, *supra* note 12.

376. *Id.* (citing Eismann, Bundesarbeitsgericht [BAG] [Federal Labor Court] [NJW] 2973 (1997) (Ger.); Eismann, Bundesgerichtshof [BGH] [Federal Court of Justice] [NJW] (1999) [BGHZ] 218, 220 (Ger.)).

377. Bretthauer, *supra* note 365, at GER/35 (noting the inherent conflict a franchisor must grapple with in striking the proper balance between affording too much and too little freedom). German franchisors should also carefully weigh their interests when requiring a franchisee to have a non-delegable duty to render services in-person; this is a standard aspect of many labor contracts, but may prove the tipping point in the franchisee-not franchisee analysis.

378. Alexander Blumrosen & Fleur Malet-Deraedt, International Franchising FRA/1 (Dennis Campbell ed., 2d ed. 2022).

efforts of the courts, become a unified body of law with rather clearly established rules.[379] It is perhaps unsurprising then that French law imposes certain contractual requirements, especially vis-à-vis disclosures, that must be observed by parties entering into a franchise agreement.[380] A franchisor operating in France must provide its would-be franchisees with such "truthful information" as will allow them to enter into the agreement with "full knowledge of the facts."[381] These disclosures must be provided, along with a draft of the contract, no less than twenty days prior to the signing of the agreement.[382] Failure to observe these formalities, if found to have actually vitiated the consent of the franchisee,[383] results in nullification of the contract or—if the franchisee so desires—damages.[384]

Control is a major factor in characterizing a franchise agreement as an employment contract under French law, and French courts have the power to "re-characterize" a franchise agreement as an employment agreement.[385] In fact, a certain degree of control has even been found to satisfy one of the most difficult conditions predicate for there to be re-characterization: the existence of a hierarchical reporting line.[386] The *cour de cassation*, France's highest court,[387] affirmed the re-characterization of a franchise agreement to an employment contract on the grounds that the franchisor imposed detailed obligations on the franchisee (who was really merely a licensee). In effect, the franchisor rendered that licensee a "mere executing agent deprived of any autonomy."[388] Even absent re-characterization, a franchisee who is found to fit the definition of a branch manager can be afforded the

379. *Id.*
380. *Id.* at FRA/2.
381. *Id.*
382. *Id.* at FRA/3.
383. *Id.* (citing Cour de cassation [Cass.] [supreme court for judicial matters], 20 March 2007, No. 06-11290 (Fr.)).
384. *Id.*
385. *Id.* at FRA/9–10 (recognizing that several decisions have held that a franchisee can qualify as an employee where the franchise is an independent contractor running its own business). *Id.* at FRA/9 (alternatively, French courts can, applying the Labor Code § L.7321-2, characterize the franchisee as an employed branch manager).
386. *Id.* at FRA/10.
387. *See Role of the Court of Cassation*, Cour de Cassation (Feb. 23, 2023), https://www.courdecassation.fr/en/about-court
388. Blumrosen & Malet-Deraedt, *supra* note 376, at FRA/10.

protections of both the Commercial and Labor Codes, bestowing upon these workers the protections associated with both employees and independent contractors.[389] Indeed, the labor code's application to the franchise relationship can be costly for franchisors.[390]

More generally, two important principles of French law, *abus de droit* ("abuse of right")[391] and *abus de dépendance économique* ("abuse of economic dependence"),[392] may also apply in many

389. *Id.*

390. *See* Blumrosen & Malet-Deraedt, *supra* note 376, at FRA/11 (amounts paid due to an employer-employee relationship could include holiday pay, overtime, reimbursement of fees and training costs, and, for an unjustified termination, as much as three years of back wages).

391. Nicolas Dissaux & Charlotte Bellet, Le Guide de la Franchise 271 (Nov.7, 2020) (evaluating *abus de droit*). The abuse of right concept is found in many countries, such as Greece and Poland, *see, e.g.*, Yanos Gramatidis, Fundamentals of Franchising: Europe 203, 208 n.8 (Robert A. Lauer & John Pratt, eds., 2017) (stating that in Greece "[t]here are no statutory requirements regarding the content of a franchise agreement, although general principles of law are applied"; and then citing "good faith, morality, *abuse of rights*, and commercial practices" (emphasis added) as those general principles); Magdalena Karpińska, Fundamentals of Franchising: Europe 315, 320 (stating, "no party is allowed to perform any of its rights in a manner that would be contrary to the rules of social coexistence; such actions are deemed an abuse of a right and are not protected by law"; further noting that "the rules of social coexistence generally relate to selected moral norms . . . commonly approved of as fair and justified," including good faith and fair dealing).

392. Cyril Grimaldi, Serge Méresse & Olga Zakharova-Renaud, Droit de la Franchise 85–94 (2017) (reviewing *abus de position dominante* and *abus de dépendance économique*); Gilles Menguy, Fundamentals of Franchising: Europe, *supra* note 391, at 157 ("The commercial code provides special rules applicable to the distribution sector, which tend to introduce a certain level of transparency and to prohibit abusive behavior of those businesses that hold a strong market position."). Many other Civil Law nations have also applied the abuse of economic dependence as a potential basis for intervention on behalf of franchisees. *See* Judit Budai, Fundamentals of Franchising: Europe, *supra* note 391, at 221, 226 (concluding, Hungary's "Competition Act does protect the franchisee against the abuse of a dominant position by the franchisor"); Hikmet Koyuncuoglu, Fundamentals of Franchising: Europe, *supra* note 391, at 413, 421 ("'abuse of economic dependence' has been invoked by the court of appeals several times in disputes involving supplier–agency, employee–employer, and lessor–lessee relationships; . . . it is likely that this notion [of abuse] could be invoked by the court in a dispute concerning a franchising agreement."); Petr Mrázek, Fundamentals of Franchising: Europe, *supra* note 391, at 115, 118–19 (noting that the New Civil Code of the Czech Republic requires good faith and fair dealing in all contractual relationships, thus including franchising; further noting that while this code does not explicitly define who could be the weaker party or whether a franchisee is to be treated as a consumer (who is protected), the code does provide

contexts, including commercial cases such as franchising.[393] These claims of abuse contest behavior that is allegedly in bad faith, profoundly unfair, or otherwise against fundamental moral tenets, with party X challenging party Y's (1) use of a right in an abusive manner (*abus de droit*), or (2) taking wrongful advantage of X's economically disadvantaged position (*abus de dépendance économique*).[394] As one commentator concluded, a franchisor can take steps to control franchisees' behavior and thereby safeguard the franchise identity and know-how, but "such control cannot exceed what is strictly necessary to achieve these objectives."[395] Indeed, recent French appeals court decisions have pushed back on franchisor-imposed contract clauses whose cumulative effect limit franchisees' ability to leave the franchise network or that otherwise restrict their

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protections for "the weaker party," as it "prohibits the entrepreneur/business person with respect to other persons in economic transactions to abuse his or her expertise or economic position to create or take advantage of the dependence of the weaker party and to achieve a clear and unjustified imbalance in the mutual rights and duties of the parties").

393. Didier Ferrier & Nicolas Ferrier, Droit de la Distribution 214–17, 264, n. 733, 416 (9th ed. 2020) (discussing *abus de dépendance économique* and *abus de droit*). Commentators from many nations have noted the centrality of these protection from an abuse of right or, if an economically dependent person, from abuse by a dominant person, or both (abuse of right and due to economic dependence). *See, e.g.,* Aldo Frignani, Fundamentals of Franchising: Europe *supra* note 391, at 247, 256 (stating, "Italian courts have established that although a franchising relationship falls into the application of the Law against the abuse of economic dependence, the franchisor's nonrenewal of the franchise agreement is abusive only if it is unforeseeable and unreasonable."); Pascal Hollander, Fundamentals of Franchising: Europe, *supra* note 391, at 71, 77 ("under Belgian law [Article 1134 of its Civil Code], franchise agreements must be performed in good faith. . . . [T]his implies that the parties may not abuse the rights that the franchise agreement gives them[, whether by using] (1) a right solely with the intent to harm the other party, [or] without any interest in it while creating major inconvenience to the other party, or (3) [when] the advantages drawn from the use of the right are out of proportion with the inconvenience suffered by the other party.")

394. Ferrier & Ferrier, *supra* note 392, at 214–17, 264 n.733, 417 (discussing *abus de dépendance économique* and *abus de droit*); Grimaldi, Méresse & Zakharova-Renaud, *supra* note 392, at 85–94 (reviewing *abus de position dominante* and *abus de dépendance économique*); Louis Vogel & Joseph Vogel, Droit de la Franchise 64–66 (2nd ed. 2020) (examining *abus de position dominante* and *abus de dépendance économique*).

395. Xavier Henry, *Contrat de franchise: analyse par la cour d'appel de Paris de quelques comportements et clauses*, Actu-Juridique.Fr (Mar. 12, 2019) https://www.actu-juridique.fr/affaires/contrat-de-franchise-analyse-par-la-cour-dappel-de-paris-de-quelques-comportements-et-clauses/ (trans., Robert W. Emerson).

freedom of contract.[396] Certainly, this reasoning could be used to protect franchisees as if they were employees, not independent contractors.

In Norway, franchising "has gained wide acceptance" and is increasing as a business form.[397] Like its French counterpart, Norwegian franchising is principally governed by contract law, but Norway is less strict than France with regard to the exact provisions of franchise agreements, instead favoring an expansive freedom of contract.[398] Accordingly, a franchise agreement under Norwegian law can essentially be "whatever the parties want it to be," so long as they are not "unreasonable, or acting in violation of good business practice."[399] The effect of Norway's treatment of franchise agreements is to grant the franchisor considerable power to direct the franchisee, even as the latter operates at its own account and risk.[400] The issue is that there are no settled limits on how far such control can go before the franchise relationship violates "good business practice," and the franchisee is deemed an agent of the franchisor.[401] However, it is generally accepted that franchisees who lack control over their business operations can thus be rendered employees or agents of the franchisor.[402] Depending on the context, Norwegian franchisors can be liable to their franchisees or others under the nation's Employment Protection Act or its Agency Act, and also liable as joint employers of their franchisees' employees.[403] Therefore, overall, Norwegian franchisors have the same franchise-labor issues as in most nations, including the

396. Cour de cassation [Cass.] [supreme court for judicial matters] Oct. 4, 2016, Bull. civ. IV, No. 14-28013 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, civ., Oct. 11, 2017, 15/03313; Cour d'appel [CA] [regional court of appeal] Paris, civ., April 19, 2017, 15/24221; Cour d'appel [CA] [regional court of appeal] Paris, civ., Sept. 18, 2013, 12/03177.

397. Knute Boye, International Franchising NOR/2 (Dennis Campbell, 2d ed., 2022).

398. *Id.*

399. *Id.* at NOR/15, NOR/9. That said, for a franchise contract term to have any significance at all, it should at least conform to common understanding. *Id.* The Unidroit Model Franchise Disclosure Law may prove a useful guide in this regard. *Id.* at NOR/15; *see also* Unidroit Model Franchise Disclosure Law (2002), https://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf (last visited Sept. 12, 2022).

400. Boye, *supra* note 397, at NOR/15.

401. *Id.* (acknowledging that Norwegian law permits considerable direction of the operation of the franchisee and that the franchise legal framework is based on reality rather than formalities).

402. *Id.* at NOR/17.

403. *Id.*

United States, and thus should steer clear of expanding their control over (e.g., their ability to direct) a franchisee's business outside the core scope of the franchise concept. Otherwise, the franchisor is at risk of assuming an employer or principal status based on excessive control over franchisees and/or franchisee employees.[404]

2. *Franchisee Compensation upon Termination*

Although the above examples represent only a small sample of approaches taken by foreign countries to franchising, they underscore the strength of the franchise model: its ability to thrive under disparate legal regimes. Beyond proving the robustness of the franchise model, the ubiquity of this business model abroad can help us to identify advantageous aspects of other systems' classification and regulation of franchising and related methods of doing business. For example, French law is readily inclined to classify strongly controlled franchisees as employees,[405] and German jurisprudence may reach similar conclusions by considering the franchisee's social status and, relatedly, the franchisee's degree of dependence on the franchisor.[406] These are key signs of franchisor dominance, and they can provide us with new insights into the dynamics of the franchisee-franchisor relationship.[407] In turn, we may see additional ways to bolster franchisees' or workers' protections in American statutes, regulations, or case holdings.

One simple refinement would be to bolster the franchisee's right to compensation upon termination, or due to nonrenewal.[408] Numerous grounds for the franchisor's

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404. *Id.*

405. *Supra* notes 385–90 and accompanying text (discussing French law and franchisors' control over franchisees).

406. *Supra* notes 370–75 and accompanying text (discussing German law and how franchisees may be personally dependent to the same extent as are employees, not merely economically dependent on the hirer; this economic dependence can override franchise law showing that the worker's social position depends on the hirer and necessitates the protection of labor law).

407. For a consideration of some notions of franchising and power dynamics, *see* Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 Calif. L. Rev. 1317 (2021) (examining 44 fast-food franchise contracts from 2016 and considering, with respect to joint employer liability, franchisors' influence upon the working conditions in their network of restaurants).

408. Franchise termination (franchisor cancellation of the franchise before the end of the contract term) should not be confused with franchise non-renewal (franchise expiration, because the parties have not agreed to

termination of the franchise are spelled out in the vast majority of franchise contracts.[409] The franchisor's or franchisee's opportunity to seek a renewal is also delineated in the vast majority of franchise agreements, although the provisions tend to focus on these matters: the length and number of renewal periods, and the notice period required to invoke a right of renewal. For franchisees who have been wrongfully terminated or who have simply not been renewed but did act in good faith, their entitlement to compensation is manifest.[410] In France and Germany, for instance, there certainly are somewhat stronger protections against allegedly arbitrary non-renewals than is typically the case in the United States.[411]

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continue the franchise after its contract term has finished). The law typically covers these two end points – termination and nonrenewal - quite differently. For termination, there usually are many bases for legal challenges, although franchisee success is mixed at best. *See* Robert W. Emerson, *Franchise Terminations: "Good Cause" Decoded*, 51 Wake Forest L. Rev. 103, 122 (2016) (analyzing 342 franchise termination cases decided on their merits in U.S. courts between 1961 and 2013; in these cases, the principal reasons for termination were - "at will" (that either party simply could terminate, and the franchisor did so), 14.3%; breach of contract, failure to comply with an agreement, or failure to meet performance standards, 30.7%; failure to cure defaults, 4.7%; failure to pay, 21.9%; misuse of trademark, 6.7%; other reasons, 16.4%; and violation of covenant not to compete/competitive conduct, 5.3%). Nonrenewal challenges, on the other hand, usually require the challenger's argument to go beyond the terms of the contract, as franchise agreements tend to broadly recognize the parties' right to walk away from the contract once the initial term is completed. The challenging franchisee ordinarily must prove that the franchisor's reasons for nonrenewal were pretext, in bad faith, violated the parties' rightful expectations (which were not in contradiction of express contract terms), or otherwise violated public policy).

409. Emerson, *Two-Standard Approach*, *supra* note 12, at 697–99; Emerson, *Franchise Contract Standards*, *supra* note 12.

410. *See* Robert W. Emerson, *Franchise Goodwill: Take A Sad Song and Make It Better,* 46 U. Mich. J.L. Reform 349 (2013) (discussing the numerous ways in which a franchisee may garner goodwill for the benefit of the franchise system and subsequently face the franchisor's capture of that goodwill upon the franchise's cessation).

411. *See* Robert W. Emerson & Zachary R. Hunt, *Franchisees, Consumers, and Employees: Choice and Arbitration*, 13 Wm. & Mary Bus. L. Rev. 487 (2022) (noting that franchisors in the United States "generally enjoy 'unbridled discretion' in choosing whether to renew the franchise agreement."). However, regardless of the nation, there is no automatic right of franchise renewal, and the parties generally have no duty to justify a decision against renewal; the parties simply must comply with the contractual and any applicable statutory notice provisions. Vogel & Vogel, *supra* note 370, at 655–62 (discussing franchise terminations and non-renewals under French law); Marco Hero, International Franchise Sales Laws (eds. Kendal H. Tyre, Jr. & Michael R. Laidhold, 3d ed. 2023) (specifying the flexibility of German law regarding franchise renewals

It is simply easier for franchisees to renew their franchise in much of Europe than is found in the United States. These European franchise contracts are more easily renewed if: (1) neither the franchisee nor the franchisor notified the other side that it would *not* renew (French law), or (2) regardless of any notice provision, a franchise holdover went beyond the franchise term originally agreed upon (French and Brazilian law), or (3) the franchisor failed to show "good cause" or otherwise follow an elaborate process for avoiding the automatic renewal of a franchise (German law).[412] Indeed, German franchisees receive the same legal protections as do commercial agents,[413] with frequent compensation extended to ex-franchisees, both to pay for their losses due to termination and to pay "reasonable remuneration" related to any noncompete covenant the parties signed.[414] While French franchisees certainly have limited rights, based on both contract terms and jurisprudence,[415] they often have extensive rights to compensation for losses due to termination or, in exceptional cases (e.g., related to faulty notice), even nonrenewal,[416] regardless of whether the franchisor is blameworthy.[417]

Supplementing American franchise law with foreign concepts would undoubtedly improve the state of franchising in this country, but it ultimately necessitates a more radical and fundamental change.

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and terminations; the franchisor should disclose "the prerequisites for a renewal [and] all provisions dealing with the termination of the franchise agreement," such as "possible grounds for giving notice of default or termination.").

412. Emerson & Hunt, *supra* note 411, at 378–79 ("Many other nations, such as Finland, Iceland, Italy, Japan, Malaysia, Paraguay, and Singapore, follow these pro-renewal approaches.").

413. Fundamentals of Franchising: Europe, *supra* note 391, at 1, 31.

414. *Id.*

415. The late Professor Didier Ferrier, a formidable commentator on French distribution law, noted that "as the franchisee's autonomy is almost nil, the franchisee must respect all of the franchisor's standards and cannot develop its own customers," referencing the holdings of two courts of original jurisdiction (*tribunaux de grande instance*). Ferrier & Ferrier, *supra* note 393, at 499 (Robert W. Emerson trans.).

416. *See* Vogel & Vogel, *supra* note 372, at 662, 667–70.

417. *Id.* at 678 (citing a May 24, 2016 French Supreme Court decision affirming that "an amicable termination of the [franchise] contract does not constitute a waiver of the franchisee's right to seek reparation of the injury caused by [the franchisor's] breach," and concluding, "[t]he franchisee's right to compensation is not limited to cases of termination at the fault of the franchisor.").

B. *A Uniform ABC Test Guaranteeing Uniform Rights*

1. *Uniform Institution of the ABC Test*

As detailed above, the main issue with independent contractor and joint employment laws may simply be their perplexing nature. Jurisdictions vary in their legal tests, and the test applied may change based on the source of the legal action. The clear solution would be to enact a single, uniform test to provide a clear-cut standard for independent contractor and joint employment lawsuits. This Article recommends the adoption of California's ABC test, put forth in *Dynamex*. This test boasts several advantages, the first of which is that it is rooted in a strong foundation of what it means to be "employed."[418]

The ABC test is a major expansion of employment rights for workers improperly classified as independent contractors, as it *presumes* that a worker is an employee of the hiring firm.[419] This presumption shifts the burden to the business—the party best able to control employment status. As such, this Article recommends that future legislation be applied equally, as much as is practical, to both joint employment and independent contractor law. As previously mentioned, joint employment and independent contractor issues are frequently intertwined, and are often causes of action in the same suit.[420] Due to their similarities, applying a single test to both inquiries would provide sorely needed clarity.

Beyond this clarity, *Dynamex*'s ABC test incorporates the common law in its "A" prong, which focuses on the "control and direction" that the business has over the hiring, firing, and performance of the worker.[421] This has the effect of harmonizing the common law and the IWC's "suffer or permit" standard, thus rendering a worker who meets *either* test an employee.[422] Additionally, given that the "suffer or permit" standard operates

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418. *See* Moore, *supra* note 122, at 936–50.
419. *Dynamex*, 416 P.3d at 31–32, 36–40.
420. *See supra* notes 2–4 and accompanying text.
421. *Id.*
422. Elmore, *supra* note 2. ("[B]ecause a worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard."). For more on the delineation of "suffering or permitting," *see supra* notes 122–26 and accompanying text.

"independent of the question of control,"[423] courts are given the flexibility to properly address nuanced issues that are likely to arise in circumstances such as e-commerce or the gig economy.

The California ABC test captures the intent of the FLSA, whose purpose was perhaps best expressed under President Obama's DOL, which espoused a broad reading of the FLSA.[424] The court in *Dynamex* affirmed that the IWC shares this aim by acknowledging that the standard was intended to "bring within the 'employee' category *all* individuals who can reasonably be viewed as working '*in* [the hiring entity's] *business*.'"[425] This expanded interpretation offers greater protection to the party that needs it most—the worker.[426] While the broader standard likely increases business costs due to a greater chance of litigation, businesses are able to shift these costs to consumers,[427] an avenue for recourse that individual workers ordinarily lack.

The Biden administration seeks to codify the *Dynamex* ABC test in its proposed act, the Protecting the Right to Organize (PRO) Act.[428] While the Act covers so many areas[429] that it could be seen as overreaching, the Act's codifying of the ABC test is a good step not just toward legal clarity, but to workplace fairness. Indeed, that test may be the capstone provision of the many clauses designed to be a collective boost of the hiree's rights and its power, individually or collectively, to effectively negotiate with the hirer (the employer). The PRO Act seeks to

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423. *Id.* at 37.

424. *See supra* Part III.B.

425. Dynamex Ops. W. v. Superior Court, Cal. Rptr. 3d 1, 27 (2018) (quoting Martinez, 231 P.3d at 281) ("A proprietor who knows that persons are *working in his or her business* without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.") (emphasis added).

426. Moore, *supra* note 122, at 945.

427. *See* Utpal M. Dholakia, *If You're Going to Raise Prices, Tell Customers Why*, Harv. Bus. Rev. (June 29, 2021), https://hbr.org/2021/06/if-youre-going-to-raise-prices-tell-customers-why ("Many companies, and even entire industries, routinely raise prices without ever telling customers.").

428. Peter R. Spanos, *The Biden Administration and The Pro Act*, Taylor English (Jan. 7, 2021), https://www.taylorenglish.com/newsroom-alerts-The-Biden-Administration-and-The-PRO-Act.html.

429. *Infra* note 455 (declaring how far-reaching, in so many ways, the PRO Act is, and listing as examples eight PRO Act provisions, mainly about labor relations outside the scope of this article). These and other PRO Act provisions need not be addressed in order to simply apply the PRO Act's version of the ABC test and a few directly related concepts from that Act. (e.g., collective bargaining). Infra notes 452-540 and accompanying text. Other PRO Act provisions are separable and may be pursued in future political and legal contests.

expand the protections offered under the NLRA to more workers.[430] To this end, the Act would also redefine "joint employers" to include, beyond separate companies that have direct control over employees, those that possess indirect or even potential control,[431] and would stiffen penalties for employers found to have violated a worker's rights.[432]

The PRO Act did pass the House of Representatives in February 2020 but failed to clear the Senate before the close of that session of Congress.[433] The Act was reintroduced the following session, and on March 9, 2021, the House of Representatives again passed it.[434] Once more, this bill died in the Senate,

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430. The California labor and workforce development agency explains how the ABC test is applied and breaks down each condition. *See ABC Test*, https://www.labor.ca.gov/employmentstatus/abctest/ (last visited Feb. 27, 2023). The PRO Act makes substantial amendments to the National Labor Relations Act. Section 2(a)(1) amends the definition of "Joint employer" providing:

Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by adding at the end the following: Two or more persons shall be employers with respect to an employee if each such person codetermines or shares control over the employee's essential terms and conditions of employment. In determining whether such control exists, the Board or a court of competent jurisdiction shall consider as relevant direct control and indirect control over such terms and conditions, reserved authority to control such terms and conditions, and control over such terms and conditions exercised by a person in fact: Provided, that nothing herein precludes a finding that indirect or reserved control standing alone can be sufficient given specific facts and circumstances. Furthermore, the definition of "Employer" is amended as well, adding at the end of Section (2)(3) of the National Labor Relations Act (29 U.S.C. § 152(3)) "An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless." *See* Protecting the Right To Organize Act of 2019, H.R. 2474, 116th, https://www.govtrack.us/congress/bills/116/hr2474/text (last visited Sept. 12, 2022); *see also* 29 U.S.C. § 152 (2020).

431. *Id.*; Amy Harwath & Michael Correll, *Labor Law Under the Biden Administration: A Preview of the PRO Act*, Employment Law Watch (Mar. 8, 2021), https://www.employmentlawwatch.com/2021/03/articles/employment-us/labor-law-under-the-biden-administration-a-preview-of-the-pro-act/.

432. Alex Gangitano, *Biden calls for passage of PRO Act, $15 minimum wage in joint address*, The Hill (Apr. 28, 2021), https://thehill.com/homenews/administration/550845-biden-calls-for-passage-of-pro-union-pro-act-and-15-minimum-wage.; *see* Robert W. Emerson & Charlie C. Carrington, *Devising a Royalty Structure that Fairly Compensates a Franchisee for Its Contribution to Franchise Goodwill*, 14 Va. L. & Bus. Rev. 279, 285–92 (2020) (discussing independent contractor and joint employment issues).

433. Spanos, *supra* note 426.

434. Natale V. Di Natale & Kayla N. West, *U.S. House Passed the PRO Act: How It Could Affect the Future of Labor Law*, The Nat'l L. Rev. (Oct. 3, 2021), https://www.natlawreview.com/article/us-house-passed-pro-act-how-it-could-

awaiting passage.[435] Then, in January 2023, the Republicans took back control of the U.S. House of Representatives that they had lost in the 2018 Congressional elections; this killed the chances for the PRO Act, in either Congressional chamber, at least until new elections and another Congress forms in January 2025.[436]

Beyond the PRO Act, there are several NLRB decisions rendered during the Trump Administration that the current Board could revisit. Most impactful on franchising – still a matter for reflection, resolution, and dealing with its aftermath - is the *Browning-Ferris Industries* case from 2015.[437] While uncertainty remains about what the Biden Administration's NLRB will ultimately accomplish, all signs point to continuing changes in labor policy, including a serious strategic impact on franchise systems.[438]

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affect-future-labor-law. The bill passed in the House of Representatives by a vote of 225 to 206 on March 9, 2021. Five House Republicans (Brian Fitzpatrick, John Katko, Chris Smith, Jeff Van Drew, and Don Young) joined the House Democrats in voting for it, while one Democrat (Henry Cuellar) voted against it. *Id.*

435. *See id.* The bill is unlikely to pass in the Senate as that would require 60 votes to overcome any filibuster, meaning universal or near-universal Democratic support and as many as ten Republican crossover votes.

436. Of course, as support for the PRO Act has been almost entirely the domain of the Democratic Party, with Republicans nearly uniformly opposed to the PRO Act, its being signed into law would, in addition to Democratic ascendancy in both houses of Congress, almost certainly require that the Democrats retain control of the Presidency.

437. 362 N.L.R.B. 1599 (2015). In this decision, the NLRB expanded the joint-employer standard by holding that status as a joint employer rested on the employer's "reserved right to control employees as well as its indirect control over employees." This relaxed the previous joint employment standard, potentially allowing employees to assert their right to bargain with both their direct employer and the company that contracted their services. Independent contractors are frequently put in a position where they are without protection of any workplace laws. By clarifying that the lead employer may also be responsible as a joint employer for the conditions of employment, administrative boards and courts in cases such as *Browning-Ferris Industries* have turned franchisor-as-employer into a clarion call for worker rights and for unionization at disparate, large, franchised chains. It is more a battle overpay, working conditions, and unionization generally – of the obvious employees versus those above them in both local and national "management" (the franchisees and the joint-employer franchisor, respectively) than simply a fight to label franchisees as the franchisor's employees.

438. Until the ABC test becomes the federal standard, workers in states that have adopted the ABC test may have difficulty bringing claims in federal court if it is determined that there is a conflict between the state and federal standards. *See* Patel v. 7-Eleven, Inc., 8 F.4th 26 (1st Cir. 2021) (affirming dismissal

2. *A Uniform Guarantee of Rights*

Assuming that the ABC test is adopted at the federal level and made to apply uniformly across jurisdictions, states that value the "right to contract" may nevertheless hold the provisions of a franchise agreement to apply even against a worker determined to be an employee under the ABC test.[439] For that reason, any effort to make uniform the ABC test should include a concomitant guarantee of the rights associated with being an employee; otherwise, workers designated as employees may receive nothing more than a change in their formal designation, without the practical benefits associated with that status.

C. *Dependent Contracting and Collective Bargaining*

Without question, legislating a single uniform standard to determine worker classification would help clarify both independent contracting and joint employment law. However, that is not the only option. Another solution is to change how franchisors and franchisees come to an agreement in the first place.

From the start, franchisees are at a disadvantage. They are often inexperienced businesspeople who gravitate towards franchising because of the structure and assistance the franchise model offers.[440] Additionally, franchisees are prone to recency,[441] outcome,[442] and optimism biases,[443] making them more likely to jump at an attractive venture without proper pause or time for reflection. Meanwhile, franchisors or their representatives often are quick to advertise low starting costs and high

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of case brought by workers alleging they had been misclassified given a potential conflict between the Massachusetts and FTC standards).

439. *See* Mujo v. Jani-King Int'l, Inc., 13 F.4th 204 (2d Cir. 2021).

440. Emerson & Benoliel, *supra* note 14, at 202–15.

441. Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 Wash. & Lee L. Rev. 767, 777 (2002).

442. Suandy Chandra, *Outcome Bias*, LinkedIn (Dec. 13, 2020), https://www.linkedin.com/pulse/outcome-bias-suandy-chandra/?trackingId=APT8jYv4Q8S%2BZBa4YeaQRA%3D%3D ("Outcome bias is [the] tendency to judge a decision by its eventual outcome instead of judging it based on the quality of the decision at the time it was made.").

443. Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 San Diego L. Rev. 709 (2014); *see also* Robert W. Emerson & Steven A. Hollis, *Bound by Bias? Franchisees' Cognitive Biases*, 13 Ohio St. Bus. L.J. 1, 24 n.126 (2019) (on the optimism bias that franchisees so frequently have); Tali Sharot, *The Optimism Bias*, 21 Current Biology R941 (2011).

probabilities of success.[444] For example, the oft-quoted statistic for franchise success rates is between 90% and 95%.[445] Whether this is true or not, the typical franchisee's lack of business experience makes it difficult to reasonably assess the franchisee's chance of success.[446]

Moreover, franchisees have little ability to meaningfully dictate contract terms throughout the negotiation process, given the franchisor's frequent refrain of "take it or leave it."[447] From the franchisor's perspective, it is far better to forego choosing a franchise applicant who has refused to comply from the outset, especially if it is relatively easy for the franchisor to find other interested parties. Once negotiations are completed, that initial power imbalance tends to continue throughout the term of the agreement. Furthermore, the oversight and control that franchisors retain over their franchisees during the course of the relationship renders franchisees independent in name only.[448]

And yet, franchisees continue to be viewed under the law as independent contractors, and thus, under the current version of the NLRA, they do *not* have a protected right to form

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444. Robert W. Emerson, *Assessing* Awuah v. Coverall North America, Inc.*: The Franchisee as a Dependent Contractor*, 19 STAN. J.L., BUS. & FIN. 203, 221 (2014).

445. *See* Carol Blitzer, *Franchise Owners Weather Turbulent Economic Times*, PALO ALTO ONLINE (Dec. 11, 2011), http://www.paloaltoonline.com/news/2011/12/11/small-franchise-owners-weather-turbulent-economic-times; TOP 3 FRANCHISE QUESTIONS, http://www.murphybusiness.com/franchise-sales/top-3-franchise-questions (last visited June 27, 2022).

446. Emerson, *supra* note 443.

447. Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 713 (2013) ("[L]ikened to an adhesion contract, with the power disparity very much weighted toward the franchisor, the franchise agreement 'carries within itself the seeds of abuse.'").

448. Surveys of 100 U.S. restaurant systems' franchise contracts in 2013 and 200 such systems' franchise contracts in 2023 demonstrated that a large majority of contracts, only increasing in percentages from 2013 to 2023, showed, *inter alia*, great controls by the franchisor over: (1) the franchised business' site selection, layout, and alterations, (2) the training of the franchisee, (3) franchisor-issued operation manuals, (4) quality control standards and product line control, (5) price restrictions, (6) franchise outlet hours of operation, (7) franchisor specifications about franchisee employees, (8) the franchisor's right to inspect the franchisee's business premises, and (9) restrictions concerning trademark display and the use or sale of trademarked goods. Emerson, *Two-Standard Approach*, *supra* note 12, at 690–93; Emerson, *Franchise Contract Standards*, *supra* note 12.

labor unions.[449] Without the freedom to work *with* one another, the franchisees are forced to compete *against* each other. Even absent these restrictions, franchisees who attempt to organize are often met with retaliation.[450] Furthermore, while franchisor advisory councils do exist to work towards promoting communication between franchisors and franchisees, they are frequently ineffective, and actually have the inverse effect of establishing new obstacles for franchisees.[451]

The change this article advocates is an increase in franchisees' ability to communicate, organize, and bargain with their franchisors. The PRO Act contains several provisions that would significantly bolster franchisee negotiating power and franchisee protections. First, the Act would remove the ban on franchisee collective bargaining, thus facilitating union organization and leveling the playing field between franchisors and franchisees.[452] Second, the Act would prohibit mandatory arbitration agreements and class action waivers,[453] giving franchisees the power to pursue litigation if union and franchisor negotiations prove unfruitful, thereby giving franchisors increased incentive to participate in these negotiations in good faith. Finally, the Act would impose financial penalties against employers who interfere with workers' organization efforts,[454] affording franchisees a means to combat franchisor retaliation.

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449. *See Frequently Asked Questions – NLRB*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/resources/faq/nlrb (last visited Sept. 12, 2022).

450. Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 Penn. St. L. Rev. 99, 112, 124 (2013).

451. Emerson, *supra* note 165, at 1536; Emerson & Benoliel, *supra* note 450, at 119–21.

452. Marc Lieberstein et al., *Is Franchising Being Threatened (Again)?*, N.Y. L. J. (May 20, 2021, 12:45 PM), https://www.law.com/newyorklawjournal/2021/05/20/is-franchising-being-threatened-again/?slreturn=20210904135308.

453. Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *How The PRO Act Restores Workers' Right To Unionize*, Economic Policy Institute (Feb. 4, 2021), https://www.epi.org/publication/pro-act-problem-solution-chart/#:~:text=Collective%20and%20class%20action%20waivers,employees%E2%80%94without%20violating%20the%20NLRA.

454. Harwath & Correll, *supra* note 429. PRO Act provisions would increase the damages available to employees for unfair labor practices - (a) back pay no longer offset by interim earnings such as unemployment pay or earnings from a new job, and (b) liquidated damages equal to twice the amount of other damages awarded. H.R. 842, 117th Cong. §109 (2021). They also subject employers to penalties starting at $50,000 for each failure to comply

In sum, these parts of the PRO Act would be a much-needed step in the right direction.[455] It is abundantly clear that, under the current state of the law, franchisors can benefit from the franchise model even as they impose controls upon the franchisee that cut against the very nature of this model. Among other things, the PRO Act's collective bargaining protections, heightened enforcement of a right to organize, and bans on class action waivers and mandatory arbitration clauses[456] would in effect acknowledge and combat these controlling practices by some franchisors. These reforms can be more than just a way to reset the balance in individual franchise relationships. These changes in the law can halt or at least diminish franchisor practices that tend to discourage, if not outright destroy, franchisee initiative and productivity, but that are ultimately self-defeating for franchise systems as a whole. To right the balance in power between franchisee and franchisor, throughout the term of the franchise relationship, may not simply help franchisees but, in the end, serve the long-term interests of all who desire a strong, nimble franchise network, including the franchisors themselves.

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with a Board order, which could be doubled if a similar unfair labor practice occurred in the past five years, and the penalties could apply to employers' directors and officers. *Id.*

455. The PRO Act has many other provisions, but they are outside the scope of this article, such as: (1) prohibiting state "right to work" laws; (2) outlawing required employee attendance of "captive audience" meetings, where employers present their arguments against unionization; (3) requiring that employers report all payments for labor relations advice and other services from lawyers; (4) mandating that, prior to any organizing election, employers give their employees' personal contact information to union organizers; (5) allowing secondary boycotts; (6) providing for increased use of bargaining orders if the employer engaged in misconduct (instead of a new election, the union is certified despite losing the first representation election); (7) changing the definition of "supervisor," by limiting the classification to those who perform "supervisory" duties "for a majority of the individual's worktime," and by eliminates two factors that often have indicated supervisory status: "assigning" work and having the "responsibility to direct" the employees' work; and (8) restoring, and placing in the NLRA, the Browning-Ferris rule (*see supra* notes 188–92 and accompanying text), so a putative joint employer's reserved and indirect control could subject it to joint employer status and liability. H.R. 842, 117th Cong. §§101-107, 111, 202 (2021).

456. *Supra* notes 452–54 and accompanying text.

D. *A Paradigm Shift*

A large share of the issues in franchising stem from confusion over the classification of the various parties. The question of whether franchisees are genuinely independent contractors or, instead, their independence is a guise used to protect franchisors from liability, arises from the unique nature of franchising relationships.[457] Further, as many franchisees establish a corporate entity through which to operate their franchise, this classification may appear to necessitate the clearing of an additional hurdle—the setting aside of the franchisee's corporate identity in order to classify that franchisee as the franchisor's employee.[458] Given this novelty, perhaps the solution lies in adapting the legal lens through which we view these relationships.

1. *An Intermediary Theory of Liability*

One viable approach has been developed by Professor Kati L. Griffith, which challenges many of the assumptions that

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457. Emerson, *supra* note 9, at 592–93 ("most customers lack the leverage to force disclosure of a non-public franchisee's financial strength, and, of those people who do, most have not engaged in transactions that would make that kind of analysis feasible or cost-effective. As a consequence, this problem comes to the surface: financially irresponsible franchisees may compete on a seemingly level playing field, under the guise of a trademark, with those franchisees who are financially responsible. These irresponsible franchisees may thus abuse the franchise business model by reaping all the benefits without assuming any risk. A response, however, would be that the franchisor has complete control in vetting and choosing a franchisee.").

458. However, in practice, choosing to adopt a corporate entity status has not proven to be a method for somehow working around compliance with laws (for safety, child labor, or other fundamental public policy concerns) as they arise in a multi-layered business structure. For instance, assume that a corporation ("C") has licensed a limited liability company ("LLC") to carry out certain contractual functions, and that LLC has managers who hire workers to perform functions that carry out LLC's duties under the C-LLC licensing arrangement. The form of the arrangement will not somehow triumph over the substance of wage law violations, nor will certain persons responsible for violations be insulated from suits or charges due to their status as key employees of a franchise party. *See* Patel v. 7-Eleven, Inc., 183 N.E.3d 398, 405 (Mass. 2022) (citing the criminal and civil remedies for Massachusetts wage statute violations, and noting that employers who misclassify their employees "do so at their peril"; further noting, "[t]hese sanctions apply to both business entities and certain individual officers" because the statutes and the precedent clearly indicate they create "liability for both business entities and individuals, including corporate officers, and those with management authority over affected workers").

undergird franchise jurisprudence.[459] Chief among these is the trend, current among some courts, to accept the letter of franchisor contracts at the expense of the true character or substance of these relationships.[460] Take, for example, a contract which provides that a franchisor may make certain recommendations to the franchisee, but which expressly claims that such recommendations are by no means to be considered mandatory.[461] Otherwise, such "recommendations" might be construed as what they often surely are: direct commands, which may only be rejected at the franchisee's peril. Regardless, the interpretation of such devices as nothing more than "recommendations" is contradicted both by the scholarly literature, which questions the allegedly "arms-length" nature of franchise transactions, as well as by the fact that franchisors frequently evaluate franchisees *on their adherence to the "recommendations*."[462]

Accordingly, courts seeking to correctly characterize the parties to franchise agreements should look to the actual substance of the relationship rather than the contractual provisions establishing such a relationship; they should prize the function of the device, rather than the form. Doing so would not only allow them to rightly view the aforementioned recommendations as requirements that franchisors take pains to meet,[463] but might also pave the way towards shifting altogether the underlying control analysis.

At present, courts operating under the FLSA and NLRA evaluate a franchisor's control by characterizing it as either direct or indirect.[464] A more nuanced analysis, however, as Professor Griffith suggests, would consider the nature of franchise relationships, and thus might assess the nature and extent of the

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459. Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 203 (2019).

460. *Id.* at 207–08.

461. *Id.*

462. *Id.* at 208–09 (interpreting such 'recommendations' correctly as 'requirements'); Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 U.C. DAVIS L. REV. 1227, 1229 (2021) ("Although franchisors nominally 'recommend' these policies, franchisees nonetheless follow them because they need the franchisor's approval for their survival.").

463. This follows, even absent explicit mechanisms for enforcement, from the dependent nature of franchisees. *See* Griffith, *supra* note 457, at 210; Elmore, *supra* note 460, at 1229, 1238.

464. Griffith, *supra* note 457, at 211.

control.[465] This would open up a number of avenues through which courts could dig into the substance of a franchise relationship in an effort to adequately apprehend the nature of the relationship, rather than to assess and prematurely disrupt the relationship based upon cleverly constructed franchising boilerplate.

As a result of such a paradigm shift, an entirely new theory of liability could be predicated upon indirect control that is nevertheless actually visited upon franchisees, their managers, and their frontline workers. This theory, which might be termed an "intermediary theory" of liability,[466] would look to the meaningful control that franchisors indirectly exert over frontline workers as a result of the myriad ways they control franchisees and their managers. For example, under this theory of liability, a franchisor could be found to effectively control its franchisee's frontline workers given that it requires the franchisee to carry insurance for employment liability.[467] Or control could be established over frontline workers via a franchisor's requiring managers to attend various training sessions which frequently center on the managers' role vis-à-vis the frontline workers.[468]

2. *Presuming Joint Employment*

Courts might also too narrowly construe control when they ignore mobility limitations that franchisors impose upon their franchisees, such as policies prescribing operational standards. These standards, while intended to ensure a uniform product and customer experience, can make a franchisee dependent upon the franchisor.[469] Professor Andrew Elmore demonstrates how these mobility limitations harm workers.[470] He proposes that the implementation of various presumptions and *per se*

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465. *Id.*
466. *Id.* at 205.
467. *Id.* at 206. Such an expansion of our current understanding of control would be critical, as franchisors are careful to disavow more traditional control over frontline workers such as wages to be paid, or day-to-day supervision. *Id.*
468. *Id.* at 209 n.154 (pointing to the training McDonald's requires of its managers and how the lessons derived from such training is implemented at the frontline level).
469. This is due to the aforementioned recommendations as requirements phenomenon. Elmore, *supra* note 460, at 1227, 1236.
470. *Id.* at 1238.

rules would negate the judicial tendency to assume franchisors are not joint employers.[471]

Consider how rules for competition might extend to employment and franchising. Under the existing antitrust framework, low-wage workers in franchised fast-food operations face an almost insurmountable barrier attempting to bring their claims of anti-competitive practice in the form of no-poaching agreements.[472] This is largely to do with courts' failing to bifurcate their analysis between labor and product markets; labor monopsony has been shown to have benefits in the latter market (products) even as it worsens conditions in the labor market.[473] Thus, courts should adjust their analysis of no-poaching agreements to the effects they have on the

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471. *Id.* at 1233–34.

472. No-poaching agreements in a low-wage context are likely to lead to wage stagnation (restricted worker mobility and lessened employer competition over wages) and are unlikely to be beneficial in protecting trade secrets and employer investments (much less intellectual property to protect with respect to lower, entry-level employees than for managers, marketers, etc.). Especially concerning with respect to these low-wage workers is the fact that they likely do not know their rights and may not easily be able to access and afford a lawyer; thus, these workers are exceptionally susceptible to the *in terrorem* effects of both (1) non-compete covenants directly limiting their mobility and (2) even more probable, the no-poaching provisions that *indirectly* harm these workers by inhibiting employers otherwise inclined to give them job offers. *See* Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 Seton Hall L. Rev. 1223, 1252 (2020) (reviewing the relevant literature and concluding that "*in terrorem* effects of noncompete agreements are not hypothetical"); Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 423 (2006) ("Even a manifestly invalid non-compete may have *in terrorem* value against an employee without counsel."); Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873, 888 (2010) (noting that – even if a non-compete covenant may not apply, the *in terrorem* effect of a potential lawsuit may cause ex-employees to refrain from seeking a new job during the term of that covenant). As stated in the seminal work on noncompetes, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 682 (1960) ("For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor . . . ."), the same reasoning and concerns apply equally well to franchising covenants against competition.

473. Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 Vand. L. Rev. 1387, 1398–413 (2016).

labor market.[474] In conducting these analyses, a *per se* rule may be called for given the difficulty that low-wage earners have in bringing their claims. However, given the courts' usual reluctance to expand their purview, the best approach appears to be not a broad *per se* rule but a "quick-look analysis."[475] Unlike traditional, rule-of-reason analysis, challenged restraints would be presumed to be anticompetitive, with plaintiffs having no burden to prove market power.[476]

Among other proposals, Professor Elmore encourages courts to adopt a presumption that franchisors who impose significant mobility limitations on their franchisees jointly employ their franchisees' employees.[477] This presumption could be rebutted with a showing that the franchisor does not actually exert undue control over the franchisees' workplaces despite the mobility limitations.[478] This sort of presumption could do a great deal to protect the independence of franchisees while simultaneously avoiding over-inclusivity by limiting its scope only to those franchisors who are *actually* exerting inordinate control over their franchisees. Functionally, mobility limitations would serve as a red flag, alerting courts to potential issues

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474. While no-poaching agreements can decrease the price charged to consumers for their burgers and fries (pro-competitive viz. products market), they cut against organic wage growth (anti-competitive viz. labor market); given that these effects are cultivated in the labor market, their eventual impact on the products market should not be considered, at least not such as to overcome the deleterious effects on the labor market. This realization almost certainly would lead courts to consider the quick-look analysis in cases like the franchising context given the substantiated anticompetitive effects of the agreement. *See* Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?* 105 Cornell L. Rev. 1343, 1388 (2020) ("[C]ollusion appears to be easier in labor markets than in product markets, because labor markets are often more concentrated than product markets are.").

475. *See* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (describing "quick-look analysis" as an "intermediate" standard between rule of reason and *per se* condemnation).

476. Cal. Dental Ass'n, v. FTC, 526 U.S. 756, 770 (1999) ("[Q]uick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained."). If a case goes to rule of reason, then any trial decision almost always favors the defendant. *See* Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 14 (1977) (describing the rule of reason as "little more than a euphemism for nonliability"); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829–30 (2009) (finding that defendants won 221 out of 222 rule of reason cases that reached final judgment from 1999–2009).

477. Elmore, *supra* note 460, at 1263.

478. *Id.*

while leaving them free to consider the totality of the circumstances before drawing their conclusions.

On the other hand, a *per se* rule that requires a finding of joint employment wherever certain contractual provisions are present, something for which Professor Elmore also advocates,[479] might serve to unnecessarily restrict parties to a franchise agreement who possess a bona fide desire for those provisions. For example, a *per se* rule which says that any franchise agreement containing a no-poaching clause is invalid, while enabling intrafirm competition for valuable workers, could also reduce franchisees' ability to safeguard its investments in its workers. While no-poaching agreements have historically had anti-competitive effects,[480] certainly these provisions could be tailored to avoid such externalities, in which case a *per se* rule might create new issues even as it puts others to rest. So, a compromise might be to proscribe most contract clauses that restrict competition, only permitting narrowly phrased and purposed clauses, such as a ban of poaching within the franchise network if that ban protects trade secrets or intense training.[481] Therefore, no-poaching agreements must still be narrowly tailored to protect franchisors' legitimate interests, especially when franchisors or their franchisees are dealing with higher-level, managerial franchisees in possession of franchisor intellectual property, such as trade secrets.[482]

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479. *Id.* at 1276–77.

480. Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, 26 ANTITRUST 73 (2012).

481. Professors Marinescu and Posner argue that the contractual barring of poaching within a franchise network "may be justified in narrow cases." Marinescu & Posner, *supra* note 472, at 1387–88 (recognizing that intrafirm no-poaching agreements may be justified even in the fast food industry if they are sufficiently tailored to protect certain investments in various classes of workers). Two of these relatively rare classes of people would be "managerial employees," specifically those "given access to proprietary information about the franchise's method of business" (presumably, that information could constitute trade secrets) or those "who have received intensive training at the franchise level." *Id.* Rather than arguing about vertical versus horizontal restrictions (the standard approach in antitrust law), Marinescu and Posner focus on individual specifics – what employees have received and thus may take to a competitor; when the restrictions are instead rather broad (e.g., they are "untailored to the skill-level and responsibility of employees or [they] apply to low-skill employees"), those wide-ranging proscriptions against hiring workers from another franchise within the network "should trigger the *per se* rule." *Id.*

482. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 ABA J. LAB. & EMP. L. 151, 180, 180 nn.206–09 (2020) (citing RESTATEMENT (THIRD) OF EMPLOYMENT L. § 8.07 (Am. L. Inst. 2015)).

In the end, it seems imperative that franchising must be viewed as *sui generis*. It does not fit squarely within the current shape of employment law, nor should it have to.[483] Rather than force franchises to conform to the law, the law should assess and refine its tools for analysis to better accomodate the franchise parties, both franchisors and franchisees. In so doing, franchisees and their workers might be better protected, while still allowing a strong and proven business model to flourish.

Conclusion

The current state of independent contractor and joint employment law is a mess. Multiple tests promulgated by various agencies and established as precedent by courts in jurisdictions across the country are applied to establish worker classification. In addition, because there is no overarching standard, numerous versions of each test are used. However, the recommended reforms – (1) accelerated consideration of the franchising realities already recognized in many foreign legal environments, (2) adoption of a uniform, simpler test for independent contractor status, (3) a push toward legal principles that enhance the prospect of collective bargaining and perhaps even implementation of "dependent contracting" concepts, and (4) enactment of some core PRO Act rights and obligations - can go a long way towards eliminating the confusion and improving the law of franchising.

Federal codification of the ABC Test will provide a uniform standard, and narrowing the definition of "independent contractor" while expanding the definition of "joint employer" will decrease the uncertainty surrounding proper classification. Passage of several PRO Act provisions will only directly reach business practices and law cases insofar as they involve *federal* law, but they should also serve as a persuasive model for state and local jurisdictions. The PRO Act provides much-needed protection for workers and relief for franchisees. This article's proposed reforms would grant some needed rights to franchisees, who as a special class of hirees often are no better off than entry-level employees without even some of the legal protections associated with employment. Some franchisor privileges may serve mainly to deny or at least delay fundamental

483. *See supra* Part V.A (noting the strength of the franchising model even under disparate legal regimes).

franchising reform. Even if, in the short term, these improvements may increase the cost of doing business, these changes are necessary for the continued advancement of healthier, fairer forms of franchising.