IDENTIFYING JOINT EMPLOYMENT IS AS EASY AS ABC

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I. INTRODUCTION

In America's current political climate, "Fight for $15" has become a common slogan among progressive activists.[1] This political movement demands an increase of the federal minimum wage to fifteen dollars per hour.[2] Under federal law, the Fair Labor Standards Act (FLSA) currently provides employees the right to a minimum wage of $7.25 per hour.[3] Often overlooked in America's political discourse, however, is the predicate for receiving such protections in the first place: the legal status of employment.[4] Moreover, even when workers are nominally entitled to such protections, the material ability for workers to exercise such rights has been significantly undercut by businesses through elaborate means of shedding employment liability.[5]

Both New Jersey's Wage and Hour Law (NJWHL) and Wage Payment Law (NJPWL) protect a minimum wage for "employees."[6] For example, when one walks into an office building, one may presume reception workers, maintenance workers, or janitors are all employees of the company that owns or operates the building. Such a presumption

J.D. Candidate, Seton Hall University School of Law, 2021. I am deeply grateful to my faculty advisor Dean Timothy Glynn for his instructive guidance and support in the drafting of this comment. I would also like to thank Professor Charles Sullivan for discussions about employment law both in and out of the classroom, Anish Patel for the late nights in the Rodino Library drafting our comments and debating legal theory, and the rest of the Seton Hall faculty and student body who have provided me a great deal of guidance and support throughout my law school career.

1 FIGHT FOR $15, https://fightfor15.org/c-petition/for-workers/ (last visited Nov. 21, 2020).

2 *Id*.

3 29 U.S.C.S. § 206(a)(1)(c) (2020).

4 29 U.S.C.S. § 206(a) (2020) ("Every *employer* shall pay to each of his *employees* . . . .") (emphasis added).

5 *See, e.g.*, DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 142 (2014).

6 *See* N.J. STAT. ANN. § 34:11-56a (2020) (establishing the minimum wage for "workers"). Hereinafter, "NJWPL" will refer to both the NJWPL and NJWHL collectively. The New Jersey Supreme Court held the employment test for both is the same due to their similarity of language. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 312 (2015).

is increasingly incorrect. There is an important caveat to the question of employment: in all employment statutes, the statutory language provides protection to "employees" and assigns liability for those protections to "employers."[7] Therefore, the analysis is actually two-fold. One side of the inquiry determines whether a worker is an employee or an independent contractor,[8] while the other side asks who the putative employer is.[9] It is this bifurcation of the employment analysis that presents the rub. There are three major tests to determine employment liability: the common law "right to control" test, the "economic realities" test, and the "ABC" test.[10] These tests determine the contours of "employment" in practice. Generally, the touchstone of employment is control.[11] Wage protection statutes, like the FLSA and the NJWPL, provide an even broader definition of employment: "to suffer or permit to work."[12] Early child labor prohibition statutes developed this particular language to prevent the circumvention of the prohibitions by utilizing third-parties as intermediaries.[13] Based on this language, the economic-realities test has been developed by the circuit courts as an attempt to broaden the suffer-or-permit-to-work formulation of employment beyond the touchstone of control in interpreting the FLSA.[14] The economic-realities test considers the "economic realities" of a potential employer-employee relationship to determine whether a worker follows the "usual path of an employee."[15] Unlike the FLSA, New Jersey has adopted the ABC test to determine a worker's employee status under the NJWPL's suffer-or-permit-to-work language.[16] Under the ABC test, employment is presumed and an employer must prove three exhaustive and dispositive factors to disclaim employment liability: (1) a worker's freedom from employer control; (2) that the

[7] *See, e.g.*, N.J. STAT. ANN. § 34:11-56a4(a) (2020) ("[E]ach *employer* shall pay to each of his *employees* . . . .") (emphasis added).

[8] *See, e.g.*, N.J. STAT. ANN. § 34:11-4.1(b) (2020) (an "employee" is "any person suffered or permitted to work *by an employer*, except that independent contractors and subcontractors shall not be considered employees.") (emphasis added).

[9] *See, e.g.,* N.J. STAT. ANN. § 34:11-4.1(a) (2020) (an "employer" is "any [person] *employing* any person . . . .") (emphasis added).

[10] *See infra* Sections III.A, IV.A& B, respectively.

[11] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a).

[12] *Compare* 29 U.S.C.S. § 203(g) (2020) *with* N.J. STAT. ANN. § 34:11-4.1 (2020) *and* N.J. STAT. ANN. § 34:11-56a1(f) (2020).

[13] *See* Laurence E. Norton, II, *Analyzing a Company's "Joint Employer" Liability for Overtime Pay Under Federal and State Wage and Hour Laws*, 88 PA. B. ASS'N. Q. 10, 12-13 (2017).

[14] *See* discussion *infra* Section IV..

[15] *See generally,* Rutherford Food Corp. v. McComb, 331 U.S. 722, 727-29 (1947).

[16] Hargrove v. Sleepy's, LLC, 220 N.J. 289, 316 (2015).

nature of work performed is outside of the employer's usual course of business; (3) and that the worker's profession will continue regardless of the employer's business.[17] The ABC test is generally considered the broadest of the three tests, providing the most protection to workers.[18]

Despite New Jersey's adoption of such a broad employment test, its effectiveness has been cast into serious doubt by a recent case from the New Jersey Appellate Division, *Perez v. Access Bio, Inc.*[19] Under the joint-employment doctrine, an employee may have multiple employers that are liable for her statutory employment rights.[20] The court in *Access Bio* held that the ABC test is limited to only the first inquiry of employment liability, whether a worker is an employee or independent contractor, and not to the second inquiry, who are the employers, in cases of alleged joint-employment.[21] In order to identify multiple putative joint-employers, the economic-realities test developed for the FLSA applies instead of the ABC test.[22] Therefore, whether the ABC test or the economic-realities test applies depends on where a putative employer stands in relation to other putative employers and the putative employee. This framework places the effectiveness of the ABC test, and the remedial purpose of New Jersey's wage protection laws, in significant jeopardy.

The stakes of employment status are high for both businesses and labor. While employment protection laws like the FLSA or NJWPL are a boon to workers, they represent a corresponding liability and cost to employers. In response, businesses have found increasingly novel and complex ways to "shed" their employment liability, while still benefiting from workers' labor. Firms achieve this by carefully structuring their organizations within the two-fold employment analysis. The consequences of this "workplace fissuring" can be devastating to workers. Fissuring schemes create a race to the bottom among the labor-providing third-party firms. As labor is pushed further away from leading firms, the market becomes increasingly fractious and competitive. Competition drives down the overall cost of labor, as well as third-party firms' ability to comply with employment laws and remain profitable. In addition, the sheer volume of small third-party firms makes employment law difficult to enforce. The *Access Bio* court's

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17 *Id.* at 305-06.

18 *See, e.g., id.* at 314-15.

19 *See,* Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *16-17 (Super. Ct. App. Div. July 23, 2019).

20 RESTATEMENT OF EMPLOYMENT LAW § 1.04 (2015); 29 C.F.R. § 791.2(a) (2020).

21 *Access Bio*, 2019 LEXIS 1673, at *16-17.

22 *Id.* (At least in circumstances in which one party stipulates employer status.), *see also infra* Section A.

limitation of the ABC test to single employment cases leaves a considerable gap for workplace fissuring arrangements to fall into, and severely limits workers' means for redress.

This comment will argue for overruling *Access Bio* and expanding the ABC test to joint-employment cases under the NJWPL. Part II will discuss in greater detail the different forms of fissured workplaces and the resulting structural pressures that lead to employment violations. Part III will review the historical development of the NJWPL's suffer-or-permit-to-work definition of employment. Part IV will elaborate on the framework of both the economic-realities test and the ABC test. Finally, Part V will argue why *Access Bio's* holding limiting the ABC test to single-employment cases is incompatible with the statutory language and purpose of the NJWPL and why the ABC test should be expanded to joint-employment cases.

II. THE MATERIAL STAKES OF THE SHIFTING WORKPLACE

A. *Purveyors of Labor: How Leading Firms Shed Employment Liability*

The relationships between businesses and workers have become more complexly layered than ever before. Fundamental employment functions—hiring, evaluation, supervision, pay, or training—which would typically be done in-house, can now require multiple organizations to fulfill.[23] This phenomenon has been dubbed "workplace fissuring."[24] Business organizations, like a rock with cracks in it, have been splitting over time.[25] But workplace fissuring is a new name for an old phenomenon.[26]

Sweatshop labor in the garment industry is one of the oldest forms of workplace fissuring.[27] In a classic sweating system, manufacturers divide their production lines into discrete parts.[28] These manufacturers outsource the different labor parts of the production line to sub-contractors for lump sums,[29] and "jobbers" then assemble the required

[23] WEIL, *supra* note 5, at 3-4, 7.

[24] WEIL, *supra* note 5, at 5, 7.

[25] WEIL, *supra* note 5, at 7.

[26] WEIL, *supra* note 5, at 7. (attributing workplace fissuring to the past three decades), 224 (recognizing garment sweatshops from the 1800s as one of the oldest forms of workplace fissuring).

[27] WEIL, *supra* note 5, at 224.

[28] *See* Bruce Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 997 (1999).

[29] *See id.* at 1056-57.

labor for piecemeal wages to "sweat out" the difference between the lump sum contract payment and the actual wages paid by the contractor for production.[30] Jobbers are typically workmen who have saved enough capital required to bid on contracts.[31] The primary benefit for leading firms utilizing a sweating system is the externalization of labor costs onto third-party firms.[32] By pushing the cost of labor into smaller and more competitive markets between jobbers, wages are squeezed tighter.[33] Therefore, the cost of labor falls in turn. Beginning with the rise of employment protections, particularly child labor laws, leading firms used workplace fissuring as a means to avoid employment liability.[34] Along with the benefits of more competitive labor markets, third-party fissuring transforms these jobbers into sacrificial lambs, assuming the employment liability in place of leading firms.[35]

Sweatshops can be classified into different types: the inside shop and the outside shop.[36] The inside shop is conducted on the leading firm's premises.[37] Despite being on the leading firm's premises, the workers are legally employed by some other middle-man contractor.[38] In contrast, the outside shop is not on the leading firm's premises, but the labor conducted therein is for the leading firm's production line and benefit.[39] At bottom, the sweatshop, whatever its form, acts as an intermediary that insulates the leading firm from employment liability.[40]

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30 *See id.* at 1056.

31 *Id.*

32 WEIL, *supra* note 5, at 224-26; *see also* Goldstein, et al., *supra* note 28, at 1056.

33 WEIL, *supra* note 5, at 224-26.

34 Goldstein, et al., *supra* note 28, at 1014.

35 *See, e.g.*, Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA: TEMP LAND (June 27, 2013), https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe ("She said that after she returned to work from surgery in 2002, the compact-disc warehouse she worked at told her it could no longer employ her because she didn't have [residency] papers. They directed her to a temp firm, she said, and a few years later, she returned to the same warehouse, [doing the same work,] still undocumented.").

36 There are three identified categories of sweatshops, but, for the purposes of this comment, "family shops" will not be discussed. Goldstein, et al., *supra* note 28, at 1057.

37 Goldstein, et al., *supra* note 28, at 1057.

38 *See, e.g.,* Rutherford Food Corp. v. McComb, 331 U.S. 722, 724-26 (1947) (explaining defendant slaughterhouse's argument that the plaintiff workers, despite working on the slaughterhouse premises, were contractually employed by another meat boner).

39 Goldstein, et al., *supra* note 28, at 1058-59.

40 Goldstein, et al., *supra* note 28, at 1059.

New developments in fissuring schemes have retained remarkable parallels to the sweating system. Staffing agencies have risen in the past sixty years to fill a similar niche as the inside sweatshop. In a similar way that the sweating system pushes labor costs and liability onto smaller entities, a staffing agency gives leading firms "flexibility" in their workforce.[41] As one advertisement from Kelly Girl, one of the first prominent staffing agencies, put it: "[w]hen the workload drops, you drop her."[42] Staffing agencies act as intermediaries between leading firms and their workers. When a staffing agency takes on all of the responsibilities as an employer of the leading firm's laborers, leading firms can simply command the required number of "bodies" necessary for their needs.[43] Besides the ability to command labor power at a whim, the staffing agency also takes on the liability of complying with employment regulations.[44] These agencies recruit workers, pay wages, and withhold taxes.[45] Despite the formal employment relationship between the worker and the agency, workers are sent out to a leading firm's premises to provide *only* the leading firm with labor.[46] Typical examples of labor provided range from vegetable cutting and fish cleaning to packaging and assembly.[47] These workers form the productive backbone for such companies as Walmart, Macy's, Nike, Philips, and Frito-Lay.[48]

Franchises are another example of modern workplace fissuring. Although the parallels are not as stark as those between staffing agencies and inside sweatshops, some franchising industries form something akin to a floating outside workshop. As an example, unlike the permanent premises of a typical jobber's outside shop, janitorial

41 Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA: TEMP LAND (June 27, 2013), https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe.

42 *Id.*

43 *See generally,* Grabell, *supra* note 41 ("[A woman] goes to the counter and asks the dispatchers if they think there will be work today. They tell her there's not much but to wait a little longer in case a company calls to say they need *more bodies*.") (emphasis added).

44 *See, e.g.,* Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *2-3 (Super. Ct. App. Div. July 23, 2019) (holding that staffing agency, not a leading firm pharmaceutical manufacturer, to be employer of temporary workers despite work occurring primarily within manufacturing plant and temporary employee tenures of multiple years).

45 *Id.*

46 Grabell, *supra* note 41.

47 Grabell, *supra* note 41.

48 Grabell, *supra* note 41.

franchises move workers from client to client.[49] A franchise is a large and well-known brand, such as Jan-Pro or Coverall, that does not provide labor directly to customers.[50] Instead, the franchisor sells the franchise to an "entrepreneur" to own and operate as a separate legal entity from the franchisor.[51] This sale includes giving the franchisee access to the franchisor's brand name, an initial customer list, training in the franchisor's cleaning methods, supplies and equipment, and "advice and counseling."[52] All of these benefits are purchased from the franchisor for an initial fee.[53] The franchisee, acting as its own business, then provides the necessary labor to its customers.[54]

Despite the franchisee's legal distinction as a separate business from the franchisor, the primary business relationship exists between the *franchisor* and the customer.[55] The franchisor, not the franchisee, coordinates and communicates with the franchisee's clients.[56] The franchisor bills the franchisee's clients and then passes along the funds after deducting the relevant "Royalty Fee, Management Fee, Sales & Marketing Fee . . . and any other amounts due to [the franchisor]."[57] The franchisee never receives money directly from its nominal clients.[58] Even where a franchisee finds new clients, they must be referred to the franchisor, who then sets the terms and conditions of the franchisee's work for that client.[59] Like the staffing agency and sweatshop, the franchise model allows the franchisor to shed employment liability. Unlike the staffing agency, the franchise utilizes multiple layers of separation. In these cases, the actual janitorial workers, cleaning in various public facilities, warehouses, and professional offices,[60] are separated from the businesses they labor for by at least two levels of fissuring.[61] The janitorial workers are the contractual employees of the franchisee alone, not the franchisor, nor of the customers the workers labor for.

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49 *See* WEIL, *supra* note 5, at 133-34.

50 WEIL, *supra* note 5, at 133-34.

51 *See* WEIL, *supra* note 5, at 133-34.

52 WEIL, *supra* note 5, at 134.

53 WEIL, *supra* note 5, at 134.

54 WEIL, *supra* note 5, at 136, fig. 6.2 (modelling the organizational structure of a major janitorial service franchise).

55 WEIL, *supra* note 5, at 135.

56 *See* WEIL, *supra* note 5, at 135.

57 WEIL, *supra* note 5, at 135. (quoting Jan-Pro Unit Franchise Disclosure Document, May 2010).

58 *See* WEIL, *supra* note 5, at 135.

59 WEIL, *supra* note 5, at 135.

60 WEIL, *supra* note 5, at 134.

61 WEIL, *supra* note 5, at 136, fig. 6.2.

B. *Seismic Consequences: Workplace Fissuring Encourages Workplace Violations*

Workplace fissuring benefits are far reaching. Ancillary services to a firm's "core competencies," such as cleaning or security, are simply not in the firm's best interest to manage themselves.[62] The fissuring that occurs in the hotel sector are emblematic of this benefit. The core competency of a hotel is the "experience" it provides to customers and the confidence any individual customer has in a hotel brand.[63] Cleaning and other services are incidental to the primary driver of a hotel's business.[64] The skills required for such incidental services are typically low, which opens up opportunities for fissuring schemes like sweatshops, staffing agencies, or franchising services.[65] Outsourcing these employment relationships can significantly reduce leading firms' management expenses from hiring, firing, supervising, providing fringe benefits, and employment and labor law compliance.[66]

The coal mining industry provides an illustrative example of how shedding employment liability can save significant operating expenses for leading firms. Between 1980 and 1983, Island Creek Coal, a major coal mining firm, shifted from using unionized in-house labor to contracting out work for smaller and more dangerous mining jobs.[67] These smaller contractors took on all of the employment liability for the labor provided, including paying employment taxes, managing personnel, and contributing to unemployment and retirement funds.[68] By shedding employment liability, large mining companies, such as Island Creek, were estimated to save between three to five dollars per each ton of coal on average.[69] In 1991, Island Creek reported production

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62 *See* WEIL, *supra* note 5, at 49-50

63 WEIL, *supra* note 5, at 50.

64 *See* WEIL, *supra* note 5, at 50.

65 *See* Goldstein, et al., *supra* note 28, at 998. (Certain aspects of production can be labor intensive while not requiring skilled labor, therefore the key for leading firms becomes finding a steady supply of workers.).

66 *See, e.g.*, Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *2-3 (Super. Ct. App. Div. July 23, 2019); Grabell, *supra* note 41 ("... Never costs you for unemployment taxes and social security payments. ... Never costs you fringe benefits."). Another non-quantifiable benefit of shedding employment is the shedding of moral responsibility that employers owe to employees. By outsourcing labor, workers are tradeable like any other commodity, sight unseen, for the lowest possible price. Timothy Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 101, 114 (2011).

67 *See* WEIL, *supra* note 5, at 104-05.

68 WEIL, *supra* note 5, at 102-04.

69 WEIL, *supra* note 5, at 103.

of nineteen million tons of coal.[70] Assuming that its less desirable, subcontracted work consisted of only five percent of its total production, Island Creek saved between $2.9 million and $4.8 million that year.[71]

This average cost savings says nothing to the shielding of leading firms from employment liability if a subcontractor goes bankrupt or violates employment law protections. Even though Island Creek contracted mining work out to third parties, the union's collective bargaining agreement required that the contractors hire Island Creek's unionized workers.[72] Of the sixty contractors that Island Creek Coal used for its less desirable mining operations, fifty-two went out of business.[73] This left approximately $170 million in unpaid unemployment and retirement funds.[74] Even though the workers were formerly unionized Island Creek employees, working in Island Creek owned or affiliated mines, Island Creek Coal was fully insulated from any liability to pay out the $170 million in missing funds.[75]

While leading firms may benefit immensely from shedding employment liability onto smaller contractor middlemen, the consequences for workers—and society—can be devastating. The very nature of fissuring schemes encourages employment law violations.[76] Returning to the janitorial franchising example, franchisee owners are typically led to believe that they can earn up to twenty-five dollars per hour from their clients.[77] But, as earlier discussed, the franchisee does not set its own terms with clients. Like a sweatshop jobber, the franchisor sets the prices to clients based on a service package rather than by the hour.[78] Additionally, like sweatshop jobbers, the fractious nature of franchisees leads to intense price-based competition.[79] This piecemeal pricing system ultimately leads to actual rates between

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[70] ENERGY INFO. ADMIN., PERFORMANCE PROFILES OF MAJOR ENERGY PRODUCERS 1992, 55 (1994), available at https://www.eia.gov/finance/archive/020692.pdf> (last visited Oct. 03, 2020).

[71] In 2020 dollars, Island Creek Coal would save between approximately $5,544,238 and $9,176,670. U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com/ (last visited Nov. 22, 2020).

[72] *See* WEIL, *supra* note 5, at 103.

[73] WEIL, *supra* note 5, at 104.

[74] *See* WEIL, *supra* note 5, at 104.

[75] WEIL, *supra* note 5, at 104-05.

[76] WEIL, *supra* note 5, at 131.

[77] WEIL, *supra* note 5, at 137.

[78] WEIL, *supra* note 5, at 137. ("For a small client who requires very basic janitorial services, contracts are often bid on the basis of a price per service visit.").

[79] WEIL, *supra* note 5, at 136.

approximately thirteen and seventeen dollars per hour in revenue.[80] At these rates, it becomes structurally impossible for a franchisee to comply with minimum wage laws and simultaneously turn a profit.[81] As workplace fissuring pushes the question of employment into the low end of the labor market, it creates fertile ground for employment violations. Besides the usual problems of employment law enforcement due to the vulnerability of low-wage workers,[82] enforcement at the low end of the labor market comes down to a game of Whac-a-Mole.[83] In the janitorial services market, the price of entry is low while the labor pool is high, resulting in the *growth* of franchisees despite its inherent unprofitability.[84] The small size and quick turnover of these types of firms allow them to fly under the radar.[85] These smaller, fractured, and likely undercapitalized contractors are also likely judgment proof.[86] Like the Island Creek example, bankruptcy may prevent workers from receiving any meaningful redress for employment violations. Thus, enforcement should not focus on the level of the third-party violators but on the fissured leading firms that drive the employment violations themselves. One available tool for both workers and employment law enforcement is the doctrine of joint-employment, in which multiple firms can be held jointly liable for employment law compliance.[87] The *Access Bio* court's limitation of the ABC test in the joint-employment context, however, severely hampers the ability to adequately address the wage violations under the NJWPL that are systematically driven by leading firms. Overruling *Access Bio* and expanding the ABC test to joint-employment cases would place a powerful tool into the hands of workers themselves to materially protect their rights.[88]

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80 WEIL, *supra* note 5, at 138, tbl. 6.2 (comparing the average per service piecemeal price of franchised janitorial services versus the estimated actual price per hour).

81 *See* WEIL, *supra* note 5, at 142.

82 *See* Glynn, *supra* note 66, at 110 (" . . . the social and economic vulnerability of low-wage workers, their lack of awareness of workplace rights, limited resources for public enforcement, limited remedies and other incentives for private enforcement, procedural hurdles, and the limited effect of unions and advocacy organizations.").

83 WEIL, *supra* note 5, at 226. (focusing on contractor/subcontractor level of the garment industry led to a "seemingly endless cat-and-mouse game between the WHD and small-scale contractors").

84 WEIL, *supra* note 5, at 140-41.

85 Glynn, *supra* note 66, at 110.

86 Glynn, *supra* note 66, at 110.

87 *See, e.g.,* 29 C.F.R. § 791.2(a) (2020).

88 Massachusetts shows signs of success for this method of holding at least franchisors accountable for franchisee wage violations using the ABC test. *See*, *e.g.*, Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80, 82-84 (D. Mass. 2010).

III. TO SUFFER OR PERMIT TO WORK

A. *The Touchstone of Control: The Tort Origins of Employment*

The common law concept of "employment" has agency law roots. Under agency principles, employment is just one form of a principal-agent relationship.[89] A principal is one who *controls* an agent that acts on the principal's behalf.[90] Although this sounds simple, not all principals are employers.[91] Conversely, not all agents are employees.[92] An employer is specifically a principal of an employee.[93] In general, agency law concerns itself with the principal's liability for an agent's conduct, such as entering into contracts with third parties.[94] The legal distinction of employment, as opposed to other agency relationships, pertains to determining an employer's vicarious tort liability for employees acting within the scope of employment, in other words, determining when an employer can be held liable for the actions of an employee.[95] Since chains of vicarious liability are severed by independent action, the question of employment under agency law must be resolved using the right-to-control test.[96]

The right-to-control test focuses on whether an employer has the right to control the "manner and means" of an employee[97], i.e., the physical conduct of an employee's performance.[98] The test as applied must consider the totality-of-the-circumstances with a non-exhaustive list of important, but not necessarily dispositive, factors.[99] These factors *may* include the physical control that can be exercised by the putative employer; the nature of the service performed; the skill required for the work; the length of service; and the terms of compensation.[100] It is important to reiterate, however, that agency law specifically deals with the extension of tort liability and the power of an agent to bind a

89 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. L. INST. 2006).

90 *Id.*

91 *See, e.g.,* RESTATEMENT (SECOND) OF AGENCY, § 14N cmt. a (AM. L. INST. 2006).

92 RESTATEMENT (THIRD) OF AGENCY, § 1.01 cmt. c.

93 *Id.* § 7.03(2).

94 RESTATEMENT (SECOND) OF AGENCY, §§ 7.03-7.08.

95 Also referred to as the doctrine of *respondeat superior*. RESTATEMENT (THIRD) OF AGENCY, § 7.03 *et seq.*

96 *Id.* § 1.01 cmt. f(1). *See also* Hargrove v. Sleepy's, LLC, 220 N.J. 289, 307-08 (2015) (referring to the common law agency approach as the "right to control" test).

97 *Hargrove*, 220 N.J. at 307.

98 *See* RESTATEMENT (SECOND) OF AGENCY, § 14N (Independent contractors are *not* employees.).

99 *Id.* § 220(2).

100 *Id.; see also* RESTATEMENT (THIRD) OF AGENCY, § 1.02.

principal.[101] Agency law does *not* deal with the conditions of employment.[102]

B. *Beyond Control: A Short History of Suffer-or-Permit-to-Work Employment*

What does it mean to "employ" under employment laws? Most employment statutes do not provide an express definition of "employment" or "employee."[103] Moreover, even where such definitions are provided they are often circular.[104] In light of this, the Supreme Court has provided that the common law right-to-control test presumptively applies unless otherwise defined in a relevant statute.[105] Although the FLSA has a circular definition of "employer" and "employee," it stands unique among federal employment statutes.[106] The FLSA bridges the gap between employer and employee with its definition of "employ," which "includes to suffer or permit to work."[107] State wage protection laws, like the NJWPL, emulate the FLSA's suffer-or-permit-to-work language in its definition of "employee."[108] In terms

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101 RESTATEMENT (THIRD) OF AGENCY, §§ 7.03-7.08; *see also*, Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (Easterbrook, J. concurring) (discussing the origins of "employment" in the context of agency law as simply a means to determine where a chain of vicarious tort liability ends).

102 *Lauritzen*, 835 F.2d at 1544 (Easterbrook, J. concurring) ("The reasons for blocking vicarious liability at a particular point have *nothing to do* with the functions of the FLSA.") (emphasis added).

103 James Reif, *'To Suffer or Permit to Work': Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 NE. UNIV. L. J. 347, 350 (2014).

104 *Id.* at 350 n.1 ("The following are examples of federal laws that do not include a definition of 'employ' but do contain a circular or otherwise unhelpful definition of 'employee'")' National Labor Relations Act of 1935, 29 U.S.C.S. 152(3) (2011) (providing that '[t]he term 'employee' shall include any employee . . .'); Employee Retirement Income Security Act of 1972, 29 U.S.C.S. 1002(6) (2011) ('employee' defined as 'any individual employed by an employer'); Occupational Safety & Health Act of 1970, 29 U.S.C.S. 652(6) (2010) ('employee' defined as 'an employee of an employer who is employed in a business of his employer which affects commerce,' even while 'employ' is not defined).").

105 TIMOTHY P. GLYNN, CHARLES A. SULLIVAN & RACHEL ARNOW-RICHMAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATION 6 (4th ed. 2019).

106 *Compare* 29 U.S.C.S. § 203(d) (2020) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."), *with* 29 U.S.C.S. § 203(e)(1) ("[T]he term 'employee' means any individual employed by an employer.").

107 *Compare* 29 U.S.C.S. § 203(g), *with* 29 U.S.C.S. § 152(3) (2011), *and* 29 U.S.C.S. § 1002(6) (2011), *and* 29 U.S.C.S § 652(6) (2010).

108 N.J. STAT. ANN. § 34:11-4.1(b) (2020) ("'Employee' means any person *suffered or permitted to work* by an employer, except that independent contractors and subcontractors shall not be considered employees.") (emphasis added).

of plain language, suffer-or-permit-to-work provides the broadest definition of employment, and therefore requires something other than the right-to-control test.[109] The Supreme Court has acknowledged that "a broader or more comprehensive coverage of employees . . . would be difficult to frame."[110] The formulation of the language has a long history in contemplating relationships outside the right-to-control test for employment.[111] As will be discussed below, over the past one hundred years of interpreting suffer-or-permit-to-work employment, different tests have been applied to determine the definition's outer limit.

Suffer-or-permit-to-work was originally formulated to eradicate the evils of child labor.[112] In the seminal case *People ex rel. v. Sheffield Farms-Slawson-Decker Co.*, the New York Court of Appeals interpreted New York's child labor law that used "suffer or permit to work" to define employment.[113] The alleged employer-defendant was a milk delivery business.[114] One of the defendant's delivery drivers paid a thirteen-year-old boy to prevent theft of the driver's bottles in violation of New York's child labor law.[115] The court held that the defendant milk delivery business was equally liable for the child labor violation as the employee delivery driver who hired the boy.[116] The court held that the defendant employer had a duty to reasonably inquire into the conditions of its business and failed to prevent the illegal child labor.[117]

The *Sheffield Farms* court articulated several fundamental principles in interpreting New York's child labor law that are still applied in the child labor context today.[118] First, and most importantly, Judge Cardozo interpreted the words of the statute in their common meaning: "Permission, like sufferance, connotes something *less than consent*. Sufferance, like permission, connotes some *opportunity for*

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109 *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947); *see also*, Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J. concurring) ("The definition, written in the passive, sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence.").

110 United States v. Rosenwasser, 323 U.S. 360, 362 (1945).

111 Norton, *supra* note 13, at 12-13.

112 *See id.*

113 People ex rel. v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30-31 (1918).

114 *Id.* at 27-28.

115 *Id.*

116 *Id.* at 29-33.

117 *Id.*

118 *See, e.g.*, 29 C.F.R. § 570.113(a) (2020) (articulating the same principles as *Sheffield Farms* in interpreting the FLSA's own child labor provision).

knowledge."[119] This interpretation is the foundation for the two-factor test that has become the basis for the FLSA's own interpretation of suffer-or-permit-to-work under its child labor provisions: (1) whether an employer knows or should have known that a child is performing work for the employer, and (2) whether an employer acquiesced or failed to prevent the child from performing work.[120] Moreover, this construction of "suffer or permit to work" inherently implicates liability for multiple employers:

> [The law] is directed primarily against the employer, and only secondarily against others as they may *aid and abet him*. He must neither create nor suffer in his business the prohibited conditions. *The command is addressed to him*. Since the duty is his, *he may not escape it by delegating it to others*. He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated "*his own power to prevent*."[121]

The *Sheffield Farms* test went all the way to the top, considering the employee who hired the boy as someone that "aided or abetted" the leading milk delivery business in utilizing child labor.[122] Although *Sheffield Farms* does not expressly reject the right-to-control test in this context, it does expressly reject the tort conception of employment under the suffer-or-permit-to-work paradigm: "[This case] is *not* an instance of *respondeat superior*. It is the case of the non-performance of a *non-delegable duty*."[123]

Other courts applied the principles laid out in *Sheffield Farms* to employment fissuring schemes utilizing independent contractors as third-party labor middlemen.[124] In *Commonwealth v. Hong*, the Supreme Court of Massachusetts found that the use of an independent contractor as a middleman to hire an underage performer did *not* relieve the business of employment liability under suffer-or-permit-to-work employment.[125] In virtually every case involving a child labor violation by an independent contractor, courts have held leading firms liable where the leading firm had an opportunity for knowledge of, and failed

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119 People ex rel. v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 31 (1918) (emphasis added).

120 *See* 29 C.F.R. § 570.113(a) (2020).

121 *Sheffield Farms*, 225 N.Y. at 29 (emphasis added) (citations omitted).

122 *See id*.

123 *Id.* at 30 (emphasis added).

124 *See* Goldstein, et al., *supra* note 28, at 1043 (discussing Commonwealth v. Hong, 158 N.E. 759 (Mass. 1927)).

125 Commonwealth v. Hong, 158 N.E. 759 (Mass. 1927).

to prevent, the independent contractor from using child labor on the leading firm's behalf.[126] Therefore, it becomes clear from *Sheffield Farms* and its progeny that suffer-or-permit-to-work necessarily implicates joint-employment. As Judge Cardozo held: "[An employer] must . . . stand or fall with those whom he selects to act for him."[127]

IV. A SQUARED CIRCLE: THE DILEMMA OF TWO TESTS FOR EMPLOYMENT

Under the NJWPL an "employee" is "any person suffered or permitted to work *. . .* except that independent contractors and subcontractors shall not be considered employees."[128] The NJWHL not only defines "employer" and "employee," but also defines "to employ," which includes "to suffer or permit to work."[129] Likewise, the FLSA's definition of employment "includes to suffer or permit to work."[130] Yet the state and federal versions, despite their similar statutory language, employ two different tests.[131] The FLSA applies the so-called "economic realities" test, which was handed down by the Supreme Court in the seminal case *Rutherford Food Corp. v. McComb*, which the circuit courts have further developed.[132] On the state level, New Jersey applies the ABC test for interpreting the NJWPL's suffer-or-permit-to-work language, at least for cases involving a single putative employer.[133] But

126 Goldstein, et al., *supra* note 28, at 1043-44.

127 People ex rel. v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30 (1918) The Department of Labor still uses this construction in its interpretation of 29 U.S.C.S. § 212(c) (2020). *See* 29 C.F.R. § 570.113(a) (2020).

128 N.J. STAT. ANN. § 34:11-4.1(b) (West 2020).

129 N.J. STAT. ANN. § 34:11-56a1(f) (West 2020). The Supreme Court of New Jersey held that because of the similar statutory language of the NJWPL and NJWHL, the ABC test was equally appropriate for determining "employee" status under either. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 312 (2015).

130 29 U.S.C.S § 203(g) (2020).

131 *Compare Hargrove*, 220 N.J. at 316 (applying the ABC test), *with* Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985) (applying a version of the economic-realities test, dubbed the "*Sureway Cleaners* test," developed by the Ninth Circuit in Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981)).

132 Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-27 (1947) (this case is also the first, and only, Supreme Court decision dealing with the doctrine of joint-employment under the FLSA); *See also Hargrove*, 220 N.J. at 310-11 (referring to the "economic realities" test developed for interpreting the FLSA); Reif, *supra* note 103, at 353 (Circuit Courts have primarily developed the economic-realities test based on the *Rutherford* factors.).

133 *See generally Hargrove*, 220 N.J. at 289; N.J. ADMIN. CODE § 12:56-16.1 (2020) (regulation providing that the ABC test as found in New Jersey's Unemployment Compensation Law be used to interpret the NJWPL.). *See also* discussion *infra* Section V (arguing that the New Jersey Appellate Division's holding in *Perez v. Access Bio, Inc.* changes the analysis when dealing with multiple putative employers).

in the recent case *Perez v. Access Bio, Inc.*, the New Jersey Appellate Division held that the NJWPL actually applies *each* test, depending on the number of putative employers.[134]

The definitions of both employer and employee under the NJWPL implicate the other.[135] Despite their intertwined nature, the two definitions of "what is an employee" and "what is an employer" creates a bifurcated analysis of employment law liability. Therefore, the first inquiry is concerned with the nature of the employment relationship and whether a given worker is an employee or independent contractor.[136] Only employees are entitled to protections provided by employment statutes.[137] If the worker is an employee of someone, the next inquiry must identify *who* are the liable employers.[138] Under the doctrine of joint-employment, an employee may have multiple employers who are liable for employment law compliance.[139]

The New Jersey Appellate Division in *Access Bio* held, "the [*Hargrove*] Court did not make its holding . . . applicable to *all* employment status disputes under the WHL . . . , but rather focused on the *distinction* between an employee and an independent contractor."[140] Therefore, *Access Bio* has bounded the ABC test within that first inquiry of employment liability.[141] When determining joint-employment under the NJWPL, the second inquiry, *who* are the employers, may apply the economic-realities test *or* the ABC test, depending on where the putative employers stand in relation to each other and the putative employee.[142] Upon careful examination, however, such a standard proves

134 *See* Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *16-17 (Super. Ct. App. Div. July 23, 2019). *See also* discussion *infra* Section V (interpreting the *Access Bio* court's holding).

135 An "employer" is "any [person] *employing* any person . . . ." An "employee" is "any person suffered or permitted to work *by an employer*, except that independent contractors and subcontractors shall not be considered employees." N.J. STAT. ANN. § 34:11-4.1(a)-(b) (West 2020) (emphasis added).

136 Glynn, *supra* note 66, at 109.

137 GLYNN, *supra* note 105, at 3-6; *see also* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 5 (2018) (discussing the stakes of improper employment classification).

138 Glynn, *supra* note 66, at 109.

139 RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.04 (2015); 29 C.F.R. § 791.2(a) (2020).

140 Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *16 (Super. Ct. App. Div. July 23, 2019) (emphasis added).

141 The court in *Curry v. Equilon Enterprises, LLC*, reasoned similarly, limiting the application of the ABC test to cases determining if a worker is an employee or independent contractor to a single putative employer. 23 Cal. App. 5th 289, 314 (2018).

142 *See Access Bio*, 2019 LEXIS 1673, at *16-17. Both the *Curry* and *Access Bio* courts did not address how the ABC test would apply in a case contemplating multiple employers where one party did not stipulate its employer status.

unworkable outside the specific facts of *Access Bio*. In order to understand why, the two tests must be compared in greater detail.

A. *The Economic Realities Test*

In the landmark case, *Rutherford Food Corp. v. McComb*, the Supreme Court first decided what constitutes employment under the FLSA's suffer-or-permit-to-work definition for claims of wage and hour violations.[143] The Court acknowledged that the FLSA's broad employment definition captures more relationships than the common law right-to-control test.[144] The Court also recognized the unity of the suffer-or-permit-to-work definition between the wage, hour, and child labor provisions, as well as the language's child labor prohibition antecedent.[145] Despite this recognition, the Court found that suffer-or-permit-to-work did not provide a limit to the employer-employee relationship, and did not engage at all with either an "opportunity for knowledge" or "the power to prevent" that was articulated in *Sheffield Farms*.[146] Instead, the court adopted the Tenth Circuit's approach in determining whether sub-contractor meat boners under a supervisor meat boner were actually the employees of the slaughterhouse itself.[147]

The Tenth Circuit found that the sub-contractor meat boners were indeed employees despite only being contractually employed by their meat boner supervisor—a classic joint-employment case.[148] The Tenth Circuit held that the "underlying economic realities" showed that the meat boners were an "integrated economic unit" of the slaughterhouse.[149] The Supreme Court affirmed, stating that workers who follow the "usual path of an employee" are covered by the FLSA.[150] The Court provided the maxim: "the determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the *whole activity*."[151] The Court listed factors that it found persuasive in upholding the Tenth Circuit's ruling:

> [T]he workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had

143 Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947).
144 *Id.* at 728-29.
145 *Id*.
146 *See id.* at 728.
147 *Id.* at 726, 27, 31.
148 *Id*. at 727.
149 Rutherford Food Corp., 331 U.S. at 726-27.
150 *Id.* at 729.
151 *Id.* at 730 (emphasis added).

> no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.[152]

Since ruling on *Rutherford* in 1947, the Supreme Court has not provided additional substantive guidance on the FLSA's employment definition or on any other suffer-or-permit-to-work employment statutes.[153] Accordingly, the circuit courts have primarily developed the economic-realities test.[154] Due to the totality-of-the-circumstances nature of the economic-realities test and the lack of legal principle for determining the "usual path of an employee," any given FLSA case can apply different weight to each factor.[155] The circuit courts have generally agreed, however, that the factors considered are neither dispositive nor exhaustive.[156] In developing the economic-realities test through the prism of *Rutherford*, two common principles emerged to determine whether an employment relationship exists: functional control and dependence.

1. Functional Control

Circuit courts frequently cite to *Rutherford* as the basis for the factors the court will consider.[157] In particular, circuit courts have focused on the fact that the slaughterhouse manager in *Rutherford* frequently kept in close contact with the meat boners.[158] Because the economic-realities test as formulated supposedly goes *beyond* the right-

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152 *Id.*

153 Reif, *supra* note 103, at 352-53; *but see* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32-33 (1961) (In a brief opinion, the Supreme Court applied "suffer or permit to work" in a single-employer context and found that cooperative stakeholders were also employees of the cooperative under FLSA because the cooperative as an entity provided the stakeholders "an opportunity to work, and [paid] them for it." The Court makes absolutely *no mention* of the right-to-control.).

154 Reif, *supra* note 103, at 353.

155 *See* Reif, *supra* note 103, at 354.

156 Reif, *supra* note 103, at 370-71; *see also* Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987) (Easterbrook, J. concurring) ("Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.").

157 *See, e.g.*, Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61, 70 (2d Cir. 2003); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985).

158 *See, e.g.*, *Zheng*, 355 F.3d at 70.

to-control, circuit courts that apply factors related to control distinguish between formal control and something akin to "functional control."[159]

For example, in *Ling Nan Zheng v. Liberty Apparel Co.*, the Second Circuit rebuked the trial court for adopting a test that focused too narrowly on formal control in determining whether the defendant-garment manufacturer was the joint-employer of garment workers who were unquestionably employed by a contractor-middleman.[160] Instead, the Second Circuit identified six factors for the trial court to apply on remand: (1) whether the premises were owned by the putative employer, (2) whether the contractor-middleman could move from one leading firm to another, (3) the extent to which the workers' labor was integral to the putative employer's production line, (4) whether the workers' contracts could pass to new workers without material changes, (5) the degree of supervision by the putative employer's agents, and (6) whether the workers predominantly labored on behalf of the putative employer.[161] The Second Circuit stated that the six articulated factors would reveal a level of "functional control" that would justify finding joint-employment despite not falling within the common law conception of control.[162]

Similar to the *Zheng* court, the Third Circuit in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation* adopted a posture that predominantly focused on control.[163] Instead of "functional control," the Third Circuit stated that joint-employment exists where additional employers exert "significant control."[164] The court took the position that joint-employment only exists where other putative employers share governance over the "essential terms and conditions of employment."[165] From a plain language perspective, "significant control" seems to be an even narrower standard than "functional control," but the court then qualified that "[u]ltimate control is not necessarily required[,] . . . even 'indirect' control may be sufficient."[166] With these principles in mind, the Third Circuit provided four factors that consider whether the putative joint-employer can: (1) hire and fire workers, (2) control the conditions of employment, (3) supervise the worker's day-to-day labor, and (4) control the worker's records (such

159 *See generally*, *e.g.*, *Zheng*, 355 F.3d at 69; In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 468 (3d Cir. 2012).

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

161 *Id.* at 72.

162 *Id.*

163 *Enterprise*, 683 F.3d at 468.

164 *Id.*

165 *Id.*

166 *Id.*

as payroll, insurance, and taxes).[167] Although the Second Circuit and Third Circuit provided different factors, both courts acknowledged that neither list is dispositive or exhaustive.[168]

2. Dependence

Another common principle articulated by the circuit courts is "dependence." In *Donovan v. DialAmerica Marketing, Inc.*,[169] the Third Circuit, in a single-employment context, listed six factors to determine whether a worker is "dependent upon the business to which they render service," such that it would justify a finding of employment.[170] The Third Circuit analyzed the following six factors: (1) the degree of control by the business over the manner and means of the worker's service, (2) the worker's opportunity for profit and loss, (3) the worker's investment in equipment or material required for the services provided (including hiring helpers), (4) any special skills required for the service, (5) the permanence of the relationship, and (6) whether the service was an integral part of the putative employer's business.[171] The principle of "dependence" in *DialAmerica* primarily relied on the last two factors.[172] The court contemplated that a worker who is "economically dependent" upon a putative employer cuts toward an employment relationship.[173] But this principle is not based upon a worker's dependence on employment as a primary source of income.[174] The court reasoned that such a construction would be both over and under-inclusive.[175] Therefore, the court focused on the permanence of the service provided rather than the monetary compensation received.[176]

The Third Circuit also limited the dependence factor by determining whether the worker's services are economically integrated into the putative employer's business.[177] Whether the work was "economically integrated" into the putative employer's business would supposedly reveal whether a worker was capable of "transfer[ring]

167 *Id.* at 469.

168 *Id.* at 469; Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61, 71 (2d Cir. 2003).

169 Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985).

170 *Id.* at 1382-83.

171 *Id.* at 1382 (citing Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981)).

172 *See id.* at 1385.

173 *Id.*

174 *Id.*

175 *See DialAmerica*, 757 F.2d at 1385 n.11 (providing a hypothetical to illustrate that such an interpretation of dependence, "would lead to senseless results if carried to its logical conclusion").

176 *Id.* at 1385-86.

177 *See id.* at 1385.

their services from place to place, as do independent contractors."[178] It is important to note, however, that even though this particular case focused on the worker's dependence on the putative employer for continued employment, the other factors the court considered material to the analysis included aspects of control.[179]

B. *The ABC Test*

Despite the similarity of many states' suffer-or-permit-to-work wage protection statutes to the FLSA, a different employment test has been developed at the state level.[180] In *Hargrove v. Sleepy's, Inc.*, the Supreme Court of New Jersey held that the ABC test should be used to determine employment under the NJWPL's suffer-or-permit-to-work framework.[181] Under the NJWPL, an employee is defined as "any person suffered or permitted to work by an employer . . . ."[182] The *Hargrove* court expressly rejected the right-to-control or economic-realities test as the proper analysis for employment liability under the act.[183]

The ABC test stands in stark contrast to both the right-to-control test and the economic-realities test. The ABC test requires a showing that employment characteristics are not present.[184] Unlike the right-to-control and economic-realities test, employment is *presumed*, with the burden of rebuttal falling to the putative employer to prove each factor.[185] The New Jersey ABC Test provides: "[s]ervices performed by an individual for remuneration shall be deemed to be employment

178 *Id.*

179 *See id.* at 1386.

180 *Employee or Contractor? The Complete List of Worker Classification Tests by State*, WRAPBOOK (Oct. 25, 2019), https://www.wrapbook.com/worker-classification-tests-by-state/.

181 Hargrove v. Sleepy's, LLC, 220 N.J. 289, 295 (2015); *see also* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 7 (2018) (adopting the ABC test to interpret suffer-or-permit-to-work in California's wage orders which regulate wage and hour violations similar to the NJWPL).

182 But such definition expressly excludes "independent contractors and subcontractors." N.J. STAT. ANN § 34:11-4.1(b). Although the concept of "independent contractor" is rooted in the common law and would suggest a common law right-to-control test, this language merely functions as an express exception to the broad coverage of the statutory language. In fact, the *Dynamex* court saw no conflict between the independent contractor distinction and "suffer or permit to work." *Dynamex*, 416 P.3d at 30.

183 *Hargrove*, 220 N.J. at 314-15. *But see* Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *16-17 (Super. Ct. App. Div. July 23, 2019) (limiting the ABC test to single-employment cases).

184 *See* N.J. STAT. ANN. § 43:21-19(i)(6)(A)-(C) (based in New Jersey's Unemployment Compensation Law, which the *Hargrove* court formally adopted to interpret both the NJWPL and NJWHL pursuant to N.J. ADMIN. CODE § 12:56-16.1).

185 *Hargrove*, 220 N.J. at 314.

. . . ."[186] Essentially, the employment presumption arises where a worker receives consideration for her labor.[187] In order to overcome the presumption of employment, the putative employer must show:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.[188]

If the employer fails to satisfy *any* of these factors, the individual performing services for remuneration qualifies as an employee of the putative employer.[189] The ABC test represents a fundamental paradigm shift in determining employment status.[190]

1. Freedom from Control

By its plain language, the first factor, "A," sweeps broadly; the putative "employer must show that it neither exercised control over the worker, *nor had the ability* to exercise control in terms of the completion of the work."[191] The level of control necessary to establish employment does not have to be pervasive, "some level of control may be sufficient."[192] Control can be established by facts, such as: setting hours

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186 N.J. STAT. ANN. 43:21-19(i)(6); *see also* N.J. STAT. ANN. 43:21-19(p) ("'Remuneration' means all compensation for personal services, including commission and bonuses and the cash value of all compensation in any medium other than cash.").

187 *See Hargrove*, 220 N.J. at 314; *see also* N.J. STAT. ANN. 43:21-19(i)(6) ("Services performed by an individual for remuneration *shall* be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) *unless* . . . .").

188 N.J. STAT. ANN. 43:21-19(i)(6)(A)-(C).

189 *Hargrove*, 220 N.J. at 314.

190 *See, e.g.*, John Skousen, *New ABC Test for Independent Contractors Sends California Employers Reeling*, Resources, FISHER PHILLIPS (July 2, 2018), https://www.fisherphillips.com/resources-newsletters-article-new-abc-test-for-independent-contractors-sends; Mike Kappel, *The End of an Era? How the ABC Test Could Affect Your Use of Independent Contractors*, FORBES (Aug. 8, 2018, 9:10 AM), https://www.forbes.com/sites/mikekappel/2018/08/08/the-end-of-an-era-how-the-abc-test-could-affect-your-use-of-independent-contractors/#719da0351f66.

191 *Hargrove*, 220 N.J. at 305 (emphasis added).

192 *Id.; but see* Law Office of Gerard C. Vince, LLC v. Bd. of Review, No. A-5441-17T2, 2019 N.J. Super. LEXIS 1846, at *8-9 (N.J. Super. Ct. App. Div. Sep. 3, 2019) (The court narrowed the A-prong control analysis, concluding that the basic supervision required of lawyers over paralegals to comply with the Rules of Professional Conduct is not enough control to establish the A-prong. The court disapproved of and rejected the

or jobs; the reservation of a right—even absent exercising that right—to control the manners and means of services performed; and requiring services to be rendered by the worker and not an agent of the worker.[193] Similarly to the economic realities test, the court must examine "all the circumstances attendant to the actual performance of the work."[194]

2. Outside the Usual Course of Business or Business Premises

The second factor, "B," under New Jersey law, contains two disjunctive sub-factors.[195] Proof of *either* sub-factor satisfies the entire B-prong.[196] B's first sub-factor requires the putative employer to show that the worker is performing services outside of her "usual course of business."[197] For example, if a bakery that sells custom cakes hired a plumber to fix a leaking pipe, it is fair to say that the plumber is acting "outside" the bakery's usual course of business.[198] For a bakery which sells custom cakes, the usual course of business relates to the labor in making cakes.[199] So, if a bakery were to hire a cake-decorator to work on the bakery's custom cakes, the cake-decorator would be working within the bakery's usual course of business.[200]

B's second sub-factor requires the employer to prove that the services performed occurred outside of *all* business premises.[201] The New Jersey Supreme Court has found, in the unemployment compensation context, that "business premises" encompasses either locations in which a putative employer has a "physical plant" or

Board's reasoning, stating that "[u]nder the Board's analysis, a paralegal could never be an independent contractor.").

193 MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., No. A-4508-17T3, 2019 N.J. Super. LEXIS 2088, at *13 (N.J. Super. Ct. App. Div. Oct. 10, 2019).

194 *Hargrove*, 220 N.J. at 314.

195 Unlike California's version of the ABC test, New Jersey's "B" factor is narrower by also allowing the prong to be satisfied if all work is done outside the putative employer's business premises. *Compare* N.J. STAT. ANN. 43:21-19(i)(6)(B), *with* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 40 (2018) (California does not include "outside all business premises" as a disjunctive sub-factor within the B-prong.).

196 Morales v. V.M. Trucking, LLC, No. A-2898-16T4, 2019 N.J. Super. LEXIS 1567, at *16 (N.J. Super. Ct. App. Div. July 9, 2019) (modeling application on unemployment compensation jurisprudence).

197 N.J. STAT. ANN. 43:21-19(i)(6)(B).

198 *Dynamex*, 416 P.3d at 37.

199 *Id.*

200 *Id.*

201 Hargrove v. Sleepy's, LLC, 220 N.J. 289, 305 (2015) (the Court did not expand on this requirement substantively; the Appellate Division provides more guidance applying the ABC test after *Hargrove*.); *see also* S. 4204, 218th Leg. § 2.4.b (N.J. 2019), https://www.njleg.state.nj.us/2018/Bills/S4500/4204_I1.HTM (proposing to remove the second sub-factor of the B-prong entirely).

"conducts an integral part of its business."[202] A business premise where a putative employer "conducts an integral part of its business" does not necessarily have to be owned by the putative employer or put out to the world as its place of business.[203] For example, in *MKI Associates., LLC v. N.J. Dep't of Labor & Workforce Dev.*, the Appellate Division found that separate and unrelated healthcare facilities were premises that the putative employer "conduct[ed] an integral part of its business."[204] The court considered "providing therapy services" to be the "principal part" of MKI's business.[205] Therefore, the healthcare facilities became business premises because supplying therapists to work there was "providing therapy services," which was an integral part of MKI's business.[206]

3. Customarily Independent Trades or Businesses

The final factor, "C," is concerned with whether the work itself is "customarily" considered an "independently established trade, occupation, profession or business."[207] This factor does not identify classes of professions that one might colloquially imagine as independent contractors and then compiling a list of those exempted.[208] Instead, the employer must prove that a worker-in-question has a "profession that will plainly persist despite the termination of the challenged relationship."[209] Similar to the economic-realities test, the simple label of "independent contractor" is not enough to satisfy this

202 MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., No. A-4508-17T3, 2019 N.J. Super. LEXIS 2088, at *14 (N.J. Super. Ct. App. Div. Oct. 10, 2019) (*quoting* Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 592 (1991)).

203 *Id.* at *15.

204 *Id.*

205 *Id.*

206 *Id.*

207 N.J. STAT. ANN. 43:21-19(i)(6)(C); *see also* S. 4204, 218th Leg. § 2.4.c (N.J. 2019) (proposing to broaden the C-prong by requiring the employer to prove that the customarily independent established trade must be "*of the same nature as that involved in the work performed"* (emphasis added)).

208 Hargrove v. Sleepy's, LLC, 220 N.J. 289, 306 (2015). *But see* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 37 (2018) (citing plumbers and electricians as "traditional" independent contractors); Law Office of Gerard C. Vince, LLC v. Bd. of Review, No. A-5441-17T2, 2019 N.J. Super. LEXIS 1846, at *9 (N.J. Super. Ct. App. Div. Sep. 3, 2019) (contemplating that paralegals can be either employees or independent contractors).

209 *Compare Hargrove*, 220 N.J. at 306 (determining whether an enterprise exists or will exist independent of the service relationship), *with Dynamex*, 416 P.3d at 39 (determining whether a worker has "independently chosen the burdens of self-employment").

prong.[210] The actual circumstances of the work must be considered.[211] Put differently, courts will not find this prong to be satisfied if termination of the relationship will leave the worker in the "ranks of the unemployed."[212] Factors for determining whether a profession will survive termination of the challenged relationship include: the number of customers besides the putative employer the worker has in the same line of business, whether the worker has any employees, and the extent that the worker owns equipment or capital resources.[213] These factors speak to the "strength" of the worker's trade.[214] Where the employer makes up a small portion of the worker's compensation, it cuts toward an independent trade or business.[215]

V. EASY AS 1, 2, 3: EXPANDING THE ABC TEST TO JOINT-EMPLOYMENT

The *Access Bio* court's holding that "the [*Hargrove*] Court did not make [the adoption of the ABC test] . . . applicable to *all* employment status disputes under the WHL . . . , but rather focused on the *distinction* between an employee and an independent contractor[,]" draws a line between single employment cases and joint-employment cases for the application of the ABC test.[216] But this line drawing raises the obvious question: *how* does one draw such a line in practice?[217] The first part of the employment inquiry determines whether a worker is an employee or independent contractor.[218] But to determine whether a worker is an employee under any test—ABC, economic-realities, or even the right-to-control—there must be at least *one* identifiable putative employer.

For example, the control principle articulated in any of the tests asks whether there was a degree of control over the worker.[219] But *who* is the one exercising the control? It is impossible to answer the first

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210 *Law Office of Gerard C. Vince*, 2019 LEXIS 1846, at *8 .

211 *Hargrove*, 220 N.J. at 314.

212 *Id.* at 306.

213 MKI Assocs., LLC v. N.J. Dep't of Labor & Workforce Dev., No. A-4508-17T3, 2019 N.J. Super. LEXIS 2088, at *15-17 (N.J. Super. Ct. App. Div. Oct. 10, 2019).

214 *Id.*

215 *Id.*

216 Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 LEXIS 1673, at *16-17 (Super. Ct. App. Div. July 23, 2019) (emphasis added).

217 For example, under the FLSA, only the economic-realities test applies regardless of single or joint-employment allegations. *Compare* Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985), *with* In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462 (3d Cir. 2012) (both applying the economic-realities test, in single and joint-employment contexts respectively, although each court focuses on different factors in application).

218 Glynn, *supra* note 66, at 109.

219 *See* discussion *supra* Section III.A & IV.

inquiry of employment without necessarily implicating the second. The two inquiries are two sides of the same coin. Therefore, in the actual application of a joint-employment case under *Access Bio*, at least one putative employer must be subjected to the ABC test, while additional putative joint-employers are subjected to the economic-realities test. This employment liability regime has numerous flaws that lend itself to overruling *Access Bio* and expanding the ABC test from simply determining whether a worker is an employee or independent contractor to identifying which parties are liable as joint-employers.

A. *The Hierarchical Problem of Two Tests for Employment*

By applying either the ABC test or the economic-realities test to different putative employers depending on where they stand to a putative employee, the *Access Bio* court creates a distinction between "primary" and "secondary" employers.[220] But how does one determine *which* entity is the "primary" employer in this scenario, to be subjected to the ABC test, and which are the "secondary" employers, to be subjected to the economic-realities test?[221] Should this determination be made by contractual relationship, or which putative employer pays employment taxes?[222] Such a threshold analysis of determining which entity will be subject to the ABC test and which entities will be subject to the economic-realities test is inconsistent with the statutory language of the NJWPL.

The NJWPL provides that employer liability is attached to any entity "*employing* any person."[223] Accordingly, a person who *is employed* is anyone "suffered or permitted to work by an employer," excluding independent contractors.[224] Under *Access Bio*, the phrase "employing" must inescapably have *two* meanings, one for the employer and one for

[220] As an analogue, a California appellate court expressly embraced the concept of "primary" and "secondary" employers in a case limiting the application of the ABC test in joint-employment context similar to *Access Bio*. Curry v. Equilon Enterprises, LLC, 23 Cal. App. 5th 289, 314 (2018).

[221] In both *Access Bio* and *Curry*, the "primary" employer was determined by stipulation. Neither court addresses a situation where a court must *distinguish* a "primary" employer from a "secondary" employer without a party stipulation.

[222] The *Curry* court stated in dicta that which party pays employment taxes justifies not applying the stricter ABC test to additional putative employers because employees are protected by California's wage order against at least one employer. *Curry*, 23 Cal. App. 5th at 314. The court did not consider or discuss how such a threshold analysis would occur if there was no stipulated employer. Indeed, the *Curry* court's reasoning has been criticized where no defendants admit employer liability. *See, e.g.,* Moreno v. JCT Logistics, Inc., No. EDCV 17-2489 JGB (KKx), 2019 U.S. Dist. LEXIS 117342, at *17–18 (C.D. Cal. May 29, 2019).

[223] N.J. STAT. ANN. § 34:11-4.1(a) (2020).

[224] N.J. STAT. ANN. § 34:11-4.1(b) (2020).

additional joint-employers.[225] Such a construction creates a hierarchy among potential joint-employers, where only one putative employer is subjected to broader employment liability while others are not. This construction is inconsistent with the statutory language.

Suffer-or-permit-to-work employment was crafted to prevent employers from circumventing child labor laws through the use of "agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."[226] As Judge Cardozo stated in *Sheffield Farms*, an employer's duty is "non-delegable" and he must "stand or fall with those whom he selects to act for him."[227] Therefore, the plain language of suffer-or-permit-to-work itself exists to implicate multiple potential employers.

Further, looking to the federal regulation's interpretation of the FLSA for guidance, it does not describe putative joint-employers in terms of a "primary" or "secondary" relationship to each other.[228] The regulation states that "two or more employers" may be held jointly liable for all of a particular employee's work, *not* "one or more additional joint-employers."[229] Under the NJWHL, an "employer" can include anyone "acting directly or indirectly in the interest of an employer in relation to an employee," which perfectly mirrors the FLSA's "employer" definition.[230] None of the statutory language of the NJWPL, NJWHL, or the FLSA, nor the FLSA's regulation, interpret suffer-or-permit-to-work to distinguish multiple employers in hierarchical terms as the *Access Bio* ruling necessarily creates.[231] A "joint-employer" is not a *different* type of employer, but simply *another* employer. An employer is anyone "employing" any person, which includes those suffered or permitted to

225 Although the *Access Bio* court did not expand on this, the *Curry* court stated: "In the joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer." 23 Cal. App. 5th at 314. Therefore, the ABC test is applied to the primary employer and the economic-realities test is applied to the secondary employer.

226 Goldstein, et al., *supra* note 28, at 1100-01.

227 People ex rel. v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30 (1918).

228 *See* 29 C.F.R. § 791.2(a) (2020).

229 *Id.*

230 *Compare* N.J. STAT. ANN. § 34:11-56a1(g) (2020) *with* 29 U.S.C.S. § 203(d) (2020). Importantly, the *Hargrove* court held that the WHL and the WPL's definition of "employee" and "employment" should equally apply the ABC test due to their similarity of language. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 316 (2015).

231 Or as the *Curry* court expressly embraces. Curry v. Equilon Enterprises, LLC, 23 Cal. App. 5th 289, 314 (2018).

work.[232] Therefore, *all* potential employers, whether "primary" or "secondary," should be identified by the ABC test.[233]

B. *The Statutory Failure of Applying the Economic Realities Test*

Even if a two-test framework for determining joint-employment was statutorily acceptable or practically workable, the application of the economic-realities test is problematic and should be replaced by the ABC test. Although the economic-realities test has dominated the application of the FLSA for the past eighty years, Judge Easterbrook found in 1987 that the test was unsatisfactory.[234] Judge Easterbrook urged that courts should *abandon* the "unfocused factors" of the economic-realities test and start again from the statute itself:

> It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope.[235]

The economic-realities test, as a *legal rule*, fails because the test's actual application by the circuit courts does not reflect the statutory language of "suffer or permit to work."

When Congress enacted the FLSA and suffer-or-permit-to-work employment, it had Judge Cardozo's judicial interpretation in mind.[236] The language, written passively, could sweep up any work done for an employer's benefit.[237] Despite the remedial purpose of the act, the circuit courts have shown a deep reluctance to go beyond the touchstone of control for determining the "economic reality" of an employment relationship.[238] This reluctance seems to come from the tort origins of common law employment.[239] Agency law principles were developed to determine where a particular chain of vicarious liability

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232 N.J. STAT. ANN. § 34:11-4.1(b) (2020); N.J. STAT. ANN. § 34:11-56a1(g) (2020).

233 *See, e.g.,* Moreno v. JCT Logistics, Inc., No. EDCV 17-2489 JGB (KKx), 2019 U.S. Dist. LEXIS 117342, at *17–18 (C.D. Cal. May 29, 2019) (The court criticized the *Curry* court's rationale because none of the putative employer defendants admitted employment liability. "The *Dynamex* court later adopted the ABC test to interpret the 'suffer or permit to work' standard. As Plaintiff points out, '*Dynamex* held that the ABC test applied to the suffer or permit to work definition as to *all workers*.'") (internal citations omitted).

234 Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J. concurring).

235 *Id.*

236 Goldstein, et al., *supra* note 28, at 1101.

237 *Lauritzen*, 835 F.2d at 1543 (Easterbrook, J. concurring).

238 Glynn, *supra* note 66, at 117.

239 *See* discussion *supra* at Section III.A.

should end when dealing with torts committed by agents.[240] Yet, this underlying principle has nothing to do with the purposes of FLSA or similar suffer-or-permit-to-work regimes.[241] *Rutherford*, the progenitor of all the myriad economic-realities tests that have been propagated by the circuit courts, illuminates this purpose clearly: "the [FLSA] concerns itself with the correction of *economic evils* through remedies which were *unknown at common law*."[242]

Moreover, a cursory review of the factors considered in the Second or Third Circuit's leading economic-realities cases show an eerie similarity between the right-to-control test as articulated in the Restatement (Second) of Agency.[243] The Restatement provides that the analysis must consider the totality-of-the-circumstances, with no one factor being dispositive or even necessary.[244] These factors include, but are not limited to: (1) the extent of supervision and physical control over the manner and means of the service; (2) the skill required; (3) the use of the putative employer's equipment and premises; (4) the length of time the person is employed; and (5) the terms of compensation.[245] In *Zheng*, the court chose to focus on similar factors such as: (1) the use of the putative employer's equipment and premise, and (2) the degree of supervision by the putative employer over the workers.[246] *Enterprise* focused on other similar factors including: (1) the ability to hire and fire, (2) the degree of supervision, and (3) the ability to set the terms of compensation and services.[247] The *Enterprise* court did not even consider "economic integration"[248] or the ability for the workers to

240 *Lauritzen*, 835 F.2d at 1544 (Easterbrook, J. concurring).

241 *Id.*

242 Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947) (emphasis added).

243 The *Enterprise* version of the economic-realities test stands on particularly shaky grounds because the Third Circuit heavily relied on the Ninth Circuit's "*Bonnette* factors." These four exhaustive factors were: (1) the power to hire and fire, (2) supervision or control of employment conditions, (3) determination of wages, and (4) maintaining employment records. The Ninth Circuit held in later cases that these factors are too narrow to be consistent with *Rutherford*. Norton, *supra* note 13, at 17-18.

244 *Compare* RESTATEMENT (SECOND) OF AGENCY § 220(2) (Am. Law Inst. 1958) *with Rutherford Food Corp.*, 331 U.S. at 730 ("[T]he determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the *whole activity*.").

245 RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)-(g)(a).

246 Such factors would be compatible under the right-to-control test because no single or specific group of factors listed within the Restatement is dispositive or necessary for determining an employment relationship. Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61, 72-73 (2d Cir. 2003).

247 In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012).

248 *See* discussion *supra* Section 2.

perform work for other businesses like the *Zheng* court.[249] This similarity between the right-to-control test and the economic-realities test has led some courts to argue that the tests are functionally the same thing.[250]

The rise of the ABC test presents an opportunity to follow Judge Easterbrook's suggestion and abandon the "unfocused factors" of the economic-realities test and follow the statutory language's expansion beyond the touchstone of control. Unlike the Third Circuit's economic-realities test, the ABC test is plainly different than the right-to-control test. The ABC test requires the satisfaction of three clearly delineated factors and only *one* of the three factors considers the element of control.[251] Moreover, the test is concerned with a worker's *freedom* from control.[252] This approach also satisfies the plain meaning of both "suffer" and "permit." Written in the passive, both terms denote something *less* than control. Therefore, *a fortiori*, a definition that requires the showing of no control, satisfies such a standard.

The test also considers the "economic realities" of the whole activity in prongs B and C. The "usual course of business" and "traditionally independent trade" prongs more fully encompasses the "economic integration" or "dependence" concepts that are articulated by the circuit courts.[253] If the work done is performed *outside* the usual course of business, it is likely not a permanent relationship nor can the work be integral to the putative employer's business. A plumber, who works in a traditionally independent trade, does not maintain a permanent relationship with a cake shop, nor does her plumbing form an integral part of the cake shop's business.[254] Likewise, the plumber will continue in her profession after her relationship to the cake shop has ended. Moreover, by shifting the focus onto the putative *employer's* actions, the test honors Judge Cardozo's maxim: that liability attaches to a putative employer for the "non-performance of a non-delegable duty."[255] Therefore, the ABC test should be expanded to joint-

[249] *Compare In re Enter.*, 683 F.3d at 469-70 *with Zheng*, 355 F.3d at 72-74.

[250] GLYNN, *supra* note 105 (citing *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943, 945 (9th Cir. 2010)); Glynn, *supra* note 66, at 135 n. 69.

[251] *See* N.J. STAT. ANN. § 43:21-19(i)(6)(A)-(C).

[252] N.J. STAT. ANN. § 43:21-19(i)(6)(A).

[253] *See* discussion *supra* Section 2 (The court in *DialAmerica* focused on the permanence of the putative employer-employee relationship as well as the integration of the worker's labor to the employer's business to determine the level of worker "dependence.").

[254] *See* discussion *supra* Section 2 (Plumbers are the quintessential example of an independent contractor not typically covered by the ABC test.).

[255] People ex rel. v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30 (1918).

employment cases because it precisely overcomes the flaws of the economic-realities test.

C. *The Economic Realities Test Fails the Remedial Purpose of the NJWPL*

Judge Easterbrook also found the economic-realities test leaves workers "in the dark about the legal consequences of their deeds."[256] From a policy perspective, a totality-of-the-circumstances approach leaves every analysis on a case-by-case basis, regardless of whether there are "recurring fact patterns."[257] This vague and amorphous approach can also lead to wildly varying outcomes.[258] With every circuit court's list of factors, none being individually dispositive, nor any list exhaustive, the harm caused by the economic-realities test's application goes beyond the frustration of lawyers and judges.[259] Because of the costs of litigation, this approach chills the ability for workers to exercise the rights owed to them under such employment statutes that use the economic-realities test like the FLSA. Indeed, this problem occurs for any totality-of-the-circumstances test, including the right-to-control test.[260]

When adopting the ABC test, the *Hargrove* court directly addressed this flaw in totality-of-the-circumstances tests.[261] The court emphasized the remedial nature of both the FLSA and the NJWPL.[262] Such regulations strike at the "fundamental terms of the employment relationship."[263] These wage protection laws were passed to provide workers with income security and a private means of action to protect that right.[264] Expanded employment coverage is crucial to effectuate that purpose.[265] How can the statute achieve its remedial goals where no worker can know with any degree of certainty whether she is entitled

256 Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J. concurring).

257 *See id.*

258 Glynn, *supra* note 66, at 117.

259 *See* discussion *supra* Section 1. Even where both the *Zheng* and *Enterprise* courts appear to use control as the touchstone for the factors to apply, both courts come to rely on different factors. *Compare* In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012), *with* Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61, 72-74 (2d Cir. 2003).

260 *See* Hargrove v. Sleepy's, LLC, 220 N.J. 289, 316 (2015).

261 *Id.* at 313-16.

262 *Id.*

263 *Id.* at 313.

264 *Id.* at 313-16.

265 *See* Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (Easterbrook, J. concurring) ("The functions of the FLSA call for coverage.").

to the right of a minimum wage or overtime payment in a fissured workplace? How can a worker have income security if her rights change from case to case depending on where her multiple putative employers stand to *each other*? A case-by-case analysis considering anything and everything about the employment relationship is inherently incapable of fulfilling such a purpose.

The application of an economic-realities test as a substitute in joint-employment cases neuters the effectiveness and purpose of the ABC test. Applying the economic-realities test to "secondary" putative employers' functionally limits those employers' liability due to the high costs for employees litigating such a fact-sensitive case-by-case analysis.[266] This framework encourages leading firms to shield themselves from the ABC test by placing one or more third-party "secondary" employers in between the leading firms and workers—their sacrificial lambs.[267] And with each layer of separation comes increasing competition between the third-party labor providers, which drives wage violations due to the difficulty of enforcement and third-party undercapitalization.[268]

The *Enterprise* version of the economic-realities test demands an exacting degree of employer control, including the ability to hire and fire, maintain employment records, and control day-to-day work.[269] The *Access Bio* construction leaves a large gap between workers who would otherwise qualify as the leading firms' employees under the ABC test[270] but are not significantly controlled by the leading firm as the *Enterprise* standard demands. Workers within this gap have no recourse if the "primary" employer is judgment-proof.[271] The *Access Bio* construction

[266] *See* Glynn, *supra* note 66, at 117 (discussing the difficulty of bringing private suit or public enforcement for employment law violations).

[267] *See* Goldstein, et al., *supra* note 28, at 997-99 (1999) (noting that sweatshop jobbers assume employment liability for the leading firm in order to take the fall).

[268] *See* discussion *supra* Section II.

[269] In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012). *See also supra* note 243 for the critique of *Enterprise's* particular factors for hewing too close to the right-to-control test.

[270] Where a worker is not free from the control of the leading firm, works within the leading firm's usual course of business and within its business premises, or whose work is not traditionally an independent trade. *See* discussion *supra* Section B.

[271] The *Curry* court stated, "the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections." But the court does not consider or discuss whether the ABC test's policy purpose for broad coverage is unnecessary where there is a judgment-proof "primary" employer, particularly when acting in the interest of a "secondary" employer. Curry v. Equilon Enterprises, LLC, 23 Cal. App. 5th 289, 314 (2018); *see also* discussion *supra* Section II.

of suffer-or-permit-to-work, which was crafted to prevent such carefully evasive workplace structuring, is susceptible to the same game of Whac-a-Mole that plagues wage and hour law enforcement.[272] Therefore, overruling the *Access Bio* framework to expand the ABC test to joint-employment is critical to fulfilling the remedial purpose of the NJWPL. The ABC test best embodies the broad employment coverage provided by the statutory language of suffer-or-permit-to-work employment. The ABC test also provides workers with greater income security by facilitating enforcement against those leading firms that drive wage protection violations.

VI. CONCLUSION

Limiting the ABC test to the distinction between employee and independent contractor status represents a significant obstacle to the NJWPL's statutory effectiveness and purpose. This approach leaves a sizeable gap in the law's enforcement because of the workplace fissuring that dominates business organization today. By bounding the ABC test to only single employment scenarios, only one potential putative employer is subject to the broad scope of the ABC test in joint-employment cases. This limitation encourages leading firms to continue to shed employment liability by placing sacrificial lamb "primary" employers in between themselves and their workers. This hierarchical framework is untenable under the statutory language of the NJWPL, which calls for broad coverage and does not differentiate joint employers in terms of coverage liability.

The economic-realities test that the *Access Bio* court adopts in place of the ABC test is likewise inconsistent with the statutory language of the NJWPL. This test hews too closely to the common law focus on control, which suffer-or-permit-to-work employment was crafted to move beyond. The limitation of the ABC test and the application of the economic-realities test fails to fulfill the NJWPL's statutory purpose. This failure leaves workers vulnerable to the precise problem that the statute was meant to prevent. Overruling the *Access Bio* framework is crucial to the material fulfillment of the NJWPL's statutory purpose. Expanding the ABC test to joint-employment cases will give workers and employment law enforcement a powerful tool to focus on the top level firms that drive violations and remedy the gap left by the *Access Bio* court's holding.

272 *See* discussion *supra* Section B.