

YOU ARE THE EMPLOYER EVEN IF YOU'RE NOT: JOINT EMPLOYMENT UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

I. INTRODUCTION

Farmer Fred¹ was a farmer based in California's San Joaquin Valley.² He used a number of farm labor contractors to obtain workers during various seasons of the year for work such as harvesting and preparing trees and vines of the fields for the upcoming crop year.³ Farmer Fred did not know that one of his farm labor contractors was going through a divorce and closed his business, bounced a check to his workers' compensation carrier, and failed to pay his employees their final paychecks.⁴ Also unknown to Farmer Fred, one of that farm labor contractor's employees had filed a workers' compensation claim and the rest of the employees filed complaints with the Department of Labor under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA" or "the Act")⁵ for payment of their final wages.⁶ The Department of Labor investigated the farm labor contractor and found violations of MSPA because the farm labor contractor has not paid those final wages, the contractor's workers' compensation insurance had expired, and the insurance company consequently rejected the filed claim.⁷

Even though Farmer Fred was unaware that the farm labor contractor had shut down, had not paid its employees, and had not maintained adequate workers' compensation insurance, the Department of Labor

¹ The company's name has been changed, but the company is a typical California agribusiness found in agricultural areas throughout the United States.

² The following scenario is taken from an interview with attorney Russell K. Ryan. Russell K. Ryan, Esquire, Partner, Motschiedler, Michaelides, Wishon, Brewer & Ryan, in Fresno, Cal. (Nov. 8, 2015).

³ *Id.*

⁴ *Id.*

⁵ *See generally* 29 U.S.C. § 1801 (2015) (providing the first of MSPA's sections in the U.S.C).

⁶ Interview with Russell K. Ryan, *supra* note 2.

⁷ *Id.*

still went to Farmer Fred and advised him that he was liable for what the farm labor contractor failed to do.⁸ Farmer Fred did not hire the workers, control them in any way, and he had fully paid the farm labor contractor for the labor, but in the end, Farmer Fred still paid over \$100,000 in unpaid wages and penalties and was then responsible for a significant workers' compensation claim.⁹

Unfortunately, agricultural businesses often find themselves in this exact unexpected situation, even though they believe that they are complying with all labor and employment rules and regulations, or that farm labor contractors are complying with obligations under state and federal law, including MSPA.¹⁰ These agribusinesses are generally unaware that they can be—and often are—deemed under MSPA the joint employers of all agricultural workers hired by the farm labor contractor and, correspondingly, can be held liable for their labor contractor's violations of wage, hour, and other employment laws.¹¹ This conundrum arises because MSPA does not mention the concept of "joint employment" in the language of the statute.¹² The concept of joint employment is mentioned only in the regulations created by the Department of Labor as a guide to enforce MSPA.¹³ Courts have interpreted these regulations as making farmers joint employers for most any violation of the Act, regardless of whether the farmer is involved in the hiring or payment of the farmworkers.¹⁴

Agribusinesses and farmers are typically unaware that under MSPA the courts have increasingly made joint employment determinations.¹⁵

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Farmers May Be Surprised to Find Themselves The Joint Employer of the Workers Provided By Their Farm Labor Contractor*, DOWNEY BRAND, (May 2013), <http://www.downeybrand.com/Resources/Legal-Alerts/65573/Farmers-May-Be-Surprised-To-Find-Themselves-The-Joint-Employer-Of-The-Workers-Provided-By-Their-Farm-Labor-Contractor>; see also Jason Resnick, *Ag & the Law: Joint Employer Liability After Arredondo*, APRIL 2013 – WG TOOL BOX TO AID GROWERS WITH DATA, April 1, 2013, <https://www.wga.com/magazine/2013/04/01/ag-law-joint-employer-liability-after-arredondo>.

¹¹ See, DOWNEY BRAND, *supra* note 10; see also Resnick, *supra* note 10.

¹² See generally 29 U.S.C. § 1801 (2015) (providing the first of MSPA's sections).

¹³ See 29 C.F.R. § 500.20(h)(5) (2015).

¹⁴ See 29 C.F.R. § 500.20(h)(5) (2015); see also *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997).

¹⁵ Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers As Joint Employers Under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 BERKELEY J. EMP. & LAB. L. 175, 189-93

Therefore, farmers do not take steps to protect themselves and limit their potential liability.¹⁶ In the example involving Farmer Fred, to avoid the fate he experienced, farmers can create and execute agreements with both the farm labor contractor and the Department of Labor *prior* to the performance of any services by the contractor's farmworkers.¹⁷ Farmers can limit liability by including liability and indemnity provisions requiring the farm labor contractor to comply with state and federal employment laws—including MSPA—and allowing inspections by Farmer Fred and the Department of Labor.¹⁸ As a result, the farm labor contractors are then held responsible for the unpaid wages, fines and penalties as well as resolving the workers' compensation claim.¹⁹

This Comment will demonstrate that even with a joint employer determination, farmers and agribusinesses can limit their liability and exposure under MSPA by initiating strong, transparent monitoring agreements with the Department of Labor and labor contractors.²⁰ Part II explores the background of MSPA and provides the foundation of the joint employment rule under the Act. Part III analyzes the increasing use of joint employment to enforce MSPA and the problems that farmers and agribusinesses face. Part IV provides recommendations for creating enforceable agreements with the Department of Labor and the farm labor contractor so that the farmers and agribusinesses may limit their liability under MSPA. Finally, Part V concludes that although farmers and agribusinesses are found as joint employers, they may limit their liability by incorporating the various agreements.

II. BACKGROUND OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT AND THE BASIC REQUIREMENTS OF JOINT EMPLOYMENT

As a response to immigrant farm worker conditions and the realization that farm labor contractors exploited migrant workers, Congress enacted the Farm Labor Contractor Registration Act in 1963 with the intent to

(1998) (providing that the joint employment rule was created by the Department of Labor to enforce MSPA and that the Department of Labor broadened that standard by issuing the related regulations in the Code of Federal Regulations).

¹⁶ *See id.*

¹⁷ Interview with Russell K. Ryan, Esquire, Partner, Motschieder, Michaelides, Wishon, Brewer & Ryan, in Fresno, Cal. (Aug. 15, 2015).

¹⁸ *Id.*

¹⁹ Interview with Russell K. Ryan, *supra* note 6.

²⁰ Interview with Russell K. Ryan, *supra* note 17.

provide a remedy for mistreated migrant workers.²¹ Congress determined that this law still left migrant and seasonal workers vulnerable and thus created MSPA as a replacement.²² MSPA went into effect in 1983 and specifically regulated the agricultural employment relationship between migrant and seasonal workers and their employers.²³ It was designed to protect migrant and seasonal agricultural workers by ensuring proper wages, hours, housing, and other working conditions.²⁴

MSPA makes specific reference to the distinction between an agricultural employer and a farm labor contractor, but left out any reference to joint employment.²⁵ Under MSPA an agricultural employer is an entity or individual who owns or runs a farm and hires other individuals for services on that farm.²⁶ On the other hand, a farm labor contractor is an individual or entity, other than an agricultural employer, who receives payment or other consideration for providing farm labor contracting services.²⁷ Such contracting services include recruiting and hiring migrant and seasonal employees to work on the farm, as well as providing their transportation and wages.²⁸ For the purpose of agriculture, such contracted farm work includes, but is not limited to, planting, packing, harvesting and processing any sort of agricultural commodity.²⁹ Generally, a farmer or agribusiness would hire a farm labor contractor, who would in turn provide laborers to work on the farm.³⁰ Farmers typically hire labor contractors with the understanding and intent that the labor contractors will be the sole employer of the

²¹ *Rivera v. Adams Packing Ass'n, Inc.*, 707 F.2d 1278, 1280-81 (11th Cir. 1983); *LeRoy*, *supra* note 15, at 178-180.

²² *LeRoy*, *supra* note 15, at 178-80.

²³ 29 U.S.C. § 1801 (2015). The Act is sometimes referred to as the AWP. *Eliserio v. Floydada Hous. Auth.*, 455 F. Supp. 2d 648, 652 (S.D. Tex. 2006); *Ricketts v. Vann*, 32 F.3d 71, 73 (4th Cir. 1994). The Federal Code of Regulations and the Department of Labor both refer to the Act as MSPA. *See* 29 C.F.R. § 500.0 (2015); *see also Fact Sheet # 49: The Migrant and Seasonal Agricultural Worker Protection Act*, DEP'T OF LABOR (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs49.htm>.

²⁴ JACK L. RUNYAN, SUMMARY OF FEDERAL LAWS AND REGULATIONS AFFECTING AGRICULTURAL EMPLOYERS 25 (2000).

²⁵ *See* 29 U.S.C. § 1802(2), (6) (2015).

²⁶ *Id.* § 1802(2) (2015).

²⁷ *Id.* § 1802(7); RUNYAN, *supra* note 24, at 25.

²⁸ RUNYAN, *supra* note 24, at 25-27.

²⁹ 29 U.S.C. § 1802(3) (2015).

³⁰ DOWNEY BRAND, *supra* note 10.

farmworkers; however, joint employment is commonly found between the contractor and the farmer.³¹

Currently, MSPA imposes liability on farm labor contractors, requiring them to register with the Department of Labor, which issues a corresponding certificate as proof of registration.³² The Act requires that the certificate of registration be readily available upon request and that farm labor contractors must display the certificate to all potential employers and employees.³³

The farm labor contractors and agricultural employers must provide to their workers, in writing, pertinent information regarding wages, hours, housing, workers' compensation (as applicable in their state), and other working conditions.³⁴ The contractors and employers are required to provide employees with their payroll records, which must be kept for three years, as well as wage statements for each work period.³⁵ If the contractors and employers provide housing and transportation for workers, such housing must meet any and all applicable standards set forth by each state regarding health and safety.³⁶ Additionally, all transportation must conform to the applicable standards and follow all licensing and insurance requirements.³⁷

In determining compliance with MSPA, the Department of Labor may regularly enter and inspect facilities and may subpoena employment records and examine witnesses regarding potential violations.³⁸ In addition to the Department of Labor's own efforts in determining compliance, farmworkers can notify the Department of Labor of potential violations.³⁹ Violations of MSPA can result in criminal and administrative sanctions.⁴⁰ Criminal sanctions can be up to a \$1,000 fine or one year in prison, or both, for a first time violation, and up to a \$10,000 fine or three years in prison, or both, for all subsequent

³¹ *Id.*

³² 29 U.S.C. § 1811 (2015); *id.* § 1812 (2015).

³³ *Id.* § 1811 (2015).

³⁴ *Id.* § 1821(a) (2015) (referring to migrant workers); *id.* § 1831(a) (2015) (referring to seasonal workers).

³⁵ 29 U.S.C. § 1821(d) (2015) (referring to migrant workers); 29 U.S.C. § 1831(c) (2015) (referring to seasonal workers).

³⁶ 29 U.S.C. § 1823 (2015) (mentioning specifically that housing must meet all applicable safety and health standards).

³⁷ *Id.* § 1841 (2015) (ensuring all drivers have a valid driver's license and that the car is covered with insurance).

³⁸ 29 C.F.R. § 500.7 (2015); RUNYAN, *supra* note 24, at 28-29.

³⁹ RUNYAN, *supra* note 24, at 28-29.

⁴⁰ 29 U.S.C. § 1851 (2015); 29 U.S.C. 1853 (2015).

violations.⁴¹ Additionally, a \$1,000 fine per violation may be imposed under the civil section of the statute.⁴² Violations may also result in judicial enforcement, such as injunctive relief, so that the employer performs certain actions to rectify violations.⁴³ Farmworkers may also initiate a private action against farm labor contractors and/or joint employers, regardless of the amount in controversy, the citizenship of the parties, or whether administrative remedies have been exhausted.⁴⁴

A. The Joint Employment Rule under MSPA

The definition of “employ” is the same under MSPA and the Fair Labor Standards Act (“FLSA”), which governs employment situations generally.⁴⁵ FLSA was initiated by Congress to protect the rights of workers and to ensure adequate labor conditions.⁴⁶ Both MSPA and FLSA were designed to protect workers; however, MSPA specifically applies to agricultural work and issues while FLSA generally applies to all employment, agricultural or otherwise.⁴⁷ An individual is considered employed pursuant to MSPA and the FLSA if an entity enables the individual to work, or if the individual is economically dependent on that entity.⁴⁸

Courts often use the Code of Federal Regulations (“CFR”) as the guideline for enforcing MSPA.⁴⁹ The CFR consists of general rules and guidelines published by various agencies and departments of the federal government, providing guidance in enforcing statutes.⁵⁰ The specific agency that regulates MSPA is the Department of Labor.⁵¹ As such, the

⁴¹ 29 U.S.C. § 1851 (2015).

⁴² *Id.* § 1853 (2015).

⁴³ *Id.* § 1852 (2015).

⁴⁴ *Id.* § 1854(a) (2015).

⁴⁵ *Id.* § 203(g) (2015); *Id.* § 1802(2) (2015); 29 C.F.R. § 500.20(h)(1) (2015).

⁴⁶ 29 U.S.C. § 202 (2015).

⁴⁷ *See id.* § 203(d)-(f) (2015); *see also id.* § 1802(2) (2015); *see also* 29 C.F.R. § 500.20(h)(1) (2015).

⁴⁸ *Charles v. Burton*, 169 F.3d 1322, 1328 (11th Cir. 1999).

⁴⁹ *See Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997); *see also Antenor v. D & S Farms*, 88 F.3d 925, 929-30 (11th Cir. 1996); *see also Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1255 (N.D. Fla. 2014); *see also Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1075 (E.D. Cal. 2013).

⁵⁰ *See* 1 C.F.R. § 2.5 (2015); 29 C.F.R. § 500.0 (2015).

⁵¹ *See Fact Sheet # 49: The Migrant and Seasonal Agricultural Worker Protection Act*, DEP'T OF LABOR (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs49.htm>.

Department of Labor created a series of regulations to help enforce MSPA, which later became codified in the CFR.⁵² The CFR recognizes that joint employment relationships often exist in the agricultural realm.⁵³ Therefore, while the term “joint employment” is not defined in MSPA itself, courts apply the CFR definition.⁵⁴ Thus, under the CFR, joint employment describes the circumstance where an employee is deemed, under the law, to be simultaneously employed by two or more entities.⁵⁵

Whether joint employment exists in a particular situation is a factual question determined on a case-by-case basis, and is dependent on the actions of the farm labor contractor and the farmer.⁵⁶ Each and every entity or individual deemed a joint employer has an equal responsibility in ensuring that their farm workers are afforded appropriate protections—meaning as joint employers, both the farm labor contractor and the corresponding farmer or agribusiness are responsible.⁵⁷ Joint employment occurs if the economic reality is that the laborer depends on both the farm labor contractor and the farm or agribusiness for employment.⁵⁸ If the labor contractor and the farmer have no real overlap in employer responsibilities, then a joint employment situation should not legally exist; therefore, the farmer employs only the farm labor contractor, who is the sole employer of all farmworkers.⁵⁹ Joint employment, therefore, should be found only when it could be determined by the facts of the case that the farm labor contractor and the agribusiness or farmer both act as employers to the farm workers.⁶⁰

⁵² 29 C.F.R. § 500.0 (2015).

⁵³ 29 C.F.R. § 500.20(h)(4) (2015).

⁵⁴ See *Torres-Lopez* 111 F.3d at 639; see also *Antenor v. D & S Farms*, 88 F.3d 925, 929-30 (11th Cir. 1996); see also *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1255 (N.D. Fla. 2014); see also *Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1075 (E.D. Cal. 2013).

⁵⁵ 29 C.F.R. § 500.20(h)(5) (2015); see also *Torres-Lopez*, 111 F.3d at 638 (stating that joint employment is “where more than one entity is an employer.”); see also *Escobar v. Baker*, 814 F. Supp. 1491, 1501 (W.D. Wash. 1993) (analyzing whether the employee was employed by more than one entity).

⁵⁶ 29 C.F.R. § 500.20(h)(5) (2015); see also *Doe v. D.M. Camp & Sons*, 624 F. Supp. 2d 1153, 1163 (E.D. Cal. 2008) (stating that joint employment “depends upon all the facts in the particular case”).

⁵⁷ 29 C.F.R. § 500.70(b) (2015).

⁵⁸ *Gonzalez-Sanchez v. Int'l Paper Co.*, 346 F.3d 1017, 1021 (11th Cir. 2003).

⁵⁹ *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003).

⁶⁰ *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997).

B. Determining Whether Joint Employment Exists Under MSPA

The economic reality test and the Title VII joint employment test are used to determine whether a joint employment relationship exists between an independent farm labor contractor and an agricultural employer.⁶¹ The courts most commonly use the Department of Labor's economic reality test, as detailed in the CFR, to determine joint employment.⁶² Recently, the court in the Eastern District of Washington, applied an alternative test, the Title VII joint employment test, in *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, (E.D. Wash. 2014), which provided factors that are virtually identical to that of the economic reality test.⁶³

1. The Economic Reality Test

The economic reality test considers various factors to determine whether joint employment is present: (1) the level and degree of the employer's control over work performance; (2) the employee's potential for loss or profit depending on the managerial skill involved; (3) the employee's equipment or material investment or whether the employer hired other employees; (4) whether the employee's services require a certain level of skill; (5) the duration of the employment relationship; and (6) the degree to which the employee's tasks are integral to the employer's business.⁶⁴

All of these factors are further divided into two categories: regulatory or non-regulatory factors.⁶⁵ Regulatory factors include the degree of control over the work;⁶⁶ degree of supervision, whether indirect or direct, over the farmworkers;⁶⁷ determination of pay rates;⁶⁸ modifying or determining employment conditions, such as hiring and firing of employees;⁶⁹ and preparing payroll and paying wages.⁷⁰ Non-regulatory

⁶¹ *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, 1308-09 (E.D. Wash. 2014); 29 C.F.R. § 500.20(h)(5)(iii) (2015).

⁶² 29 C.F.R. § 500.20(h)(5)(iii) (2015).

⁶³ *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, 1309 (E.D. Wash. 2014).

⁶⁴ 29 C.F.R. § 500.20(h)(5)(iv) (2015).

⁶⁵ *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997).

⁶⁶ *Id.*

⁶⁷ *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

⁶⁸ *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994).

⁶⁹ *Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1088 (D. Ariz. 2010).

⁷⁰ *Sanchez-Calderon v. Moorhouse Farms*, 995 F. Supp. 1098, 1107 (D. Or. 1997).

factors include whether the work was performed on the farmer's or agribusiness's land;⁷¹ the dependence on managerial skill for profits and/or losses;⁷² the farmer's or agribusiness's investment in equipment used by the farmworkers;⁷³ whether the work requires any sort of special skill;⁷⁴ whether the work serves an integral part of the business;⁷⁵ and the permanence and duration of the employee relationship.⁷⁶ Many courts viewed only the regulatory factors as relevant to determining an employer-employee relationship as opposed to the non-regulatory factors.⁷⁷ Non-regulatory factors do not always determine who actually employs a particular worker even though these factors may be useful when considering whether an individual is an employee.⁷⁸

i. Regulatory Factors Under the Economic Reality Test

Regulatory factors consider whether a farm or agribusiness regulates the employee's work conditions, and hold more weight in determining whether a joint employment relationship exists.⁷⁹ In *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), the court determined that exercising control dealt with a "specific indicia of control" as opposed to abstract notions of control.⁸⁰ When a farmer or agribusiness exercises control over the work performed, as manifested in controlling the harvest and planting schedule or in determining the method of all work performed, this strongly indicates a joint employment relationship.⁸¹ For example, specific indicia of control include delegating tasks, hiring decisions, and designing the overall structure of management.⁸²

The *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367 (M.D. Fla. 1994) court held that general instructions given to a labor contractor are not

⁷¹ *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1209 (11th Cir. 2003).

⁷² *Aimable v. Long & Scott Farms*, 20 F.3d 434, 443 (11th Cir. 1994).

⁷³ *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1256 (N.D. Fla. 2014).

⁷⁴ *Barrientos v. Taylor*, 917 F. Supp. 375, 383 (E.D.N.C. 1996).

⁷⁵ *Haywood v. Barnes*, 109 F.R.D. 568, 588-89 (E.D.N.C. 1986).

⁷⁶ *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997).

⁷⁷ *See Charles v. Burton*, 169 F.3d 1322, 1333 (11th Cir. 1999); *see also Torres-Lopez*, 111 F.3d at 640-41; *see also Aimable v. Long & Scott Farms*, 20 F.3d 434, 444 (11th Cir. 1994).

⁷⁸ *See Aimable v. Long & Scott Farms*, 20 F.3d 434, 444 (11th Cir. 1994).

⁷⁹ *See id.*

⁸⁰ *Id.* at 440.

⁸¹ *Torres-Lopez v. May*, 111 F.3d 633, 642 (9th Cir. 1997); *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1255 (N.D. Fla. 2014).

⁸² *Aimable v. Long & Scott Farms*, 20 F.3d 434, 440 (11th Cir. 1994).

enough to constitute control.⁸³ Regularly coming to the fields is not enough to indicate a farmer or an agribusiness acted in a supervisory role, particularly if no direction was provided during those field visits.⁸⁴ Additionally, minimal oversight alone does not constitute supervision; the supervision must be continuous and directly related to the farmworkers' tasks.⁸⁵ Supervision comes in the form of commands and directions on-site at the fields and overseeing the farmworkers' efforts, but does not need to be directly communicated to the worker.⁸⁶ Instead, such direction may be indirect and communicated to the worker through a foreman.⁸⁷

If a farmer does not directly determine the farm workers' wages, this indicates that joint employment is not present.⁸⁸ The farmer may still be liable, however, if they have some role in establishing pay rates.⁸⁹ Pay rates are not limited to just the employee's compensation, but may include other benefits such as insurance, social security, and worker's compensation.⁹⁰ The court must consider how large a role the farmer has in determining payment.⁹¹ For instance, in *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243 (N.D. Fla. 2014), the farmer indirectly established employee pay rates by deciding that the harvest work would be compensated by how much produce was picked.⁹² The farmer had already determined the rate of each fruit; therefore, the employee was then paid based upon how much he or she harvested as opposed to how many hours he or she worked, which was sufficient to demonstrate that the farmer substantively determined pay rates.⁹³

⁸³ *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1372 (M.D. Fla. 1994) (providing that such general instructions include the number of individuals needed for a particular harvest and what crop to harvest that day).

⁸⁴ *Aimable v. Long & Scott Farms*, 20 F.3d 434, 441 (11th Cir. 1994).

⁸⁵ *Id.*

⁸⁶ *Antenor v. D & S Farms*, 88 F.3d 925, 934-935 (11th Cir. 1996); *Haywood v. Barnes*, 109 F.R.D. 568, 590 (E.D.N.C. 1986); *see also Charles v. Burton*, 169 F.3d 1322, 1330 (11th Cir. 1999).

⁸⁷ *Antenor v. D & S Farms*, 88 F.3d 925, 934-935 (11th Cir. 1996); *Haywood v. Barnes*, 109 F.R.D. 568, 590 (E.D.N.C. 1986); *see also Charles v. Burton*, 169 F.3d 1322, 1330 (11th Cir. 1999).

⁸⁸ *See Torres-Lopez v. May*, 111 F.3d 633, 643 (9th Cir. 1997).

⁸⁹ *Antenor v. D & S Farms*, 88 F.3d 925, 935-36 (11th Cir. 1996).

⁹⁰ *Id.*

⁹¹ *Torres-Lopez*, 111 F.3d at 643; *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1259 (N.D. Fla. 2014).

⁹² *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1259 (N.D. Fla. 2014).

⁹³ *Id.*

A farmer's lack of managerial control over employees may also indicate a lack of joint employment.⁹⁴ The district court in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), found that giving general harvesting instructions alone, such as which field to begin harvesting, is not enough to satisfy this element.⁹⁵ The *Fanette* court clarified that when the farmer has the power to place workers where the farmer wants, as well as decide when and how much of the produce need to be picked, these were enough to be indicative of joint employment.⁹⁶ In addition, the power to veto decisions regarding hiring and hours worked was considered adequate to establish a right to hire and indicate joint employment.⁹⁷

Lastly, the regulatory factor of preparing payroll or directly paying wages is indicative of joint employment.⁹⁸ If the farmer has a direct role in the process of payroll, this strongly denotes that the workers are economically dependent on that farmer.⁹⁹ This indicator is based on the assumption that a labor contractor is unable to prepare payroll on the contractor's own, demonstrating that the labor contractor lacks the necessary economic substance to be the sole employer of the farm workers.¹⁰⁰ If there is no evidence of the farmer or agribusiness having a role in paying wages or payroll, this generally means that the relationship does not extend to that of employer-employee.¹⁰¹

ii. Non-Regulatory Factors Under the Economic Reality Test

In contrast to the regulatory factors, many courts find that the non-regulatory factors are only useful to ascertain whether the farm labor contractor, not the farmworker, is an employee of the farmer or agribusiness.¹⁰² The profits and losses based on managerial skill, the use of equipment or materials owned by the farmer or agribusiness, and the necessity of special skill are often factors the court has recognized as

⁹⁴ *Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1088-89 (D. Ariz. 2010); *see also* *Aimable v. Long & Scott Farms*, 20 F.3d 434, 442 (11th Cir. 1994)

⁹⁵ *See Torres-Lopez*, 111 F.3d at 642.

⁹⁶ *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1259 (N.D. Fla. 2014)

⁹⁷ *Antenor v. D & S Farms*, 88 F.3d 925, 935 (11th Cir. 1996).

⁹⁸ *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1214 (11th Cir. 2003).

⁹⁹ *Id.*

¹⁰⁰ *Antenor v. D & S Farms*, 88 F.3d 925, 936 (11th Cir. 1996).

¹⁰¹ *Torres-Lopez v. May*, 111 F.3d 633, 643 (9th Cir. 1997); *see also* *Aimable v. Long & Scott Farms*, 20 F.3d 434, 442-43 (11th Cir. 1994).

¹⁰² *See Aimable*, 20 F.3d at 443.

irrelevant.¹⁰³ In *Alviso-Medrano v. Harloff*, 868 F.Supp. 1367 (M.D. Fla. 1994), the court held that the question of profits and losses only signifies the farmworker as an employee and does not specify who is the employer.¹⁰⁴ *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) made a similar finding, holding that the investment of equipment or materials required for a task merely implies that the individual was an employee but does not show who employed them.¹⁰⁵

Generally, courts find that there is little to no skill in harvesting or planting produce.¹⁰⁶ This low skill level helps demonstrate that the employee is performing work of a sort for an employer—whether the farmer or the labor contractor.¹⁰⁷ However, this element is often viewed as essentially irrelevant because it does not establish whether the farm labor contractor or the farmer is the true employer of the worker.¹⁰⁸

Some courts have found that certain non-regulatory factors held a little more weight in determining whether a joint employment relationship exists.¹⁰⁹ For instance, without the farmer's land, there would be no question of employment, because the employee could not conduct farm work without the land.¹¹⁰ Therefore, it is useful to note whether the farm work occurred on the farmer's land to establish whether the farmer could have a more central employer role.¹¹¹ The court in *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) found that there is a presumption

¹⁰³ See *Charles v. Burton*, 169 F.3d 1322, 1332-33 (11th Cir. 1999); *Aimable*, 20 F.3d at 443.

¹⁰⁴ *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1371 (M.D. Fla. 1994).

¹⁰⁵ See *Aimable*, 20 F.3d 434 at 443.

¹⁰⁶ *Aimable*, 20 F.3d at 444; see also *Ricketts v. Vann*, 32 F.3d 71, 74 (4th Cir. 1994) (describing farm work as unskilled labor); see also *Barrientos v. Taylor*, 917 F. Supp. 375, 383 (E.D.N.C. 1996) (harvesting tobacco and sweet potatoes does not require special skill); see also *Maldonado v. Lucca*, 629 F. Supp. 483, 485-86 (D.N.J. 1986) (indicating there is no specialization in picking blueberries); see also *Haywood v. Barnes*, 109 F.R.D. 568, 588 (E.D.N.C. 1986) (stating farm work does not require any sort of experience or aptitude); compare with *Gonzalez v. Puente*, 705 F. Supp. 331, 336 (W.D. Tex. 1988) (indicating that cucumber picking has been recognized as requiring more effort and skill than other produce and therefore qualified as a skilled job).

¹⁰⁷ *Aimable*, 20 F.3d at 444.

¹⁰⁸ *Id.*

¹⁰⁹ *Charles v. Burton*, 169 F.3d 1322, 1333 (11th Cir. 1999); see also *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997); see also *Antenor v. D & S Farms*, 88 F.3d 925, 937 (11th Cir. 1996); see also *Aimable*, 20 F.3d at 444; see also *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1260 (N.D. Fla. 2014).

¹¹⁰ *Charles*, 169 F.3d at 1333.

¹¹¹ *Id.*

that the farmer owning the land will have some control over the worksite, even if the actual hiring and supervision may lie in the hands of labor contractors.¹¹² It should be noted, however, that if the workers had no knowledge that they were working on the particular farmer's land, they likely did not rely on that farmer as their income source or even realize that the farmer or agribusiness had any significant role in their employment.¹¹³

The permanency and duration of the working relationship helps determine whether the farm labor contractor, as opposed to the agribusiness or farmer, truly employed the farmworkers.¹¹⁴ The longer the farmworker works at the same farm, the more likely the agribusiness or farmer would be deemed as a joint employer.¹¹⁵ Some courts have concluded that working during a single harvesting season was enough to satisfy this factor as opposed to working for several years.¹¹⁶ This conclusion is based on the idea that agriculture is a seasonal business and although employments relationships may only be for a single season, that relationship lasts throughout that entire timespan.¹¹⁷ Other courts have held that such a short period, sometimes only thirty days, was not enough to establish permanency.¹¹⁸

A worker performing a task that is integral to a farmer's or an agribusiness's production is more likely to be economically dependent on the farmer or agribusiness.¹¹⁹ Work such as harvesting and planting is a crucial element to the success of agribusinesses and leans toward a joint employment relationship.¹²⁰ Pre-harvest work and line-jobs

¹¹² *Id.*; see also *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1260 (N.D. Fla. 2014).

¹¹³ *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1213-14 (11th Cir. 2003).

¹¹⁴ *Charles v. Burton*, 169 F.3d 1322, 1331 (11th Cir. 1999); see also *Aimable v. Long & Scott Farms*, 20 F.3d 434, 444 (11th Cir. 1994).

¹¹⁵ *Charles*, 169 F.3d at 1331; see also *Aimable*, 20 F.3d at 444.

¹¹⁶ *Charles*, 169 F.3d at 1331-32.

¹¹⁷ *Haywood v. Barnes*, 109 F.R.D. 568, 589 (E.D.N.C. 1986).

¹¹⁸ *Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997).

¹¹⁹ *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1256 (N.D. Fla. 2014); see also *Torres-Lopez*, 111 F.3d at 644; see also *Antenor v. D & S Farms*, 88 F.3d 925, 937 (11th Cir. 1996).

¹²⁰ *Fanette*, 28 F. Supp. 3d at 1256; see also *Torres-Lopez*, 111 F.3d at 644 (picking cucumbers is a substantial factor in the business); see also *Antenor*, 88 F.3d at 937 (packing snap beans in the course of the harvest qualified).

involved in the process of picking are both substantive enough to be deemed an integral part of the business.¹²¹

Joint employment depends upon “the economic reality of all the circumstances” rather than upon any single factor in particular.¹²² In other words, it depends on whether the farmworker economically depended on the agribusiness or farmer to receive all benefits due to that farmworker as an employee.¹²³ Additionally, these factors are not exhaustive and various courts have considered other factors, depending upon the specific circumstances of the case.¹²⁴

2. *The Joint Employment Test under Title VII*

The Eastern District of Washington recently applied a joint employment test under Title VII in *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, (E.D. Wash. 2014), which provided factors that were virtually identical to those of the economic reality test, with the exception of employee taxes.¹²⁵ Title VII is the title given to the federal statutes regulating equality among employment.¹²⁶ For Title VII to apply, the defendant of the case must be deemed as an employer.¹²⁷ In *E.E.O.C. v. Global Horizons, Inc.* a labor contractor supplied workers from Thailand for work on an orchard.¹²⁸ The Thai workers filed hundreds of complaints of discrimination to the E.E.O.C. because of the actions of the labor contractor.¹²⁹ The E.E.O.C. brought suit on behalf of the Thai workers against the labor contractor and the orchard as joint employers under Title VII.¹³⁰ The court in *E.E.O.C. v. Global Horizons, Inc.* felt that the economic reality test under MSPA would be appropriate to determine whether joint employment existed between the labor

¹²¹ *Charles*, 169 F.3d at 1332-33; *Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1081-82 (E.D. Cal. 2013).

¹²² *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994).

¹²³ *Antenor*, 88 F.3d at 932; 29 C.F.R. § 500.20(h)(5)(iii) (2015).

¹²⁴ *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 407 (7th Cir. 2007).

¹²⁵ *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, 1308-09 (E.D. Wash. 2014) (stating that the factors included 1) required skill, 2) investment in equipment, 3) the location of work, 4) the duration of the parties' relationship, 5) control over hiring and assignment projects, 6) control over the work performed, 7) control over wages and employee benefits, and 8) the treatment of the employee's taxes).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1306.

¹²⁹ *Id.* at 1307.

¹³⁰ *Id.*

contractor and the orchard.¹³¹ The focus of the court was to evaluate the amount of control the hiring party has over the work provided.¹³² *E.E.O.C. v. Global Horizons, Inc.* added a specific reference to tax treatment, which is implied under other factors of the economic reality test through the control over payroll and related factors such as worker's compensation.¹³³

C. Exemptions to the Joint Employment Rule Under MSPA

Two main exemptions to the Act exist: the family business exemption and small business exemption.¹³⁴ If either exemption applies to a particular business, the business is not subjected to MSPA or required to follow the regulations detailed within the Act¹³⁵ The family business exemption applies solely to family-owned farms where only family members perform labor.¹³⁶ Courts have interpreted this language to mean that the farmer and his or her immediate relatives must complete all work on the farm.¹³⁷ If the farmer employed anyone not designated as immediate family, it would defeat the exemption.¹³⁸

The small business exemption applies when the farmer does not use more than a total of 500 man-days during the previous calendar year between the various employees.¹³⁹ For the purpose of this calculation, a "man-day" is any day in which an employee works for at least one hour; therefore if two employees work for at least one hour on a single day, this would be considered two man-days.¹⁴⁰ These man-days cumulate to form the total 500 allowed.¹⁴¹ This limitation is strictly analyzed and

¹³¹ *Id.* at 1308-09.

¹³² *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010).

¹³³ *E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, 1308 (E.D. Wash. 2014); see *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997); see also *Sanchez-Calderon v. Moorhouse Farms*, 995 F. Supp. 1098, 1107 (D. Or. 1997).

¹³⁴ 29 U.S.C. § 1803(a) (2015).

¹³⁵ *Id.*

¹³⁶ *Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994).

¹³⁷ *Martinez v. Hauch*, 838 F. Supp. 1209, 1211 (W.D. Mich. 1993). Immediate relatives include only spouses, children, parents and siblings. 29 C.F.R. § 500.20(o) (2015).

¹³⁸ *Martinez v. Hauch*, 838 F. Supp. 1209, 1212 (W.D. Mich. 1993).

¹³⁹ 29 U.S.C. § 213(a)(6)(A) (2015).

¹⁴⁰ See 29 C.F.R. § 780.305(a) (2015).

¹⁴¹ *Id.* (explaining that 500 man-days would be "the equivalent of seven employees employed full-time in a calendar quarter").

construed against the farmer due to the Act's remedial nature.¹⁴² With such a small amount constituting a day of labor, MSPA is likely to apply to all but the smallest farming entities.¹⁴³

III. THE APPLICATION OF JOINT EMPLOYMENT

Under MSPA, farmers and agribusinesses have increasingly been held as joint employers with farm labor contractors, imposing liability on contractor and farmer alike.¹⁴⁴ After extensive factual analyses, courts are more often than not finding that a joint employment relationship exists.¹⁴⁵ Therefore, farmers must be cautious in entering service agreements with labor contractors so as to limit ultimate liability and responsibility for the actions of the labor farm contractors.¹⁴⁶

A. The Increasing Use of Joint Employment Doctrine to Enforce Compliance

Only about six court decisions analyzing joint employment have found no such relationship, and those decisions are now outdated, with the recent trend finding of joint employment.¹⁴⁷ The most recent court that decided against joint employment made its decision over ten years ago in 2003.¹⁴⁸ All other courts since 2003 have found that joint employment was present.¹⁴⁹ Farmers and agribusinesses must limit their

¹⁴² *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1252 (N.D. Fla. 2014); 29 C.F.R. § 780.305(a) (2015).

¹⁴³ *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1252 (N.D. Fla. 2014).

¹⁴⁴ *LeRoy*, *supra* note 15, at 196-199.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1214-15 (11th Cir. 2003); *see also Charles v. Burton*, 169 F.3d 1322, 1325 (11th Cir. 1999); *see also Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994); *see also Ricketts v. Vann*, 32 F.3d 71, 74-76 (4th Cir. 1994); *see also Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1988); *see also Gonzalez v. Puente*, 705 F. Supp. 331, 336 (W.D. Tex. 1988).

¹⁴⁸ *Martinez-Mendoza*, 340 F.3d at 1214-15.

¹⁴⁹ *See Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408-10 (7th Cir. 2007); *see also Martinez-Mendoza*, 340 F.3d 1200 at 1214-15; *see also E.E.O.C. v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301, 1321 (E.D. Wash. 2014) (stating that there was a triable issue of fact as to whether they were joint employers and that summary judgment should therefore not be granted); *see also Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1087 (E.D. Cal. 2013); *see also Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1101 (D. Ariz. 2010).

liability if they do not want to be held responsible for the actions of farm labor contractors, especially since courts are commonly making a finding of joint employment.¹⁵⁰

B. The Rare Instance in Which Joint Employment is Not Found

The few courts that found no existence of a joint employment relationship did so only after great consideration to the facts of the case before making a determination.¹⁵¹ *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) determined that the farmer involved was not a joint employer because only two of the eleven factors analyzed were indicative of a joint employment relationship.¹⁵² In this case, the farmer, Long & Scott Farms, dealt almost exclusively with their labor contractor and rarely with the workers except for providing land in which they worked.¹⁵³ The farmer did not in any way actually control the worker's employment.¹⁵⁴ On the other hand, the court in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) disagreed with *Aimable*, feeling that the court in *Aimable* overemphasized the non-regulatory factors.¹⁵⁵ The court in *Torres-Lopez* believed that *Aimable* might have confused the issue of joint employment by emphasizing the dependence on the contractor over the farmer.¹⁵⁶ *Torres-Lopez* felt the real issue was not on whom the worker most depended, but how the worker actually economically depended on both the contractor and the farmer.¹⁵⁷

The court in *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) held that any one factor is not determinative of joint employment, and MSPA should be construed broadly due to its remedial nature.¹⁵⁸ The *Charles* court found that one of the parties qualified as a joint employer, but the

¹⁵⁰ See DOWNEY BRAND, *supra* note 10.

¹⁵¹ See *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1214-15 (11th Cir. 2003); see also *Charles v. Burton*, 169 F.3d 1322, 1328-29 (11th Cir. 1999); see also *Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994); see also *Ricketts v. Vann*, 32 F.3d 71, 74-76 (4th Cir. 1994); see also *Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1988); see also *Gonzalez v. Puente*, 705 F. Supp. 331, 335-36 (W.D. Tex. 1988).

¹⁵² *Aimable*, 20 F.3d at 445.

¹⁵³ *Id.* at 437.

¹⁵⁴ *Id.* at 441.

¹⁵⁵ *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997) (stating that *Aimable* was too lenient in analyzing the factors).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Charles v. Burton*, 169 F.3d 1322, 1333-34 (11th Cir. 1999).

other did not because the workers were only economically dependent on the one party.¹⁵⁹ This case involved three entities: the farm labor contractor; Burton, the farmer; and Little Rock, the produce packinghouse.¹⁶⁰ Burton hired Little Rock to package the harvested snap beans and cucumbers, agreeing with Little Rock that Burton would supply all of the necessary labor—Burton then hired the farm labor contractor to actually supply the workers.¹⁶¹ Burton was also responsible for directing the workers to different fields to harvest.¹⁶² Little Rock's main contribution was to provide the boxes used to harvest the snap beans and cucumbers; otherwise, it had little influence over the workers.¹⁶³ The farm labor contractor had violated the vehicle insurance requirements and Burton had no knowledge that the farm labor contractor had inadequate insurance.¹⁶⁴ The farm workers filed suit after a truck had overturned, killing several workers and causing serious bodily injury to others.¹⁶⁵ The court consequently held that Burton was liable as a joint employer because Burton's role met many of the factors, but Little Rock was not a joint employer because the workers were in no way economically dependent on Little Rock.¹⁶⁶ This case demonstrates the recurring problem of holding farmers liable even when the farmer may not be aware of his role as a joint employer.¹⁶⁷

In *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200 (11th Cir. 2003), only two of the seven factors analyzed indicated there might be a joint employment relationship: the fact that the farmworkers worked on Champion's land and that there was no special skill necessary for the farmworkers' tasks.¹⁶⁸ The court felt these factors weighed heavily against a joint relationship because there was no indication that Champion had any actual control over working conditions.¹⁶⁹ Because of its limited role, Champion was not liable for the MSPA violations of unpaid wages and unpaid overtime committed

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1325.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1326.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1333-34.

¹⁶⁷ *Id.*

¹⁶⁸ *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1212-15 (11th Cir. 2003).

¹⁶⁹ *Id.*

by the labor contractor.¹⁷⁰ In *Howard v. Malcolm*, 852 F.2d 101 (4th Cir. 1988), the court found that Malcolm had demonstrated very little control over the farmworkers.¹⁷¹ It believed that the two strongest factors, unskilled labor and Malcolm's signed contract with the labor contractor, indicated that the labor contractor would be liable for Malcolm's crew.¹⁷² Therefore, the circumstances under which a court has determined there is no joint employment is very limited.¹⁷³

C. Problems Farmers and Agribusinesses Face Because of Joint Employment

A joint employment determination can trigger the imposition of automatic liability upon the farmers for the farm labor contractors' misconduct.¹⁷⁴ An agribusiness or farmer cannot simply create a shield by hiring a farm labor contractor and giving that contractor direct oversight over workers.¹⁷⁵ Additionally, it is difficult for a farmer to foresee how a court may rule because there is no bright-line threshold for how many factors are necessary or which factors will be used to establish joint employment status.¹⁷⁶ The courts appear to be encouraging joint employment through its rulings as a way to help ensure that if a violation occurs, then at least some entity will be held responsible.¹⁷⁷ However, protection of farmworkers in this respect may be failing to adequately protect farmers and farm labor contractors who did not contribute to the harm.¹⁷⁸ Farmers can take steps themselves to ensure their own adequate protection.¹⁷⁹

¹⁷⁰ *Id.* at 1203-05.

¹⁷¹ *Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1988).

¹⁷² *Id.*

¹⁷³ *See* *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1214-15 (11th Cir. 2003); *see also* *Charles v. Burton*, 169 F.3d 1322, 1333-34 (11th Cir. 1999); *see also* *Aimable v. Long & Scott Farms*, 20 F.3d 434, 445 (11th Cir. 1994); *see also* *Ricketts v. Vann*, 32 F.3d 71, 74-76 (4th Cir. 1994); *see also* *Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1988); *see also* *Gonzalez v. Puente*, 705 F. Supp. 331, 335-36 (W.D. Tex. 1988).

¹⁷⁴ *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 592 (W.D. Tex. 1999).

¹⁷⁵ *See* *Saintida v. Tyre*, 783 F. Supp. 1368, 1373 (S.D. Fla. 1992).

¹⁷⁶ *See* *Charles v. Burton*, 169 F.3d 1322, 1333-34 (11th Cir. 1999) (“[T]he absence of evidence on any one or more of the criteria listed does not preclude a finding that an . . . agricultural employer was a joint employer along with the crewleader.”).

¹⁷⁷ Interview with Russell K. Ryan, *supra* note 17.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

IV. RECOMMENDATIONS

A farmer must protect himself against unintended joint employment status to avoid potentially catastrophic liabilities and losses if one or more of the farmer's labor contractors violate MSPA.¹⁸⁰ When a farmer hires a farm labor contractor, he must first confirm that the labor contractor has the proper licensing under MSPA.¹⁸¹ It is also necessary for the farmer to ensure that the farm labor contractor will comply with MSPA; otherwise, the farmer will be culpable for every violation the farm labor contractor may commit.¹⁸² To prevent liability as a joint employer, the farmer should enter into agreements with the Department of Labor or the farm labor contractor, preferably both, to limit the farmer's liability.¹⁸³

There are certain practices that the agricultural industry should consider to ensure compliance by the farm labor contractors and avoid liability due to the complexity and unforeseen problems of joint liability.¹⁸⁴ Farmers, agribusinesses, farm labor contractors, and the Department of Labor can create different types of monitoring agreements to avoid unintended joint employment status.¹⁸⁵ These agreements can work with the full cooperation of the Department of Labor to make sure liability is imposed against those who have actually contributed to the harm.¹⁸⁶ In fact, in California's Central San Joaquin Valley, a few enterprising and proactive agribusinesses have begun incorporating such agreements with the full cooperation of the Department of Labor already.¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ 29 U.S.C. § 1842 (2015).

¹⁸² Interview with Russell K. Ryan, *supra* note 17.

¹⁸³ *Id.*; Russell K. Ryan, Agreement for Farm Labor Contracting Services 1 (2014) (unpublished agreement) (on file with author) [hereinafter *FLC*]; Russell K. Ryan, United States Department of Labor Wage and Hour Division, Compliance and Self-Monitoring Agreement 1 (2014) (unpublished agreement) (on file with author) [hereinafter *Self-Monitoring Agreement*].

¹⁸⁴ Interview with Russell K. Ryan, *supra* note 17.

¹⁸⁵ *Id.*; *FLC*, *supra* note 183, at 1; *Self-Monitoring Agreement*, *supra* note 183, at 1.

¹⁸⁶ Interview with Russell K. Ryan, *supra* note 17; *Self-Monitoring Agreement*, *supra* note 183, at 1.

¹⁸⁷ Interview with Russell K. Ryan, *supra* note 17.

A. The Compliance and Self-Monitoring Agreement with the Wage and Hour Division of the Department of Labor

Recently, the Department of Labor has begun using compliance and self-monitoring agreements with select agribusinesses in California's Central Valley.¹⁸⁸ It intends to use this type of agreement as a model for further agreements with farmers and agribusinesses in the western United States.¹⁸⁹ A compliance and self-monitoring agreement recognizes that the agribusiness or farmer is an agricultural employer under MSPA, and promotes farmer and labor contractor compliance with MSPA.¹⁹⁰ Additionally, the agreement includes a stipulation that prior to using the farm labor contractor, the agribusiness has taken reasonable steps to ensure the farm labor contractor has registered with the Department of Labor and is authorized to act on behalf of the agribusiness.¹⁹¹ This type of stipulation helps limit the liability of the agribusiness as a joint employer.¹⁹²

The farmer or agribusiness may contract with the farm labor contractors so the contractors provide all necessary transportation training to farmworkers.¹⁹³ The farmer can agree to comply with all MSPA transportation requirements, including identifying vehicles used, maintaining insurance on those vehicles, ensuring those vehicles pass safety inspections, and proving that all drivers have a valid driver's license.¹⁹⁴

The farmer would be protected from liability for farm labor contractors' misconduct by including provisions that the farm labor contractor must assume responsibility in complying with MSPA.¹⁹⁵ Such compliance should include following the same procedures with transportation.¹⁹⁶ The farmer may also conduct random inspections to ensure that neither the agribusiness nor its employees are using transportation not covered under MSPA.¹⁹⁷ The farmer can enter into a

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Self-Monitoring Agreement, supra* note 183, at 1.

¹⁹¹ *See* 29 U.S.C. § 1811 (2015); *see also* 29 U.S.C. § 1812 (2015); *see also Self-Monitoring Agreement, supra* note 183, at 1-3.

¹⁹² *See Self-Monitoring Agreement, supra* note 183, at 3-4.

¹⁹³ *Id.* at 2-4.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 3-4.

¹⁹⁶ *Id.* at 2-5.

¹⁹⁷ *Id.* at 4.

written agreement to provide annual training regarding the requirements of MSPA with its employees and farm labor contractors.¹⁹⁸ Providing such training will ensure that all employees are well aware of the rights and protections attributed to them under MSPA.¹⁹⁹

This agreement helps establish a good faith effort to cooperate and work with the Department of Labor to foster full and complete compliance with MSPA by the agribusiness and the farm labor contractors.²⁰⁰ The agribusiness recognizes in writing that the agreement was not a waiver to the Department of Labor's right to investigate the premises, enforce MSPA, and enact any penalties associated with violations.²⁰¹ Enacting such an agreement with the Department of Labor helps guarantee that the agribusiness is doing everything in its power to comply with MSPA and display to the Department of Labor that the agribusiness is taking all reasonable steps.²⁰²

B. Agreement for Farm Labor Contracting Services

The agribusiness or farmer may also enter into an agreement with the farm labor contractor to make certain that the contractor is following MSPA.²⁰³ An "Agreement for Farm Labor Contracting Services" between the agribusiness and the farm labor contractor establishes the responsibilities of the farm labor contractor.²⁰⁴ Under this agreement, the farm labor contractor agrees to be licensed pursuant to MSPA requirements and to provide proof of that license.²⁰⁵ The farm labor contractor then agrees to act in good faith to be in full compliance under MSPA and all other applicable state and federal laws.²⁰⁶

The contractor, therefore, ensures that it will follow all transportation requirements, housing protocols, safety and health regulations, and provide necessary training as needed to enable compliance with those

¹⁹⁸ *Id.* at 4-5.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 5.

²⁰¹ *Id.*

²⁰² *See id.* at 1, 5.

²⁰³ *See FLC, supra* note 183, at 1.

²⁰⁴ *See id.* at 1-9.

²⁰⁵ *See* 29 U.S.C. § 1811 (2015); *see also* 29 U.S.C. § 1812 (2015); *see also FLC, supra* note 183, at 6.

²⁰⁶ *FLC, supra* note 183, at 6-7.

regulations under MSPA.²⁰⁷ The agreement designates the farm labor contractor as an independent contractor of the farmer and that the agribusiness or farmer have limited control, direction, and supervision under the agreement, ensuring that the labor contractor and not the farmer or agribusiness would be liable for all actions completed.²⁰⁸ It also requires the contractor to demonstrate and verify compliance with MSPA and other federal and state wage, hour and employment laws, along with providing documentation satisfying each of the obligations set forth in the agreement and MSPA.²⁰⁹ Such an agreement will specify exactly what contractors are responsible for under MSPA, which can include contractor registration and the necessity of providing workers all necessary information, insurance, and proper wage statements.²¹⁰ The agreement also gives the farmer or agribusiness the right to inspect (both scheduled and random inspections) the farm labor contractor to ensure that the contractor is in compliance with MSPA and other state and federal laws and regulations.²¹¹ Enacting such an agreement and requiring the contractor to demonstrate and verify compliance with MSPA along with all state and federal wage and hour laws will better protect the farmers and agribusinesses from unexpected liability.²¹²

V. CONCLUSION

MSPA was enacted to protect migrant and seasonal agricultural workers by ensuring that employers provide adequate protection and follow all laws.²¹³ Farmers and labor contractors have often been found as joint employers under the Act, meaning farmers are liable for their contractors' actions.²¹⁴ Joint employment is largely determined by how much farmworkers economically depend on the farmers as opposed to the labor contractors and courts most often will deem both liable when there is any semblance of reliance upon the farmer.²¹⁵ This decision occurs because if the court determines that a farmer or agribusiness satisfied various factors under the economic reality test, such as having

²⁰⁷ *See id.* at 2-7.

²⁰⁸ *Id.* at 5-6.

²⁰⁹ *Id.* at 6-8.

²¹⁰ *Id.* at 6-7.

²¹¹ *Id.* at 4, 8.

²¹² Interview with Russell K. Ryan, *supra* note 17.

²¹³ Part II.

²¹⁴ Part I-III.

²¹⁵ Part II.

managerial control, the court then deems the farmer as a joint employer with the farm labor contractor.²¹⁶ But, even as joint employers, farmers can still limit their individual liability through agreements with both the Department of Labor and labor contractors to ensure contractors are complying with MSPA.²¹⁷ As a result, the seasonal and migrant workers will still be protected, but it will be the labor contractor—the entity who hired the workers in the first place—that is ultimately responsible for compliance with MSPA, proper compensation, and protections to farmworkers.²¹⁸

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²¹⁶ Part II.

²¹⁷ Part III-IV.

²¹⁸ Part IV.

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