Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine

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Franchisors often impose exhaustive operational standards on franchisees, and enforce those standards by restricting the mobility of their franchisees and their franchisees' employees. But courts often ignore mobility limits when applying joint employer doctrine. This Article argues that courts and agencies should be more likely to find, and presume, that franchisors and their franchisees are joint employers under federal and state employment law based on proof that a franchisor restricts the mobility of franchisees or their employees. In so doing, this Article traces how the Chicago School's efficiency arguments in favor of relaxing antitrust law enforcement of vertical restraints developed into a presumption that franchisors are not joint employers, despite modern antitrust law litigation showing that mobility restraints can harm workers. It concludes that preventing franchisor-imposed mobility restraints from harming workers will require courts, legislatures, and agencies to center subordinate firm dependency on lead firms in the joint employer doctrine.

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INTRODUCTION

Some companies shape the working conditions of their subordinate firms'[1] employees by preventing those firms from operating independently and restricting how easily those firms' employees can obtain work elsewhere. Large franchisors, such as McDonald's and Domino's Pizza, contract with franchisees — often recruiting small proprietors who only run a franchise store — by including terms in their franchise agreements that encompass all aspects of a store's operation. Franchisors often require franchisees to pay fees and make upfront capital investments in franchise stores.[2] They often restrict franchisees from operating businesses that compete with the franchisors, even after the franchise agreement expires.[3] Some require "no-poaching" agreements that bar franchisees from hiring other franchise stores' employees.[4]

These and other *mobility limitations*[5] make subordinate firms depend on a lead firm (here, the franchisor) for economic survival, and thus afford franchisors significant power to shape franchisee workplaces in ways that tend to harm workers. For example, franchisors often provide franchisees with pay and supervision policies without explaining the legal obligations triggered by them. Although franchisors nominally "recommend" these policies, franchisees nonetheless follow them because they need the franchisor's approval for their survival.[6] In turn, these franchisees are less likely to comply with employment law.[7]

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[1] I use the term "subordinate firm" to describe a company that a lead firm contracts with to provide the lead firm's product or service to customers, instead of directly providing the product or service itself. While focused on the franchise relationship, this relationship is similar to other subcontracting relationships, such as between large retailers and small transportation and warehousing companies.

[2] Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 919-20 (2018).

[3] Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1343 (2021).

[4] Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1385-87 (2020).

[5] By mobility limitations, I mean to refer not only to vertical restraints under antitrust law, see Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 83 n.1 (1995), and contractual restrictions that limit labor mobility, see Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 666-85 (2020), but also any other kind of lead-firm practice that causes subordinate-firm dependency.

[6] Elmore & Griffith, *supra* note 3, at 1346-55.

[7] *See* DAVID WEIL, THE FISSURED WORKPLACE 9 (2014) (franchising can facilitate legal violations by subjecting franchisees to such onerous operational standards that the

Many franchisees are undercapitalized and violate employment law at higher rates than franchisors.[8] Particularly if the franchisee is judgment proof, the ability of franchise store employees to vindicate employment law rights hinges on the joint employment doctrine. Under it, a company has joint and several liability for its subordinate firm's violations of employment law if that company exerts sufficient control over the terms and conditions of that firm's workforce.[9] Mobility restraints can be central to how franchisors control franchise store workplaces.[10] But in applying that doctrine, because of joint employer doctrine's indeterminate[11] and often-narrow focus on "control," courts often ignore mobility limitations as evidence of control,[12] especially for lead firms in sectors in which contracting out for labor is common.[13] Courts using this test have discounted even substantial indirect control

only way to increase profit is reducing labor costs); *see also* Elmore, *supra* note 2, at 927; Alan B. Krueger & Orley C. Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Nat'l Bureau of Econ. Rsch.,Working Paper No. 24831, 2018).

8 Mark D. Easton, Andrea M. Noack & Leah F. Vosko, *Are Franchisees More Prone to Employment Standards Violations than Other Businesses? Evidence from Ontario, Canada*, 32 ECON. & LAB. RELS. REV. 39, 52-54, 56 (2020); Elmore & Griffith, *supra* note 3, at 1321.

9 *See infra* Part I.B.

10 Kate Griffith and I presented empirical findings from fast food franchise contracts that many franchisors require their franchisees not to operate competitive businesses during the term of the agreement, and nearly all franchisors have the uniform lateral right to terminate the franchise agreement and forbid the franchisee from competing with the franchisor afterward. Elmore & Griffith, *supra* note 3, at 1324, 1343-46, 1368. Brian Callaci, an economist, similarly found a wide range of franchisor contractual limitations on franchisee operations. *See* Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. & POL. ECON. 397, 407 tbl.2 (2021).

11 *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 281 (2011) (explaining that "the agency law test for employee status itself is notoriously vague and indeterminate," enabling employers to restructure operations to avoid liability). This can also result in inconsistent outcomes. *Compare* Torres v. Air to Ground Servs., Inc., 300 F.R.D. 386 (C.D. Cal. 2014) (considering quality control inspections as evidence of joint employer status), *with* Lepkowski v. Telatron Mktg. Grp., 766 F. Supp. 2d 572, 579 (W.D. Pa. 2011) (discounting evidence of quality control in joint employer analysis).

12 *See infra* Part I.B; *see, e.g.*, Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 739 (Cal. 2014) (disregarding evidence of franchisor control to create a presumption against franchisor joint employment).

13 *See infra* Part I.B; *see, e.g.*, Zheng v. Liberty Apparel Co., 355 F.3d 61, 75 (2d Cir. 2003) (concluding that "supervision with respect to contractual warranties of quality and time . . . has no bearing on the joint employment inquiry . . .").

by franchisors over franchisees' employees.[14] Even worse, some courts *presume* that franchisors cannot be joint employers.[15] This can erode not only legal compliance but also encourage companies to shift to a subcontracting relationship as a form of regulatory arbitrage.[16]

Relatively few commentators have identified what mobility limitations (contractual or otherwise) imply for joint employment status in employment law. Hiba Hafiz stresses buyer market power[17] as essential to joint employer analysis under the National Labor Relations Act ("NLRA").[18] Unlike many sources of employment law, however, the NLRA's bar on "unfair labor practices" can typically only be enforced by an agency-initiated administrative adjudication process by the National Labor Relations Board (NLRB or Board).[19] As a result, Hafiz's proposal to "integrat[e] social scientific methods and research into an administrable equal bargaining power standard,"[20] is primarily directed to the Board and appellate courts that review that agency's actions.[21] Outside the NLRA, others have argued that employer obligations for

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14 *See* Elmore & Griffith, *supra* note 3, at 1328-33.

15 *See Patterson*, 333 P.3d at 739.

16 *See* Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 740, 790-92; Kate Conger, *Uber and Lyft Consider Franchise-Like Model in California*, N.Y. TIMES (Aug. 18, 2020), https://www.nytimes.com/2020/08/18/technology/uber-lyft-franchise-california.html [https://perma.cc/G9DG-HJAM].

17 I use the term "buyer market power" to refer to an employer's market power to suppress employee wages to a sub-competitive level. Labor and antitrust law and economics scholarship also use the terms "employer market power," "monopsony power," and "labor market power," as synonyms. These terms are broader than the definition of "monopsony" in section 2 of the Sherman Act. *See* 15 U.S.C. § 2 (2018); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

18 Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 713 (2021). This is aligned with Griffith's and my argument that labor and employment laws must take account of power disparities in the employment relationship. *See* Elmore & Griffith, *supra* note 3, at 1356-61.

19 *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1553, 1552 (2002).

20 Hafiz, *supra* note 18, at 703.

21 *See id.* at 713 (proposing that the Board "define 'employer' or 'joint employer' to include *all those with buyer power, direct or indirect, over workers' labor inputs*"). Because this Article is primarily directed at how trial courts should interpret the joint employment standard, this Article does not expressly consider the joint employment standard under the NLRA, although its prescriptions are equally applicable to the Board's (and other agencies') joint employer definition. *See infra* Part IV.C. Callaci, similar to Hafiz, suggested that courts and agencies consider "social scientific evidence" of franchisors' market power over franchisees when deciding who counts as an "employee" or "employer." Callaci, *supra* note 10, at 416-18.

lead firms notwithstanding their control over workers can be justified to avoid worker domination.[22] Griffith and I argued that courts should consider a franchisor's "overall influence and power to co-determine the work" in the joint employment analysis of labor and employment law.[23]

This Article offers concrete ways to change joint employer doctrine under federal and state employment law to better account for the limited mobility of subordinate firms in employment relationships like franchising.[24] In so doing, it goes further than prior commentary in three ways.

First, it traces the genealogy of the judicial rationale for not treating franchisors as joint employers to the Chicago School's efficiency-based rationale to relax antitrust enforcement against vertical restraints in the franchise relationship.[25] The Supreme Court adopted this reasoning by the 1970s, finding that vertical restraints in franchising can encourage intrabrand competition and benefit consumers.[26] Franchisor attorneys then reshaped this efficiency-based rationale as justifying a favored judicial treatment of the franchise relationship in claims for harms that occur in franchise stores.[27] This favored status is justified, franchisor attorneys urge, because franchisees are independent entrepreneurs who benefit from the franchisor's operational control. Courts have increasingly accepted this rationale, and narrowly interpreted the franchisor's liability, first in tort claims seeking to hold the franchisor vicariously liable for harms to customers in franchise stores, and later in joint employer employment law claims. This rationale, however, is unsound. Its assumptions have been contradicted by courts, and

[22] Brishen Rogers has argued, for example, that "employment duties are fair when 'economic dependence' and 'unequal bargaining power' are sufficiently great that workers are at risk of *domination*." Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 500-03 (2016).

[23] Elmore & Griffith, *supra* note 3, at 1368.

[24] *See id.* at 1366-69.

[25] *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 394, 414-15 (2020); *infra* Part II.A.

[26] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54 (1977) (stating that vertical restraints can "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products"); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889-92 (2007) (finding that setting minimum prices on retailers can improve efficiency and interbrand competition).

[27] As Callaci explains, franchisor attorneys from the 1960s to the 1980s sought to reduce antitrust law enforcement against franchisors, and then reduce other regulation of the franchisors' economic control over franchise stores, including as a joint employer under labor law. *See* Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980*, 22 ENTER. & SOC'Y. 156, 165-74 (2021).

franchisors themselves, in recent antitrust law litigation.[28] Rejecting this presumption can reduce inequality of bargaining power,[29] and advance social equality[30] and the remedial goals of employment law and employment discrimination law.[31]

Second, this Article shows how joint employer law can better capture forms of subordinate-firm dependency beyond just weighing it as a factor in favor of joint employer status.[32] This includes a presumption that franchisors that significantly limit the mobility of their franchisees are joint employers,[33] and extending the "ABC" test for "employee" status,[34] which presumes an employment relationship, to the joint employer inquiry. While some courts only consider the ABC test as a measure of *worker dependency* on the putative joint employer, it is easy to extend its "independent trade or business" prong as a measure of *subordinate firm dependency*.

Third, this Article can guide future statutory and regulatory reform. It offers the ABC "independent trade or business" test in franchising and similar relationships, and proposes that when a lead firm uses mobility restraints such as non-compete and no-poaching agreements, it should

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[28] *See infra* Part II.A.

[29] Wage and hour law expressly seeks to reduce "inequality of bargaining power" between employees and employers. *See* 29 U.S.C. § 151 (2018); Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 558 (2019). *See generally* Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 409 n.18 (2020) ("wage and hour laws could help rectify these bargaining-power imbalances both directly (by mandating that pay not fall below a certain rate) and indirectly (by helping to set societal expectations about what is a fair wage)"). Courts have repeatedly recognized the purpose of wage and hour law to address inequality of bargaining power between employers and employees. *E.g.*, Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 302 (1985); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07 (1945); Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 32 (Cal. 2018).

[30] Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 230 (2013); *see also* Rogers, *supra* note 22, at 495, 502 (stating that employment law and employment discrimination law secure individual "dignity or interpersonal equality" and maintain an egalitarian political economy).

[31] *See* Elmore & Griffith *supra* note 3, at 1321.

[32] *See, e.g.*, Salinas v. Com. Interiors, 848 F.3d 125, 139 (4th Cir. 2017) (declaring that joint employer status depends on whether potential joint employers "share or codetermine the essential terms and conditions of a worker's employment").

[33] *See infra* Part II.B.

[34] *See infra* Part III. The ABC test presumes employment status unless the putative employer can show that the putative employee performs work free from control, in an independent trade, and outside the defendant's usual business. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 748-49 (2020).

be treated as a joint employer under a per se rule. Centering subordinate firm dependency in the joint employer doctrine, moreover, will require guidance from the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), and National Labor Relations Board (NLRB) about the effect of mobility limitations in joint employer litigation. Agency guidance and coordination will also be necessary to account for a lead firm's power to shape subordinate firm workplace practices outside of judicially-recognized forms of control, including the lead firm's buyer market power. Proving a company's buyer market power in antitrust law requires expensive economic analysis[35] that most employment-law plaintiffs and their lawyers cannot afford.[36] Accordingly, agency guidance is needed for how the joint employer doctrine accounts for subordinate firm dependence on lead firms with buyer market power, and how to assess buyer market power in joint employer claims.[37]

This Article, while considering a variety of economic relationships, focuses on franchisors in the fast food sector. Fast food franchisors are both exemplars of lead firms that use mobility restraints and central to

[35] *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 548 (2018) (proposing that FTC and DOJ in reviewing a proposed merger consider its harmful effects on workers by, after defining the relevant market, estimating the increase in labor market concentration and decrease in employee mobility, and then "econometrically estimat[ing] . . . how a merger is likely to change prices, quality, innovation, and so forth").

[36] Antitrust suits often require substantial upfront costs for plaintiffs, especially in economist expert fees. *See* Leah Nylen, *FTC's Economics Witness Out, in New Blow to Court Fight with Facebook*, POLITICO (July 30, 2021, 3:40 PM EDT), https://www.politico.com/news/2021/07/30/facebook-antitrust-suit-carl-shapiro-501825 [https://perma.cc/A94E-RWMZ] (detailing $5.7 million FTC paid to economics consulting firm and economics expert in beginning stage of FTC antitrust suit against Facebook). Class certification is, as a result, essential to finance private antitrust suits. *See* Marinescu & Posner, *supra* note 4, at 1387 (financing no-poaching antitrust suits in the fast food sector requires class certification because the low individual "damages will not finance a single expert report on market conditions"). Requiring these economic analyses would place insurmountable resource barriers on many private plaintiffs in employment and employment discrimination suits given the low value of many of these claims, the rise of mandatory arbitration with class waivers in employment contracts, and the difficulty in showing market effects in litigation involving an individual workplace. *See* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. (forthcoming 2021) (manuscript at 35-48).

[37] *See infra* Part IV. This is similar to the proposal by Hiba Hafiz that the National Labor Relations Board hire economists and consider buyer market power in labor law joint employer determinations. Hafiz, *supra* note 18, at 703-11.

the debate over joint-employer doctrine's reach.[38] Franchising is a dominant form in some low-wage sectors, especially fast food,[39] and companies in other sectors have converted to, or are considering, franchising as a form of regulatory arbitrage. This analysis has implications for other fissured industries in which contractors indirectly shape the workplaces of their subcontractors, such as large retailers that integrate delivery and warehousing personnel into their production process.[40]

This Article proceeds as follows. Part I explains how mobility limitations bind subordinate firms to the lead firms' operational standards, taking the franchise relationship as a main example. It will then reveal that courts often ignore mobility limitations in joint employment inquiries and sometimes presume that franchisors are not joint employers.

Part II traces the genealogy of judicial indifference to mobility restraints in the joint employment doctrine to Chicago School efficiency arguments in favor of relaxing antitrust law enforcement against vertical restraints. It will show that the assumptions grounding arguments that the franchise relationship should not be regulated under work law, that franchisees are entrepreneurs who benefit from franchisor mobility restraints, are rejected by courts – and contradicted by franchisors' own representations – in antitrust litigation. This shows how unsound it is for judges to presume that franchisors are not joint employers. It will propose centering subordinate firm dependency in the joint employment test by presuming that franchisors that limit franchisee mobility are joint employers.

Part III turns attention to the emerging trend of states presuming an employment relationship in the ABC test. It will show why mobility limitations justify extending the ABC test to the joint employment relationship, and propose an interpretation of the ABC test in which its

38 WEIL, *supra* note 7, at 122-24; Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PA. L. REV. ONLINE 73, 73-74 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1186&context=penn_law_review_online [https://perma.cc/59CN-FHVD].

39 *See* Elmore & Griffith, *supra* note 3, at 1318 & n.1 (reporting that nearly half of all franchisee employees work in the fast food sector, and that fast food franchise store employees "are among the lowest paid workers in the United States").

40 *See, e.g.*, Edmonds v. Amazon.com, Inc., No. C19-1613JLR, 2020 WL 1875533, at *4-6, *17-18 (W.D. Wash. Apr. 15, 2020) (finding that Amazon can jointly employ subcontractor delivery employees); Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 2:11-CV-8557-CAS, 2014 WL 183956, at *12, *16 (C.D. Cal. Jan. 14, 2014) (holding that Wal-Mart can jointly employ subcontractor warehousing employees).

"independently established trade" prong is a measure of subordinate firm dependence.

Part IV concludes with three proposals to address mobility limitations in ways unaccounted for in current doctrine: (1) federalizing the "independently established trade" test; (2) establishing a per se rule that lead firms that impose mobility restraints on subordinate firms are joint employers; and (3) agency enforcement, guidance, and coordination to reduce the harmful effects of mobility limitations on workers.

I. MOBILITY IN THE JOINT EMPLOYMENT DOCTRINE

This Part identifies mobility restraints that lead firms, such as franchisors, impose on their subcontractors as an independent source of power that can enable lead firm control over the workplace, and shows how courts routinely discount evidence of this power.

A. *Mobility Limitations as Mechanisms to Bind Subordinate to Lead Firms, Which Can Harm Workers*

Large companies have increasingly "fissured," or split apart their operations, often contracting out work through complex chains of organizations to cut down on labor costs.[41] Fissuring has created layered employment relationships for these workers. At the top of a layered employment relationship, the lead firm creates standards that workers must follow to provide uniform products and services to customers. At the bottom, "the actual liability, oversight, and supervision of the workforce become[s] the problem of" one or more subordinate firms.[42]

Franchising, in which the lead firm, a franchisor, contracts with franchisees, or subordinate firms, to provide a uniform, licensed product or service in chain stores in geographically dispersed markets, is a leading form of fissuring in the fast food sector. The typical fast food franchisor indirectly operates chain stores through small proprietors they contract with, franchisees, by embedding exhaustive operational standards in standardized contracts called franchise agreements.[43]

To overcome principal/agent problems that can arise in contracting out the responsibilities of supervising a large workforce to subordinate firms, lead firms establish mechanisms to effectively monitor and enforce their standards.[44] For many fast food franchisors, limiting

[41] WEIL, *supra* note 7, at 8.
[42] *Id.* at 9.
[43] Elmore, *supra* note 2, at 909, 913-15.
[44] WEIL, *supra* note 7, at 63-64.

franchisee mobility ensures franchisee compliance with their operational standards. Franchisors often recruit and retain undercapitalized, unsophisticated franchisees, and require capital investments in franchise stores.[45] Franchisors also often limit the franchisee's ability to compete with the franchisor while or after operating a franchise store.[46] By selecting sole proprietors that cannot easily absorb the losses of franchise termination, and by limiting the ability of franchisees to operate independently, franchisors ensure compliance with exhaustive operational standards in franchise agreements.[47]

Franchisors can use the limited mobility of franchisees to shape franchisee workplaces. Sometimes mobility restraints directly control franchise store employees, as in franchisor no-poaching agreements prohibiting franchisees from hiring the franchisor's or each others' employees.[48] This effectively prevents franchise store employees from seeking better conditions in other stores. But more often, franchisors limit franchisee mobility to indirectly control franchise stores. Franchisor operational standards often reach deep into the employment relationship, requiring specific background qualifications, work hours, job responsibilities, training, dress, and personal appearance. Franchisors also often provide other personnel recommendations and tools encompassing staffing, supervision, and pay, which franchisor representatives and inspectors expect that franchisees use.[49] By limiting franchisee mobility, franchisors ensure that franchisees comply with these standards.

To be sure, indirectly controlling subordinate firm workplaces by fostering subordinate firm dependency is not unique to franchising, and mobility limitations are not the only means by which franchisors can control franchise store operations. But franchisee dependence is a

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45 Elmore, *supra* note 2, at 919-20; *see also* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALBANY L. REV. 193, 205-07, 213 (2013).

46 Elmore & Griffith, *supra* note 3, at 1343-44 (finding that over a third of franchisors prohibit franchisees from operating a competitive business during the term of the agreement, and nearly all prohibit franchisee competition with the franchisor after the franchise agreement ends).

47 *See id.* at 1339.

48 Alan Krueger and Orley Ashenfelter found that half of fast food franchisors in 2016 required franchisees to sign no-poaching agreements that they would not hire each others' employees. *See* Krueger & Ashenfelter, *supra* note 7, at 4; *see also* Callaci, *supra* note 10, at 407 tbl.2 (finding that virtually all franchisors include a non-complete clause in franchise agreements, and a no-poaching clause in a little over half of them).

49 Elmore, *supra* note 2, at 920-24.

defining characteristic of the franchise relationship, and mobility limitations bind franchisees to franchisor standards.[50] Franchisee dependence heightens the consequences attending noncompliance with the franchisor's standards, by ensuring that termination and loss of upfront capital effectively shut down the franchisees' business.

The limited mobility of franchisees in the franchise relationship can also harm workers. Operational costs, imposed by franchisors on franchisees with limited ability to increase revenue, can suppress wages and other working conditions.[51] Franchising can facilitate legal violations by recruiting small, judgment-proof franchisees and subjecting them to such onerous operational standards that the only way to increase profit is reducing labor costs.[52] Unsophisticated, judgment-proof franchisees also have little incentive to consider whether franchisor recommended and required personnel policies trigger employment and employment discrimination law obligations.[53] No-poaching agreements can also suppress franchise store employees' work standards by prohibiting them from seeking better employment.[54]

The effect of mobility restraints on working conditions has garnered significant interest in antitrust law.[55] Restraints imposed by franchisors can violate the Sherman Act if "multiple franchisees in a single labor market possess market power, and hence can suppress wages by colluding."[56] Non-compete and no-poaching agreements can suppress

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[50] *Id.* at 919-22.

[51] *See* Krueger & Ashenfelter, *supra* note 7, at 17.

[52] *See* WEIL, *supra* note 7, at 9. Wage and hour law violations are more common in franchise stores than franchisor-owned stores. MinWoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 INDUS. & LAB. RELS. REV. 977, 985 (2015). Franchisees are more likely to violate wage and hour law, and less likely to repay owed wages, than comparable businesses. Easton et al., *supra* note 8, at 39-64.

[53] Elmore, *supra* note 2, at 922, 927-31.

[54] Marinescu & Posner, *supra* note 4, at 1385-88 (explaining theory of no-poaching antitrust suits). *See generally* WEIL, *supra* note 7, at 9 ("Laws that protect workers have not kept pace with the new boundaries of the fissured workplace.").

[55] Employers with buyer market power that suppress employee wages by restraining employee mobility can violate antitrust law. Plaintiffs in antitrust suits seek to show that there are horizontal elements of franchisor no-poaching agreements because of its more favorable standard for plaintiffs, as I will explain *infra* Part II.A. *See* Andrele Brutus St. Val, *No-Hire Provisions in McDonald's Franchise Agreements, an Antitrust Violation or Evidence of Joint Employer*, 23 EMP. RTS. & EMP. POL'Y J. 279, 283-301 (2020) (explaining legal standard of antitrust law challenges to franchisor no-poaching agreements).

[56] Naidu et al., *supra* note 35, at 598.

the wages of employees by reducing those workers' mobility.[57] The discovery of no-poaching agreements as a common feature of the franchise relationship has led to a recent wave of antitrust litigation by franchisee employees, and public agency enforcement, against fast food franchisors.[58] While some courts have dismissed these suits,[59] others have found that franchisor no-poach agreements can be an unlawful restraint.[60] State Attorneys General have since 2018 obtained agreements with hundreds of franchisors to cease using no-poaching agreements, including national fast-food franchisors.[61]

[57] *See, e.g.*, *id.* at 545 (explaining the prevalence of employer-required no-poaching and non-compete agreements, with the likely effect of "reduced mobility between jobs and possible suppressed wages").

[58] *See* St. Val, *supra* note 55, at 294-301 (discussing fast food no-poaching antitrust litigation and Washington Attorney General enforcement).

[59] These courts have dismissed no-poaching claims on the grounds that franchise store employees have failed to adequately allege a cognizable injury, and that the franchise relationship is entitled to firm immunity from Sherman Act liability. *E.g.*, Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1332 (S.D. Fla. 2020) (dismissing Sherman Act claim because plaintiffs failed to sufficiently allege that franchisor "and its franchisees are separate economic actors for antitrust purposes"); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, 639-40 (E.D. Mich. 2019), *appeal dismissed*, No. 19-1986, 2020 WL 948507 (6th Cir. Jan. 28, 2020) (granting motion to dismiss Sherman Act claim because of failure by plaintiff to adequately allege a cognizable injury). Two courts have denied class certification in no-poaching claims on the ground that plaintiffs could not meet the predominance requirement. *See* Conrad v. Jimmy John's Franchise, LLC, No. 18-CV-00133, 2021 WL 3268339, at *9-11 (S.D. Ill. July 30, 2021); Deslandes v. McDonalds USA, LCC, No. 17 C 4857, 2021 WL 3187668, at *15-16, *43 (N.D. Ill. July 28, 2021).

[60] *See* Blanton v. Domino's Pizza Franchising LLC, No. 18-13207, 2019 WL 2247731, at *7 (E.D. Mich. May 24, 2019) (denying motion to dismiss, finding that plaintiff adequately alleged that no-poaching agreement is an unlawful horizontal restraint of trade); Conrad v. Jimmy John's Franchise, LLC, No. 18-CV-00133, 2019 WL 2754864, at *3 (S.D. Ill. May 21, 2019), *motion to certify appeal denied*, No. 18-CV-00133, 2019 WL 4596762 (S.D. Ill. Aug. 6, 2019) (denying motion to dismiss Sherman Act claim); Yi v. SK Bakeries, LLC, No. 18-5627, 2018 WL 8918587, at *5 (W.D. Wash. Nov. 13, 2018) (denying motion to dismiss). Before denying class certification, the trial court in *Deslandes* found that the plaintiffs sufficiently alleged an unlawful restraint. *See Deslandes*, 2021 WL 3187668, at *6-7. As that court explained, a no-poaching agreement between a franchisor and franchisee that operate competing stores in the same geographic market can be a horizontal restraint that is ancillary to the franchise agreement, and "unlawful under quick look analysis." *Id.* at *7-8.

[61] The Washington Attorney General obtained agreements to cease using no-poaching agreements from over 200 franchisors. WASH. ATT'Y GEN.'S OFF., NO-POACH INITIATIVE 3, 6-9 (2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf [https://perma.cc/35R6-G9T4]. The Pennsylvania and Massachusetts Attorneys General led multi-state settlements with seven fast food franchisors to end no-poaching practices. Press Release, Pa. Att'y Gen. Josh Shapiro, *AG Shapiro Secures Win for Workers as Four Fast Food*

But it remains unclear whether antitrust law, employment law, or employment discrimination law can reach other employer practices that restrain mobility in ways that harm workers. Despite the fact that the widespread use of non-compete agreements by employers with buyer market power can violate antitrust law,[62] and studies showing that non-competes depress wages, employers commonly require them, even in states that will not enforce them.[63] As Orly Lobel explains, most non-compete agreements are unchallenged, and antitrust law claims by employees challenging a single contract often face an uphill challenge in showing anticompetitive market effects.[64] Employment and employment discrimination law, moreover, has not squarely considered the implications of mobility limitations that harm workers.[65] While subordinate firm dependency on lead firms can encourage violations of employment and employment discrimination law,[66] practical problems stunt the effectiveness of the private enforcement of employment and employment discrimination laws. Especially with the rise of mandatory arbitration with class waivers in employment,[67] the private enforcement of employment and employment discrimination laws seems unlikely to surface, much less challenge, the harmful effects of mobility limitations on workers.

Chains Agree to End Use of No-Poach Agreements (Mar. 12, 2019), https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements/ [https://perma.cc/9LMH-HQJF]; Press Release, Mass. Att'y Gen. Maura Healey, *Three Fast Food Chains Agree to End Use of No-Poach Agreements* (Mar. 2, 2020), https://www.mass.gov/news/three-fast-food-chains-agree-to-end-use-of-no-poach-agreements [https://perma.cc/S7MQ-WG86].

[62] *See* Naidu et al., *supra* note 35, at 596 (analogizing antitrust analysis of widespread use of non-compete agreements to successful antitrust law challenges to "exclusive dealing relationships between firms with market power and independent contractors").

[63] Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633, 633 (2020).

[64] *See* Lobel, *supra* note 36, at 34-36.

[65] A state common law challenge of non-compete agreements, for example, typically examines the reasonableness of the mobility restrictions on the individual employee and does not consider the employer's buyer market power. Naidu et al., *supra* note 35, at 595-96.

[66] *See* Elmore, *supra* note 2, at 927-32.

[67] *See* Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357, 386-87 (2020) (explaining loss of enforcement of employment and employment discrimination law with the rise of mandatory arbitration with class waiver requirements in employment contracts, especially after Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)).

The next section will examine the current judicial trend of presuming that franchisors do not jointly employ franchisee employees, which underscores the need for courts to account for how mobility limitations can heighten franchisee dependence as a form of control.

B. The Need to Consider Subordinate Firm Dependence as a Form of Control in the Joint Employment Doctrine

Whether a lead firm is co-liable for violations of employment and employment discrimination law along with its subordinate firms requires courts to apply a control-based, totality of the circumstances joint employment test,[68] guided by a number of factors borrowed in part from the common law of agency.[69] These factors evaluate the nature of the economic relationship between lead and subordinate firms, and the control that the lead firm has over the subordinate firm's employees. Courts in applying this test typically distinguish between "direct" and "indirect" control in the joint employment analysis. Here, indirect control means control that is not exercised directly, through day-to-day hiring, firing, supervision and pay, but through other means. Those means can be difficult to discern, because they are often remote, or reserved through contractual restrictions, but nonetheless shape workplace practices.[70]

The direct-indirect control distinction provides trial courts with significant discretion in how to evaluate control. Where a court seeks to narrow the standard, it primarily credits evidence of direct control over hiring, firing, pay, and supervision.[71] The Third Circuit, for

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68 *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (instructing that the remedial purposes of the law require a broad inquiry that "does not depend on such isolated factors but rather upon the circumstances of the whole activity").

69 Among the federal employment law statutes, only the Fair Labor Standards Act expressly defines employment more broadly than the common law, in the "suffer or permit" standard. *See* Griffith, *supra* note 29, at 579; *see also* Rogers, *supra* note 22, at 486. *See generally* Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1030-48 (1999) (discussing the historical origins of the "suffer or permit" language). The typical judicial approach to this FLSA standard, however, only considers additional factors, rather than using a different framework. *See* Frey v. Coleman, 903 F.3d 671, 676 (7th Cir. 2018).

70 *See* Elmore & Griffith, *supra* note 3, at 1326-28.

71 Decisions by the Second and Ninth Circuits in the 1980s suggested this restrictive interpretation of the joint employer test. *See, e.g.*, *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (listing four factors: "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of

example, in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*,[72] while instructing courts to consider the totality of the circumstances, directs courts to consider four narrow factors: "(1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like."[73]

A broader standard, in contrast, shifts focus from lead firm control of workers to additionally examine the lead firm's control of subordinate firms. The Fourth Circuit in *Salinas v. Commercial Interiors*,[74] for instance, considers whether the putative joint employers "codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."[75] *Salinas* instructs courts to make this inquiry by assessing the subordinate firm's relationship with the lead firm, including the degree of permanency and duration of the relationship, and their shared management and physical premises.[76]

While trial courts do not have unfettered discretion to credit or ignore indirect control,[77] these two different approaches to the joint employer doctrine can result in widely varying decisions.[78] This indeterminacy

employment, (3) determined the rate and method of payment, and (4) maintained employment records" (quoting *Bonnette v.* Cal. *Health & Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983))); Bonnette, 704 F.2d at 1470 (applying same test as *Carter*, 735 F.2d at 12).

72 683 F.3d 462 (3d Cir. 2012).

73 *Id.* at 469; *see also* Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1178 (11th Cir. 2012) (restricting control analysis to instance in which the putative joint employer "begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work" (quoting *Aimable v. Long & Scott Farms,* 20 F.3d 434, 441 (11th Cir. 1994))); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1701-03 (2016) (discussing *Layton*, 686 F.3d 1172, and trial court decisions applying a narrow version of the test).

74 848 F.3d 125 (4th Cir. 2017).

75 *Id.* at 141.

76 *See id.*

77 As a trial court held in rejecting a recent DOL final rule, the FLSA requires courts to consider evidence of economic dependence of the subordinate entity on the lead firm. *See* New York v. Scalia, 490 F. Supp 3d 748, 779 (S.D.N.Y. 2020) (quoting Cunningham-Parmeter, *supra* note 73, at 1693), *appeal filed sub nom.* New York v. Walsh, No. 20-3806 (2d Cir. 2020).

78 *Compare In re* Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig., 735 F. Supp. 2d 277, 338 (W.D. Pa. 2010), *aff'd*, 683 F.3d 462 (3d Cir. 2012) (finding "strong presumption" that a parent corporation is not a joint employer of a subsidiary's

has led courts to seek approaches to simplify the analysis. A technique often used by courts is to summarily dispose of joint employer claims involving economic relationships typically found not to establish a joint employment relationship. In *Zheng v. Liberty Apparel*,[79] in finding that a garment manufacturer could jointly employ its subcontractor's workforce, the Second Circuit nonetheless cautioned that not all subcontracting arrangements "should attract heightened scrutiny."[80] Instead, courts should be "mindful of the substantial and valuable place that outsourcing,"[81] has in the United States economy. Courts, the Second Circuit instructs, should apply less scrutiny to supervision "with respect to contractual warranties of quality and time of delivery," because this "is perfectly consistent with a typical, legitimate subcontracting arrangement."[82]

I will take up the instruction in *Zheng* that courts focus on the nature of the economic relationship to decide the level of scrutiny to apply indirect control in Part II(B). Here, I will focus on its suggestion that a subcontracting arrangement is not a joint employment relationship if it is routine or typical, which can be indifferent to lead firm power and subordinate firm dependence. Others have criticized this reasoning for enabling contractors to evade liability notwithstanding their control over the subcontractor's workplace.[83] Hinging the relevance of franchisor controls in a joint employer inquiry on the proportion of franchisors that require them seems arbitrary and counterproductive.[84] A rule that franchisors are not joint employers unless the franchise relationship is atypical encourages franchisors to adopt control measures so long as they are typical, and obscures whether these measures enable franchisors to control the franchisees' workplaces.

employees), *with* Flemming v. REM Conn. Cmty. Servs. Inc., No. 11CV689, 2012 WL 6681862, at *5-6 (D. Conn. Dec. 21, 2012) (rejecting presumption).

[79] 355 F.3d 61 (2d Cir. 2003).

[80] *Id.* at 73.

[81] *Id.*

[82] *Id.* at 75.

[83] As Keith Cunningham-Parmeter explains, this "absolve[s] businesses of liability if they ha[ve] innocent motives for creating triangular employment relationships." Cunningham-Parmeter, *supra* note 73, at 1702.

[84] For example, as of 2016, roughly half of franchisors required no-poaching agreements. Callaci, *supra* note 10, at 407 tbl.2; Elmore & Griffith, *supra* note 3, at 1358 n.221. It seems arbitrary that a no-poaching agreement is only relevant in a joint employment inquiry if roughly half is an insufficient proportion to make it a typical feature of the franchise relationship. And it seems equally arbitrary that if ninety percent of franchisors now decide to require no-poaching agreements, those agreements should be disregarded because the practice is a "substantial and valuable" feature of franchising. Zheng v. Liberty Apparel Co., 355 F.3d 61, 73 (2d Cir. 2003).

It is also contrary to established law. As many courts have held, outsourcing of normal, routine work on a production line weighs in favor of joint employer status because the worker is more likely to be dependent on the lead firm's overall production process.[85] The Second Circuit in *Zheng* found this, instead, to weigh against heightened scrutiny.

Courts have relied on *Zheng* to dismiss joint employer claims if the proffered control is standard in that type of relationship or sector.[86] Some courts have even elevated this deference to "typical" economic arrangements into a presumption of no joint employment, especially in parent-subsidiary and franchisor-franchisee relationships. The Fifth Circuit in *Lusk v. Foxmeyer Health Corp.*[87] rejected an employment discrimination claim that a parent corporation jointly employed a subsidiary's employee, finding that "[t]he doctrine of limited liability creates a strong presumption that a parent corporation is not the employer of its subsidiary's employees."[88] While some courts have followed this presumption,[89] others have rejected it.[90]

Some courts reject the presumption against joint employment in franchising.[91] But it is now common in the fast food sector, leading

[85] *E.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Torres-Lopez v. May, 111 F.3d 633, 641 (9th Cir. 1997); Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996).

[86] *See* Lepkowski v. Telatron Mktg. Grp., 766 F. Supp. 2d 572, 579 (W.D. Pa. 2011) (rejecting "detailed instructions and strict quality control" as evidence of joint employment); Quintanilla v. A & R Demolitina, Inc., No. Civ.A. H-04-1965, 2005 WL 2095104, at *11 (S.D. Tex. Aug. 30, 2005) (same).

[87] 129 F.3d 773 (5th Cir. 1997).

[88] *Id.* at 778.

[89] *See, e.g.*, Attanasio v. Cmty. Health Sys., Inc., 863 F. Supp. 2d 417, 426 (M.D. Pa. 2012) (adopting the presumption that a parent corporation is not an employer); *In re* Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig., 735 F. Supp. 2d 277, 338 (W.D. Pa. 2010), *aff'd*, 683 F.3d 462 (3d Cir. 2012) (dismissing FLSA claim against parent corporation on this ground).

[90] *See, e.g.*, Flemming v. REM Conn. Cmty. Servs. Inc., No. 11CV689, 2012 WL 6681862, at *5 (D. Conn. Dec. 21, 2012) (finding that "high degree" of control in parent-subsidary relationship justifies joint employer status); Hart v. Rick's Cabaret Int'l Inc., No. 09 Civ. 3043, 2010 WL 5297221, at *3 (S.D.N.Y. Dec. 20, 2010) (same); Colindres v. QuitFlex Mfg., 235 F.R.D. 347, 363 (S.D. Tex. 2006) (acknowledging presumption as a ground not to grant plaintiff motion for summary judgment on Title VII joint employer claim against parent corporation, but permitting claim to proceed).

[91] *See, e.g.*, Johnson v. McDonald Corp., No. 20-CV-1867, 2021 WL 2255000, at *3 (E.D. Mo. June 3, 2021) (denying McDonald's motion to dismiss in a Title VII claim that fast food franchisor is a joint employer). Courts appear more receptive to joint employer claims against franchisor hotels and motels, for instance. *See, e.g.*, Ocampo v. 455 Hospitality LLC, No. 14-CV-9614, 2016 WL 4926204, at *7-9 (S.D.N.Y. Sept. 15,

courts to ignore or minimize substantial evidence and allegations of control.[92] The Fifth Circuit in *Orozco v. Plackis*,[93] for example, found insufficient evidence that a fast food franchisor trained the plaintiff, set policies for the franchise store, and reserved the right to control "selection, supervision, or training of personnel" in the franchise agreement.[94] The Ninth Circuit, in *Salazar v. McDonald's Corp.*, rejected the franchisor's alleged participation in a Fair Labor Standards Act (FLSA) violation as evidence of a franchisor's joint employer status.[95] Federal and state trial courts in California and New York have rejected similar challenges.[96]

The presumption of no joint employment in franchising has created a "safe harbor"[97] for franchisors, insulating them from liability so long as they embed forms of control consistent with a "typical" franchise relationship.

Eighteen states have gone even further, amending their state laws to expressly exclude franchisors from state employment laws.[98] Some state franchisor joint employer shield laws embrace the typicality framework from *Zheng* as an exception to the state employment law exemption.[99]

2016) (finding that allegations of indirect control are sufficient to defeat a franchisor's motion to dismiss the joint employer claim).

[92] *See* Jacobson v. Comcast Corp., 740 F. Supp. 2d 683, 690 n.6 (D. Md. 2010) ("Courts evaluating franchise relationship[s] for joint employment have routinely concluded that a franchisor's expansive control over a franchisee does not create a joint employment relationship [on its own].").

[93] 757 F.3d 445 (5th Cir. 2014).

[94] *Id.* at 450-52.

[95] 944 F.3d 1024 (9th Cir. 2019).

[96] *See In re* Domino's Pizza Inc., No. 16CV2492, 2018 WL 4757944, at *5 (S.D.N.Y. Sept. 30, 2018); Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 738-39 (Cal. 2014).

[97] As Griffith and I argue, this safe harbor "preclude[es] franchisor liability for labor and employment law violations in franchise stores where there is no evidence of the franchisor's direct hiring, firing, or supervision of employees." Elmore & Griffith, *supra* note 3, at 1325.

[98] *Id.* at 1336; *see, e.g.*, IND. CODE § 23-2-2.5-0.5 (2021) (declaring that a franchisor is not the employer of a franchisee or the franchisee's employees); KY. REV. STAT. ANN. § 337.010(1)(e) (2021) ("[N]either a franchisee nor franchisee's employee shall be deemed to be an employee of the franchisor . . . ."); TEX. LAB. CODE ANN. §§ 21.0022, 61.0031 (2021) (deeming that a franchisor is not the employer of a franchisee unless it exercises "a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand"); WIS. STAT. § 104.015 (2021) (same).

[99] *See* Allison R. Grow & Adrienne L. Saltz, *Effectiveness of the Legislative Response to Joint Employer Liability*, 37 FRANCHISE L.J. 349, 351-67 (2018) (discussing franchisor shield laws in Alabama, Arizona, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Michigan, New Hampshire, North Carolina, North Dakota, Oklahoma, South Dakota,

In Texas, as in Utah and Wisconsin, a franchisor is not a joint employer unless it "exercised a type or degree of control over the franchisee or the franchisee's employees *not customarily exercised by a franchisor* for the purpose of protecting the franchisor's trademarks and brand."[100] Similar to Trump-era administrative agencies, the franchisor-shield laws of Michigan and Louisiana, in contrast, establish a safe harbor by codifying a narrow control test. Those states, like the current NLRB Trump-era rule, only permit a joint employment finding for franchisors that "share" or "co-determine" the terms and conditions of employment and "directly and immediately" control franchisee workplaces.[101]

The foreclosure of joint employment in franchising has enabled franchisors to elide considerable and increasingly intensive forms of control, especially through contractual restrictions and remote monitoring and supervision.[102] Other defendants in employment law claims now seek a presumption that they are not joint employers because of their "quasi-franchise relationship" with their subcontractors.[103] Companies concerned about their potential employment law liability as direct employers have converted to a franchise relationship, or have considered doing so, as a form of regulatory arbitrage. After courts found that FedEx is an employer of its drivers, for instance, FedEx responded by restructuring its operations to a franchise system, once again shifting its operations outside of the boundaries of employment.[104] Uber has considered shifting to a

Tennessee, Texas, Utah, Wisconsin, and Wyoming). As of 2018, Wisconsin and Utah adopted the same typicality exemption as Texas. *Id.* at 371.

[100] *Id.* (citing, in addition, UTAH CODE 31A-40-212(2) and WIS. STAT. 102.04(2r)); TEX. LAB. CODE ANN. § 21.0022 (2021) (emphasis added).

[101] *Id.* at 371 (citing LA. STATE. § 23:921 and MICH. COMP. LAWS § 418.120); Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. at 11186, 11198 (requiring a showing of "'possession and exercise of substantial direct and immediate control over one or more essential terms and conditions of employment'"); *see* Elmore & Griffith, *supra* note 3, at 1367.

[102] Elmore & Griffith, *supra* note 3, at 1328-33, 1337-55; Elmore, *supra* note 2, at 922. While franchising as an organizational form has existed for decades, the contractual restrictions imposed by franchisors on franchisees have increased over time. Elmore, *supra* note 2, at 922 & n.57.

[103] Ambrose v. Avis Rent a Car Sys. Inc., No. 11-CV-09992, 2014 WL 6976114, at *6-8 (C.D. Cal. Dec. 8, 2014); *see also* Henderson v. Equilon Enters., 253 Cal. Rptr. 3d 738, 749 n.5 (2019), *review denied*, (Feb. 11, 2020) (finding persuasive Shell's argument that its detailed operational control over its convenience stores "do not create a joint employer relationship" because they are similar to the operational control embedded in franchise agreements).

[104] As Kenneth Dau-Schmidt explains, FedEx "has spent years losing cases and then tweaking its operating system in an effort to claim that its drivers are independent contractors rather than employees, and so exempt from coverage under the NLRA, and

franchising model to avoid coverage under the broad "ABC" state employment tests.[105]

The incentive that a control-based test creates for companies to shift operations to avoid employment law liability has led scholars to question whether control should serve as a benchmark for employment status.[106] This Article is aligned with this view, and will propose law reform that does not depend on a finding of a franchisor's direct control over franchise store workplaces in Parts III and IV. But, in the interim, courts also need a principle to guide them in applying the control-based test to joint employment claims against franchisors.

This Article proposes (in Part II(B)) centering dependence in the joint employment test. Subordinate firm dependence can create a presumption of lead firm joint employer status.[107] This approach is consistent with the Fourth Circuit's instruction in *Salinas* to focus on the nature of the relationship between the lead firm and its subordinate firms.[108] Replacing the *Zheng* typicality focus with subordinate firm

other federal and state laws." Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. CHI. LEGAL F. 63, 79. FedEx has converted to an "independent service provider" ("ISP") model, in which drivers "cover five service areas." Dubal, *supra* note 16, at 790. ISP drivers who cover this territory typically hire their own drivers and spend significant time managing, taking them (once again) outside the boundary of employment. *Id.*

105 *See* Erin Mulvaney & Paige Smith, *Uber, Lyft Won't Eliminate Legal Fights with New Business Models*, BLOOMBERG L. (Aug. 26, 2020, 2:46 AM), https://news.bloomberglaw.com/daily-labor-report/uber-lyft-wont-eliminate-legal-fights-with-new-business-models [https://perma.cc/2EXD-Y9EK]. At writing, Uber has placed those plans on hold as it seeks instead to lobby states to enact shield laws for transportation network companies. Proposition 22, which exempts Uber from California employment laws, has been found unconstitutional in trial-court litigation, which is on appeal. Castellanos v. State, No. RG21088725, 2021 WL 3730951, at *2-5 (Cal. Super. Aug. 20, 2021). If upheld, Uber may shift back from a litigation to a franchising strategy to avoid liability.

106 Veena Dubal and Noah Zatz critique a control-based test for enabling companies to restructure operations in order to avoid a finding that they are employers. *See* Dubal, *supra* note 16, at 794 ("The legal entitlement of firms to restructure their business model undermines any redistributive power enabled by a judicial finding of employee status."); Zatz, *supra* note 11, at 289 ("If a firm designs a work structure to achieve an independent contractor designation, simply asking after the fact whether the workers are employees or independent contractors misses the way that both the firm and the law already set up the problem." (footnote omitted)). I have previously argued that a narrow control-based joint employment test "fails to account for the franchisor's relationships with franchisees and franchise store employees and can have the perverse effect of encouraging employment law violations in franchise stores." Elmore, *supra* note 2, at 939.

107 Zheng v. Liberty Apparel Co., 355 F.3d 61, 75 n.12 (2d Cir. 2003).

108 Salinas v. Com. Interiors, 848 F.3d 125, 139 (4th Cir. 2017).

dependency can account for mobility limitations in the joint employment analysis, dispel the presumption of no joint employer status for franchisors, and remove incentives for firms to restructure operations to a franchise relationship to avoid liability.

II. MOBILITY LIMITATIONS AS DEPENDENCY IN THE JOINT EMPLOYMENT DOCTRINE

To show why courts often ignore franchisor mobility restraints that foster franchisee dependency in joint employment claims, this Part begins with a genealogy of the judicial turn away from regulating the franchise relationship. It begins with the Chicago School law and economics movement in the 1960s. The Chicago School advanced an efficiency rationale to relax antitrust law enforcement against franchisor vertical restraints of franchisees.[109] After the Supreme Court accepted this rationale, removing most franchisor vertical restraints from antitrust scrutiny, lawyers for franchisors repackaged it as a defense in tort and employment law claims of franchisor liability for harm that occurs in franchise stores. Courts, franchisor attorneys in these cases argued, should protect the franchise relationship by narrowly interpreting vicarious liability and joint employment standards. These arguments succeeded in migrating a protective view of the franchise relationship, justifying a presumption of no franchisor liability in vicarious liability standards, and then again in employment discrimination and employment law. This section will show that the assumptions underlying the presumption against joint employer liability, that franchisees are independent entrepreneurs who benefit from the franchisor's operational control, are unwarranted. They are most recently belied by court findings and franchisor representations in current antitrust litigation. It will conclude that centering subordinate firm dependency can guide the joint employer analysis. This approach can justify a presumption that lead firms that limit the mobility of subordinate firms are joint employers.

A. The Genealogy of the Presumption that Franchisors Are Not Joint Employers

In the decade after the New Deal, the Supreme Court broadly construed the employment relationship in the FLSA and NLRA and embraced a purposive approach to defining the employment

[109] Paul, *supra* note 25, at 394, 414-15.

relationship in New Deal statutes.[110] But in 1947, the Taft-Hartley Act[111] amended the NLRA's definition of "employee" to expressly exclude independent contractors.[112] After the 1960s, the Supreme Court instructed courts to adopt the common law definition of "employee" for any law in which the statute is silent or ambiguous about its definition.[113]

Neither change, however, explains why judges narrowed joint employment doctrine across work law for franchisors. As Sachin Pandya explains, while the legislative history of the Taft-Hartley Act was critical of earlier precedent regarding the employment status of independent contractors, it did not amend the NLRA to supplant the pre-1947 joint employment doctrine.[114] Congress, moreover, did not amend the FLSA's definitions of "employer", "employee", or "employ".[115] Thus, the Supreme Court in 1947 held in *Rutherford Food v. McComb*,[116] that courts should use an "economic realities" test for FLSA that considers whether the workers are integrated into the contractor's production process.[117]

The Supreme Court's clear-statement rule for the statutory term "employee" also does not require a narrow joint employment test. The common law of agency right to control test[118] considers a wide variety of factors that elicit the agent's dependence on the principal, such as the

110 *See* United States v. Silk, 331 U.S. 704, 713 (1947), *abrogated by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); NLRB v. Hearst Publ'ns, 322 U.S. 111, 126-28 (1944), *overruled in part by Darden*, 503 U.S. 318.

111 Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 152(3) (2018).

112 *Id.* § 152(3) (amending the NLRA to note that the definition of an employee "shall not include . . . any individual having the status of an independent contractor").

113 *See Darden*, 503 U.S. at 322-23; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989); NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968) (applying common law definition of employment in interpreting NLRA).

114 Sachin S. Pandya, *What Taft-Hartley Did to Joint-Employer Doctrine*, 25 EMP. RTS. & EMP. POL. J. (forthcoming 2021) (manuscript at 13-21).

115 *See* Goldstein et al., *supra* note 69, at 1015-102; Griffith, *supra* note 35, at 579.

116 331 U.S. 722 (1947).

117 *Id.* at 726-37, 730 (finding that workers' work in contractor's production line, on the contractor's premises and using the contractor's equipment, weigh in favor of joint employment); *see also* Torres-Lopez v. May, 111 F.3d 633, 640 (9th Cir. 1997) (relying on *Rutherford* in applying an "economic reality" test for FLSA).

118 The common law of agency "right to control" uses a "manner and means" test to distinguish employees from independent contractors. The Restatement (Third) of Agency Law instructs that an employer is subject to vicarious liability so long as the employee "is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work," for torts by employees acting within the scope of employment. RESTATEMENT (THIRD) OF AGENCY § 7.07 (3)(a) (AM L. INST. 2006).

agent's distinct occupation or business, skill required, time employed, and whether the work is part of the principal's business.[119] These factors substantially overlap with the economic realities test.[120] Many courts, relying on these factors, have imposed vicarious (or apparent agency) liability on companies in tort claims based on factors other than direct control over the work.[121]

Instead, the judicial turn toward a narrow joint employment test, at least in franchising, began with the Chicago School in the 1960s, which proposed that relaxing antitrust law enforcement against restraints made between entities at different levels of a supply chain, or "vertical" restraints, can promote interbrand competition.[122] As courts and administrative agencies accepted this efficiency-based rationale, franchisors repurposed this justification to persuade courts to adopt a presumption of no vicarious liability for customer tort claims in franchise stores, and later of no joint employer status under employment and employment discrimination laws.

While courts often treat "horizontal" restraints, or agreements between competitors at the same level of the market, as inherently anticompetitive, and per se unlawful under antitrust law, they typically apply the less exacting rule of reason standard to vertical restraints.[123]

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[119] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM L. INST. 1958).

[120] As the Seventh Circuit acknowledged in explaining its version of the joint employer test in Frey v. Coleman, 903 F.3d 671 (7th Cir. 2018), "the 'economic realities' test . . . is, in its essence, an application of general principles of agency law to the facts of the case." *Id.* at 676.

[121] *See, e.g.*, Drexel v. Union Prescription Ctrs., *Inc*., 582 F.2d 781 (3d Cir. 1978) (finding that factual issues preclude summary judgment on the vicarious liability and apparent agency questions of whether the franchisor retained a right to control or held out its franchisee as an agent); Estate of Anderson v. Denny's Inc., 987 F. Supp. 2d 1113 (D.N.M. 2013) (finding that franchisor's vicarious liability for franchisee's negligence in wrongful death action by worker killed during robbery is an appropriate jury question); Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792 (D. Or. 1998) (finding that the franchisor has sufficient right to control); People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728 (Cal. Ct. App. 2013) (affirming vicarious liability theory finding franchisor vicariously liable for franchisee's illegal advertising that franchisor had the right to control).

[122] The Chicago School, which is associated with the law and economics movement, in the 1960s and 1970s promoted an economic standard of efficiency for antitrust law. *See* Paul, *supra* note 25, at 414-15.

[123] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-94, 907 (2007) (describing horizontal agreements to fix prices or divide markets as *per se* unlawful because they are inherently anticompetitive, while holding that vertical price restraints are subject to the rule of reason standard, which permits restraints that courts deem to be procompetitive); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) (examining 222 antitrust claims over a decade in which courts applied rule of reason analysis, and finding that in

This was not always the case. In the decades after the New Deal, courts viewed vertical restraints with skepticism under antitrust law,[124] and vertical restraints remained of uncertain legality as late as the 1970s.[125] In *United States v. Arnold, Schwinn & Co.*,[126] the Court held in 1967 that a franchisor's vertical restraints can be per se illegal, casting doubt on the legality of franchisor restrictions on franchisee territory, services, and prices.[127] *Schwinn* provoked fierce criticism from Robert Bork, Frank Easterbrook, and Richard Posner, who argued in favor of curtailing judicial scrutiny of vertical restraints.[128] Citing Bork, Easterbrook, and Posner, the Supreme Court reversed *Schwinn* and held in *Continental T.V. v. GTE Sylvania*,[129] that vertical restraints "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies," in distribution.[130] This efficiency rationale has largely removed vertical restraints from antitrust scrutiny.[131]

Economists after *Sylvania* viewed franchising as an efficient coordination of production outside the firm that should receive deferential treatment under antitrust law. Economists beginning in the 1970s posited that firms franchised in the fast food sector instead of

all but one of these cases the plaintiffs lost, primarily because those courts found that "the plaintiff failed to show an anticompetitive effect").

124 The Supreme Court first expressed skepticism about vertical territorial restrictions in 1963 in *White Motor Co. v. United States*, 372 U.S. 253 (1963), and remanded the case for the trial court to determine whether to apply the *per se* illegal or rule of reason standard. *Id.* at 263.

125 Callaci, *supra* note 27, at 164-69. *See generally* Paul, *supra* note 25, at 394-95 (explaining how the Chicago School worked to limit antitrust enforcement against vertical restraints).

126 388 U.S. 365 (1967).

127 *Id.* at 379 (holding that after a manufacturer's sale of a product to a distributor, manufacturer territorial restraints are *per se* unlawful).

128 Posner argued that nonprice vertical restraints have no anticompetitive effect and enhance interbrand competition. Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 297 (1975) (explaining criticism of *Schwinn*). Easterbrook went further, arguing that vertical price restraints, or "resale price maintenance," should be permitted because they can be procompetitive by forcing prices down, reigning in distributor market power. Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 n.20 (1981). Bork urged the Supreme Court to "abandon its concern with such beneficial practices as . . . vertical price maintenance and market division." ROBERT H. BORK, THE ANTITRUST PARADOX 406 (1978).

129 433 U.S. 36 (1977).

130 *Id.* at 54.

131 In *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Supreme Court found maximum prices procompetitive. *See id.* at 22. By 2007, the Supreme Court eliminated the *per se* rule for minimum price restraints. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

directing managers in firm-owned stores because of the high monitoring costs of remote supervision.[132] In this view, franchisees who operate as agents of the franchisor can more efficiently monitor geographically dispersed stores. Franchising as a solution to the "moral hazard" of manager and employee shirking came to dominate economic theory of why firms franchise.[133] This view was highly influential among economists in the following decades,[134] and accepted by antitrust scholars who argued that vertical restraints can efficiently reduce franchisee opportunism.[135]

The franchisor argument against regulation on efficiency grounds did not stop with antitrust law, however. Franchisor attorneys sought to extend this efficiency rationale to limit franchisor vicarious liability for tort suits in franchise stores.[136] But extending efficiency as a defense for claims against franchisors outside of antitrust law faced several challenges. Fairness remained an important, competing value in the franchise relationship, especially with the rise of state franchise statutes prohibiting unfair and deceptive franchising practices in the 1970s.[137] And even assuming that vicarious liability decreases efficiency, a

[132] *See* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 226-31 (1978).

[133] *See, e.g.*, Sugato Bhattacharyya & Francine Lafontaine, *Double-Sided Moral Hazard and the Nature of Share Contracts*, 26 RAND J. ECON. 761, 761-62 (1995) (summarizing literature).

[134] *See* James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 J. FIN. ECON. 401, 420 (1987).

[135] *See, e.g.*, Henry N. Butler & Barry D. Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organization Theory*, 32 EMORY L.J. 1009, 1092-93 (1983) (arguing that franchisors restrain franchisee behavior "in order to deter franchisee shirking and intrabrand free riding," and that market forces sufficiently deter franchisor opportunism).

[136] *See, e.g.*, Kevin M. Shelley & Susan H. Morton, *"Control" in Franchising and the Common Law*, 19 FRANCHISE L.J. 119, 127 (2000) (urging that courts favorably view the franchise relationship as enabling franchisors to protect their brands while promoting franchisee entrepreneurialism). *See generally* William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23 (2008) (arguing that vicarious liability is undesirable on efficiency grounds).

[137] Jean Wegman Burns, *Vertical Restraints, Efficiency, and the Real World*, 62 FORDHAM L. REV. 597, 617-21 (1993) (arguing that "fairness concerns" animated the enactment of state franchise laws in the 1970s, which protect "the franchisee . . . from unfair termination (or the threat of termination), overreaching, and arbitrary or unethical business practices by an unscrupulous franchisor" (citations omitted)).

contestable proposition,[138] vicarious liability primarily turns on the principal's control over the agent,[139] not the relationship's efficiency. Nor does the franchisor's Lanham Act[140] duty to supervise a registered trademark insulate franchisors from vicarious liability.[141] The Lanham Act, as the Seventh Circuit held in rejecting this defense, "does not give a licensor control over the day-to-day operations of a licensee beyond that necessary to ensure uniform quality of the product or service in question."[142] This left open the question of under what circumstances a franchisor's right to control franchisees and their workplaces creates an employment relationship.[143] For these reasons, courts up until the 1990s applied the law of vicarious liability unevenly to franchisors.[144]

By the 2000s, franchisor advocates understood that efficiency alone was not enough to merit a presumption against vicarious liability for torts in franchise stores. The "task," according to one set of franchisor counsel writing in 2000, "is to convince the courts that the modern franchise relationship is necessarily premised upon the imposition of systemwide standards to ensure uniformity and quality," which creates

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138 Vicarious liability can improve efficiency by inducing the principal to take optimal care, particularly when violations are easily observable and agents are judgment proof, and because principals can be superior risk bearers, if they are wealthier and can more easily obtain insurance than agents. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1235-39, 1244-46 (1984); *see* Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1115, 1118-19 (2002) (proposing vicarious liability for franchisors on an efficiency basis, arguing that franchisors can spread risk better than customers, and "the trademark owner — unlike the customer — typically has both the opportunity and the bargaining leverage to investigate and control the risk of insolvency").

139 Rogers, *supra* note 22, at 484-85.

140 15 U.S.C. §§ 1051-1141 (2018).

141 Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781, 785-86 & n.5 (3d Cir. 1978) (summarizing case law during this period holding that "the mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such a relationship").

142 Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1327 (7th Cir. 1979).

143 *See Drexel*, 582 F.2d at 790 (holding that disputed facts about extent of franchisor control preclude summary judgment on issue of vicarious liability).

144 *Compare id.*, *and* Miller v. McDonald's Corp., 945 P.2d 1107 (Or. Ct. App. 1997) (finding that the franchisor's operational control and identification of store with franchisor brand sufficed to create jury questions on actual agent and apparent agent theories), *with* Cislaw v. Southland Corp., 4 Cal. App. 4th 1284 (Cal. App. 1992) (finding that the franchisor did not sufficiently control operations to be vicariously liable in negligence claim against franchisee). Franchise store employees may independently claim that the franchisee is an apparent agent of a franchisor, notwithstanding the franchisor's joint employer status. *See* RESTATEMENT (SECOND) OF AGENCY § 267 (AM. L. INST. 1958) (providing apparent agency standard); Elmore, *supra* note 2, at 947-49.

benefits for both franchisors and franchisees.[145] This beneficial relationship, the authors argued, merits favorable treatment under vicarious liability standards, limiting franchisors' liability to those rare instances in which they exercise "day-to-day operational control" over franchise stores.[146]

Joseph King, a law professor, advanced this position in a law review article, arguing that "unique realities of present-day franchising," namely that franchisors control franchise store operations in order to protect their brands, require a special rule narrowing vicarious liability in franchising.[147] For King, vicarious liability "overrides the freedom of the parties to chart the parameters of their relationship and to enjoy the benefits of that relationship, a type of business relationship that was never intended to be that of employer-employee."[148] King assumed away the possibility of franchisors controlling franchise stores, finding "doubtful" that the operational requirements, trainings, monitoring, and sanctions commonly required by franchisors "add anything in the way of effective day-day-operational 'control.'"[149]

Courts in the 2000s came to adopt the franchisor's view of franchisees as independent entrepreneurs who benefit from franchisor control, requiring a presumption of no liability to avoid disrupting the franchise relationship. This began as a limitation on franchisor vicarious liability. The Supreme Court of Wisconsin in *Kerl v. Dennis Rasmussen*,[150] announced an "instrumentality rule" for franchise relationships, in which plaintiffs to establish a vicarious liability theory must show that "the franchisor had control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."[151] The court reasoned that vicarious liability would not otherwise induce efficient precautions because "[t]he typical franchisee is an independent business or entrepreneur, often distant from the franchisor and not subject to day-to-day managerial

145 Shelley & Morton, *supra* note 136, at 127.

146 *Id.*

147 Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 468 (2005). King argued, specifically, that franchisors exercise control to protect their trademarks. *Id.* at 468-69. While franchisor control extends to trademarks, franchisor measures to promote the brand extend well beyond what the Lanham Act requires, and indeed beyond measures to protect the franchisor's marks. *See infra* Part III.

148 King, *supra* note 147, at 470.

149 *Id.* at 470-71.

150 682 N.W.2d 328 (Wis. 2004).

151 *Id.* at 340, 342.

supervision by the franchisor."[152] The International Franchise Association (IFA), the leading franchisor trade group in the United States, relied on *Kerl* to urge widespread adoption of the instrumentality rule in vicarious liability litigation.[153] The Supreme Court of Maine in *Rainey v. Langen*,[154] while rejecting the instrumentality rule, nonetheless held that the standard franchise relationship does not establish sufficient control to establish vicarious liability.[155] Most states now follow these approaches.[156]

And from there, the IFA spread this conventional wisdom across employment discrimination and employment law. Since 2013, the IFA has argued as amicus curiae in joint employment litigation that limiting franchisor liability benefits franchisees (and consumers) by permitting the franchisor to control the quality and consistency of its products and services.[157] The California Supreme Court in 2014 adopted this reasoning in *Patterson v. Domino's Pizza*,[158] in establishing a presumption against franchisor liability for sexual harassment in franchise stores under state law. Citing opponents of franchisor vicarious liability, the California Supreme Court in *Patterson* opined that "[t]he franchisee is often an entrepreneurial individual who is willing to invest his time and money, and to assume the risk of loss, in

152 *Id.* at 338.

153 Brief for Int'l Franchise Ass'n as Amicus Curiae Supporting Appellant at 19-20, People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728 (Cal. Ct. App. 2013) (No. A125474), 2010 WL 3623052 (arguing that *Kerl* and similar courts reflect an understanding that in modern franchising, franchisor controls are necessary to ensure product uniformity); Brief for Int'l Franchise Ass'n as Amicus Curiae Supporting Appellant at 14, Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008) (No. 2005-SC-000614), 2006 WL 5402936 (urging adoption of the instrumentality rule).

154 998 A.2d 342 (Me. 2010).

155 *Id.* at 349-51.

156 *See* Elmore, *supra* note 2, at 933-34; *see, e.g.*, Viado v. Domino's Pizza, LLC, 217 P.3d 199, 202 (Or. Ct. App. 2009) (holding that "to determine whether the franchisee (and its employees) are the agents of the franchisor, we look to whether the franchisor controls the day-to-day operations of the franchisee").

157 *See* Brief for Int'l Franchise Ass'n et al. as Amici Curiae Supporting Respondents at 11, Patterson v. Domino's Pizza, LLC, 333 P.3d 723 (Cal. 2014) (No. S204543), 2013 WL 3809579 (arguing that courts should disregard controls "necessary to preserve and enhance the quality and consistency of the products and services" in joint employment litigation); Brief for Int'l Franchise Ass'n as Amicus Curiae Supporting Appellees at 16-17, Courtland v. GCEP-Surprise, LLC, No. CV-12-00349-PHX, 2013 WL 3894981 (D. Ariz. July 29, 2013) (No. 13-17182), 2014 WL 3421247 (urging narrow joint employment test to preserve franchisor controls to ensure consistency and uniformity of brand products and services).

158 *Patterson*, 333 P.3d 723.

order to own and profit from his own business."[159] Quoting King, the California Supreme Court accepted that the franchisors' "systemwide standards and controls . . . benefit[] [both franchisors and franchisees] . . . by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves."[160] Given that the franchising relationship is arms-length and benefits franchisees, the court held that a presumption against joint employment in franchising is necessary because "[a]ny other guiding principle would disrupt the franchise relationship."[161]

Franchisors, having succeeded in extending vicarious liability limitations to employment discrimination in *Patterson*, now assert its relevance across all of work law.[162] While in theory *Patterson* confined its reasoning to employment discrimination laws that adopt vicarious liability standards, courts have adopted it in wage and hour law claims. The Ninth Circuit in *Salazar v. McDonald's* in 2019 rejected a wage and hour law claim against the franchisor despite allegations that its payroll software undercalculated franchise store employee owed wages.[163] Citing *Patterson*, the court held that "involvement in its franchises and with workers at the franchises is central to modern franchising and to the company's ability to maintain brand standards, but does not

159 *Id.* at 733-34. In support of this statement, the Court cited an article by a franchisor attorney who provided no authority for the proposition. *See* Killion, *supra* note 136, at 28.

160 *Patterson*, 333 P.3d at 733.

161 *Id.* at 739. Courts have taken this position to limit liability of franchisors for allegations of tortious and discriminatory conduct by franchisees against customers. *See* Chavez v. McDonald's Corp., No. 19-cv-00164 , 2020 WL 1322864, at *3-5 (D. Colo. Mar. 20, 2020) (dismissing section 1981 claim by customer against McDonald's for alleged discriminatory conduct by franchisee, because "to hold a franchisor liable because of nationwide advertising and branding alone would result in virtually unlimited liability against franchisors for the conduct of franchisees." (quoting McKinnon v. YUM! Brands, Inc., No. 15-CV-00286, 2017 WL 3659166, at *9 (D. Idaho Aug. 24, 2017))).

162 *See, e.g.*, Brief for Int'l Franchise Ass'n et al. as Amici Curiae Supporting Appellees at 8, Salazar v. McDonald's Corp., 944 F.3d 1024 (9th Cir. 2019) (No. 17-15673), 2018 WL 618494 (arguing against joint employment in a wage and hour claim because a high level of franchisor control over franchisee operations is "the essence of franchise business model"); Brief for Int'l Franchise Ass'n as Amicus Curiae Supporting Appellants at 3, Williams v. Jani-King of Phila. Inc., 837 F.3d 314 (3d. Cir. 2016) (No. 15-2049), 2015 WL 4480394 (arguing in the claim that the franchisor misclassified commercial cleaners as independent contractors and that the "franchise business model becomes unworkable if brand controls are treated as the controls of an employer over an employee").

163 *Salazar*, 944 F.3d at 1032.

represent control over wages, hours, or working conditions."[164] A New York trial court, also citing *Patterson*, held that "the type of standard setting and oversight exercised by a franchisor does not rise to the requisite level of control to constitute joint employer status."[165] And in *People v. Domino's Pizza*,[166] a New York trial court in October 2020 dismissed the New York Attorney General's joint employer claim against Domino's Pizza, because of a "clear, nearly unbroken trend . . . that as a matter of law a franchisor is not a joint employer."[167]

To be sure, some courts have rejected a hard presumption against joint employer liability in franchising, often in denying motions to dismiss joint employer claims.[168] But by 2021, franchisors have successfully refashioned the efficiency-based justification to relax antitrust law enforcement against franchisors into a presumption of no franchisor liability for conduct in franchise stores as a majority rule across employment and employment discrimination laws. In modern no-poaching antitrust litigation, franchisors' assertions that franchisees are independent entrepreneurs, and that franchisors and franchisees have a shared economic interest in franchisor vertical restraints, support their argument that these mobility restraints are "reasonably necessary to the promotion of the [franchisor's] brand."[169]

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164 *Id.* at 1030.

165 *In re* Domino's Pizza Inc., No. 16-CV-2492, 2018 WL 4757944, at *4 (S.D.N.Y. Sept. 30, 2018); *see also In re* Jimmy John's Overtime Litig., No. 14 C 5509, 2018 WL 3231273, at *15 (N.D. Ill. June 14, 2018) (similarly relying on *Patterson* to conclude that "a showing of corporate guidance in the hiring process, without any personal involvement in the hiring decisions of individuals seeking employment at a [a franchise store], is insufficient to demonstrate that [a franchisor] controls the selection of franchise employees").

166 People v. Domino's Pizza, Inc., No. 450627/2016 (N.Y. Sup. Ct. Oct. 27, 2020).

167 Transcript of Record at 42, *Domino's Pizza*, No. 450627/2016. The New York Attorney General has filed a notice of appeal. Notice of Appeal, James v. Domino's Pizza, Inc., No. 450627/16 (N.Y. Sup. Ct. Feb. 5, 2021), NYSCEF No. 480.

168 *See* Johnson v. McDonald Corp., No. 20-CV-1867, 2021 WL 2255000, at *2-3 (E.D. Mo. June 3, 2021); Ocampo v. 455 Hospitality LLC, No. 14-CV-9614, 2016 WL 4926204, at *7-9 (S.D.N.Y. Sept. 15, 2016); Cordova v. SCCF, Inc., No. 13CIV5665, 2014 WL 3512838, at *5 (S.D.N.Y. July 16, 2014); Olvera v. Bareburger Group LLC, 73 F. Supp. 3d 201, 207-08 (S.D.N.Y. 2014); Cano v. DPNY, Inc., 287 F.R.D. 251, 257, 259 (S.D.N.Y 2012).

169 Conrad v. Jimmy John's Franchise, LLC, No. 18-cv-00133, 2019 WL 2754864, at *2 (S.D. Ill. May 21, 2019), *motion to certify appeal denied*, No. 18-cv-00133, 2019 WL 4596762 (S.D. Ill. Aug. 6, 2019) (citing Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008)). In antitrust law, no-poaching agreements may be subject to the less stringent rule of reason rather than a quick look analysis if they are ancillary to the franchise agreement. *Id.*; *see also* Motion to Dismiss Pursuant to Rule 12(b)(6), Yi v. SK Bakeries, LLC, No. 18-5627 (W.D. Wash. Oct. 11, 2018), 2018 WL

But these assumptions, that franchisees are independent entrepreneurs and that franchisor restrictions on franchisee behavior benefit franchisees, cannot be sustained. Franchisees, in fact, are not independent entrepreneurs, and franchisors and franchisees often have misaligned interests. Paul Rubin, writing in 1978, observed that while franchisees are legally classified as independent contractors, "the economics of the situation are such that the franchisee is in fact closer to being an employee of the franchisor than to being an independent entrepreneur."[170] As explained in Part I, many franchisors limit franchisee mobility with non-competition agreements, prohibiting entrepreneurialism that is in the interests of franchisees because it may harm franchisor interests. All franchisors limit franchisee entrepreneurialism in operating franchise stores by imposing standards that remove the discretion from franchisees to pursue their own interests. These restraints often require that franchisees relinquish control over all manner of store operations.[171] The economists cited by *Patterson* for the proposition that franchisors and franchisees have a mutual interest in these restrictions, Roger Blair and Francine Lafontaine, stress in that same article that "conflicts emerge because the interests of the franchisor and the franchisee *are not fully aligned*."[172] For Blair and Lafontaine, the franchisor's interest is in promoting its trademark and increasing store revenue, even if franchisor requirements to do this create costs that cut into franchisees' profits.[173]

As contract law scholar Gillian Hadfield explains, franchisors and franchisees have adverse interests in expanding their own businesses and limiting competition from other businesses. A franchisee naturally seeks exclusive jurisdiction over profitable areas, while the franchisor's interest is in saturating the market to increase revenue, drive out competitors, and advertise the brand, even if particular units are not profitable. For the same reasons, franchisors impose standards on franchisees even if they create costs that cut deeply into franchisee profits. Franchisors want stores open at all hours, even during times in which there are few customers and during which franchisees would

5622602 ("In a franchise system like Cinnabon, the franchisor and the franchisee share a common interest in providing the best Cinnabon-branded products and services.").

170 Rubin, *supra* note 132, at 232.

171 *See* Elmore, *supra* note 2, at 914-26.

172 Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws that Regulate It*, 26 FRANCHISE L.J. 55, 55 (2006) (emphasis added). I thank Marshall Steinbaum for this insight.

173 *See id.* at 59-60.

prefer to close in order to save on costs.[174] Franchisor requirements that franchisees agree not to own competing businesses, and to operate franchise stores in geographic areas that place them in competition with other franchisees or the franchisor for the same customers, and to keep stores open even when unprofitable, are not at all in the interests of the franchisees. For these reasons, state franchise and consumer protection laws often protect franchisee interests from franchisor opportunism in imposing some restrictions, even though permitted by antitrust law as procompetitive.[175]

Recent litigation challenging no-poaching agreements as an unlawful restraint under the Sherman Act reveals that franchisees are not independent entrepreneurs, and that franchisors and franchisees can have misaligned interests. Franchisors themselves have grounded their defense to these claims on a rationale of franchisee dependency, arguing that franchisors and franchisees are a single enterprise that is incapable of conspiring in violation of the Sherman Act.[176] Courts have extended Sherman Act firm immunity to some franchisor-franchisee relationships,[177] often grounded in the same evidence of indirect control disregarded in joint employer claims. In *Arrington v. Burger King Worldwide, Inc*., for example, the court recognized that the franchisor imposes on franchisees uniform requirements for compliance with the franchisor's royalties and advertising payments, and operational standards, from personnel appearance, training, service and manner of food preparation, to store image, menu, hours of operation and equipment.[178] Finding that this relationship is "totally derivative," and that the franchisee has "no independent source of power" in this relationship, the court dismissed the no-poaching claim against Burger King because of the "unity decisionmaking" of franchisors and

[174] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 950-51 (1990).

[175] *See* Burns, *supra* note 137, at 622-24.

[176] A Sherman Act claim that a restraint is a conspiracy requires a showing of coordination between multiple actors. The Supreme Court in *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984) held that a firm is a single actor incapable of a conspiracy under section 1 of the Sherman Act. *Id.* at 777; *see* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 70-71 (2019) (discussing franchisor use of *Copperweld* single firm immunity defense in no-poaching litigation).

[177] *See* Williams v. I.B. Fischer Nev., 999 F.2d 445, 447-48 (9th Cir. 1993); *see also* Hall v. Burger King Corp., 912 F. Supp. 1509, 1548 (S.D. Fla. 1995). For a criticism of the logic that the firm immunity doctrine is necessary where companies have common economic goals, such as franchisors and franchisees, see Paul, *supra* note 176, at 68-72.

[178] Arrington v. Burger King Worldwide, 448 F. Supp. 3d 1322, 1330-31 (S.D. Fla. Mar. 24, 2020).

franchisees.[179] Franchisors in defending against no-poaching claims, far from contesting this conclusion, often assert their expansive control over franchise store operations as a defense.[180] This control that franchisors claim is necessary in franchising to provide a uniform presentation of their brands in franchise stores can also distinguish the franchisor-franchisee relationship from more independent relationships subject to section 1 Sherman Act liability.[181]

Antitrust no-poaching litigation is also instructive in its skeptical view of the claim that franchisors and franchisees have aligned interests. As McDonald's economist expert in *Deslandes v. McDonald's* explained, "a basic tenet of franchising economics is that franchisors do not benefit when their franchisees gain market power because franchisees will then sell less of their products, which undermines the brand's growth."[182] Franchisors in seeking dismissal of these antitrust claims nonetheless argue that no-poaching agreements are procompetitive, enabling franchisors to coordinate with their franchisees in their aligned interest in interbrand competition.[183] But most courts have rejected the claim that franchisors and franchisees have aligned interests in no-poaching agreements. As the court in *Deslandes* reasoned, the competition restrained by no-poaching agreements are not "for the sale of hamburgers to consumers," but for employees.[184] McDonald's, like most franchisors, operates both company-owned and franchisee-owned stores, and when it does so in the same geographic area, the franchisor

[179] *Id.* at 1331.

[180] *See* Reply in Support of Motion to Dismiss at 9, *Arrington*, 448 F. Supp. 3d 1322 (S.D. Fla. June 10, 2019) (No. 18-24128-CIV-MARTINEZ/Otazo-Reyes), 2019 WL 4701199 (distinguishing fast food franchisor-franchisee relationship from that of sports franchises, because fast food franchisor "controls almost all aspects of its franchisees' restaurant operations").

[181] As the Supreme Court held in rejecting firm immunity for National Football League franchises, even closely associated firms can conspire if "the agreement 'deprives the marketplace of independent centers of decisionmaking.'" Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010).

[182] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668, at *10 (N.D. Ill. July 28, 2021) (concluding that because monopsony power enables franchisees to make more profit but sell fewer products, it "is terrible for the franchisor, who wants to increase output of hamburgers and fries").

[183] Memorandum in Support of Motion to Dismiss, *Deslandes*, 2021 WL 3187668 (No. 17 C 4857). Cinnabon, for instance, argued that its no-poaching agreements could not violate the Sherman Act, because they promote "interbrand competition between rival businesses, with Cinnabon and its franchisees working together to compete against other companies for customer sales and loyalty." Motion to Dismiss Pursuant to Rule 12(b)(6), Yi v. SK Bakeries, LLC, No. 18-5627 (W.D. Wash. Nov. 13, 2018), 2018 WL 5622602.

[184] *Deslandes*, 2018 WL 3105955, at *6-8.

and its franchisees "are direct, horizontal, competitors."[185] Other courts following this reasoning have denied motions to dismiss because franchisors and franchisees can be involved in a joint venture and yet have separate, adverse interests.[186]

In sum, *Patterson* and courts that rely on *Patterson* impose a presumption against joint employment in franchising based on assumptions of franchisee independence and franchisee aligned interests with franchisors. As explained in this section, neither assumption is justified. Franchisees depend on franchisors for their business and can be harmed by the contractual restraints imposed on them by franchisors. Courts — and franchisors themselves — have acknowledged this reality in current antitrust litigation. This should be sufficient for courts to reject the presumption against joint employment for franchisors. Contrary to conventional wisdom, franchising presents no special circumstances that warrant a presumption against joint employment status.

Franchisor assertions of single firm immunity in antitrust litigation raises the question of whether plaintiffs can introduce these claims as admissions of joint employer status in employment and employment discrimination law litigation. Andrele Brutus St. Val argues that a franchisor's single firm claim "arguably entails a concession that they exercise control over the franchisee's employment and personnel matters," and so should be considered by courts in joint employer claims.[187] This is an intriguing suggestion,[188] but my aim here is

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185 Before denying plaintiffs' motion for class certification, the court in *Deslandes* found that allegations of no-poaching agreements were sufficient to state an antitrust claim, despite the franchisor's fear "about training and then losing employees." *Id.* at *8. As the court reasoned, "every employer" fears losing employees, and has options other than "unlawful market division . . . includ[ing] paying higher wages/salaries and contracting directly with each employee to set an employment term." *Id.*

186 *SK Bakeries*, 2018 WL 8918587, at *3 (denying motion to dismiss because franchisor and franchisees "are capable of conspiring under § 1" of the Sherman Act); *see also In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 18-CV-00825, 2019 WL 5386484, at *6-10 (W.D. Ky. Oct. 21, 2019); Blanton v. Domino's Pizza Franchising LLC, No. 18-13207, 2019 WL 2247731, at *4 (E.D. Mich. May 24, 2019) (finding no-poaching agreement allegations sufficient to support a claim of unlawful horizontal restraint); Conrad v. Jimmy John's Franchise, LLC, No. 18-cv-00133, 2019 WL 2754864, at *2-3 (S.D. Ill. May 21, 2019), *cert. denied*, No. 18-cv-00133, 2019 WL 4596762 (S.D. Ill. Aug. 6, 2019) (denying motion to dismiss because claim requires further factual development, including "the relative independence of Jimmy John's franchisees").

187 *See* St. Val, *supra* note 55, at 318.

188 While some courts might consider this a prior inconsistent statement, as St. Val explains, many courts would reject a party's legal brief as an admission in a subsequent case. *Id.* at 279 & n.251 (collecting cases). Even if taken as an admission, this would

different. It is to show that courts should not look to efficiency arguments from antitrust law in presuming that contractors are not joint employers. Doing so ignores economic research and antitrust litigation suggesting the contrary, and undermines the remedial goals of employment and employment discrimination law.

The next section will offer a framework grounded in franchisee dependency to guide the joint employment analysis.

B. Centering Subordinate Firm Dependence with Presumptions in the Joint Employment Doctrine

Rejecting the presumption against joint employment in franchising should lead courts to consider the power that franchisors have over franchise store operations by virtue of franchisee dependency.[189] But, while current joint employer standard doctrines and their multi-factor, totality of the circumstances tests can account for how much subordinate firms depend on lead firms for continued operations,[190] extending current doctrine in this way is unlikely to make enough of a difference.[191] Instead, courts should center subordinate firm

not be dispositive, as many courts presume that a parent is not a joint employer of a subsidiary's employees. Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997).

189 Elmore & Griffith, *supra* note 3, at 152.

190 Mobility limitations inform the joint employer factors of (1) "the permanence or duration of the working relationship," (2) "the extent to which the work is an integral part of the employer's business," and (3) "opportunity for profit or loss." Salinas v. Com. Interiors, Inc., 848 F.3d 125, 150 (4th Cir. 2017); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Zheng v. Liberty Apparel Co., 355 F.3d 61, 67 (2d Cir. 2003) (quoting *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988)). The permanence of the relationship can show the subordinate firm's dependency on the lead firm for continued operation. *See Rutherford*, 331 U.S. at 724-25, 731. Integration of the workers' work into the putative joint employer's coordinated production, likewise, can show that the subordinate firm cannot exist as a separate business organization apart from its relationship with the lead firm. *See id.* at 729-30; Goldstein et al., *supra* note 69, at 1143-44. Lead firm requirements that subordinate firms agree not to compete with the lead firm can show limited opportunity for gain or loss. *See* Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 309 (4th Cir. 2006) (finding that a non-compete agreement is evidence of joint employer status); *In re* Baez, 41 N.Y.S.3d 146, 148 (N.Y. App. Div. 2016) (affirming employer status of franchisor based on substantial evidence of control, including requirement of non-compete agreement from franchisee).

191 As Dubal and Zatz explain, this approach to weighing evidence of joint employment invites judicial line-drawing exercises and lead firm restructuring to avoid joint employer status. Dubal, *supra* note 16, at 794; Zatz, *supra* note 11, at 281, 289.

dependency by applying presumptions.[192] This section will explain how courts can restructure the control-based joint employer test to do this. I will then propose extending the ABC test presumption of employment status to lead firms like franchisors in which subordinate firms have no independently established occupation or trade in the next Part.

A presumption that centers dependency in the current joint employer standard can begin with an initial inquiry into the mobility limitations imposed by the lead firm on the subordinate firm. Upon an initial finding that a lead firm significantly limits the mobility of its subordinate firm, a court can presume that the lead firm jointly employs the subordinate firm's employees. This presumption is justified by the power of lead firms to shape their subordinate firms' workplace because of the subordinate firm's dependence on the lead firm for economic survival. In a control-based joint employment standard, the lead firm can rebut this presumption by showing that it does not reserve or exercise control over the workplace despite the subordinate firm's limited mobility.

This approach to centering subordinate firm dependency takes the concept of identifying economic relationships that merit heightened scrutiny from *Zheng*, and refashions it as a presumption, as in *Patterson*, but inverted in favor of joint employment status. A presumption in favor of employment status is central to the ABC test, which the California Supreme Court used in *Dynamex* to distinguish between employment and independent contractor relationships,[193] and which I discuss as applied to joint employment *infra* Part III. Here, the presumption that a lead firm is a joint employer of employees of subordinate firms is grounded in the control that lead firms can reserve and exercise by virtue of the subordinate firm's limited mobility.[194]

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192 This is similar to the approach of the California Supreme Court in Dynamex Operations W. v. Superior Ct., 416 P.3d 1 (Cal. 2018), which shifted the burden under state wage and hour law to the hiring entity to show that the worker is an independent contractor and not an employee. *Id.* at 41-42. Hiba Hafiz also proposes a presumption of joint employment status for lead firms like franchisors that "impose any service-related quality control provisions in franchising and licensing agreements with their direct employer." Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMPL. & LAB. L. (forthcoming 2022) (manuscript at 52).

193 *Dynamex*, 416 P.3d at 34-36.

194 Tanya Goldman and David Weil similarly argue in favor of shifting the burden in claims of misclassification of employees as independent contractors to the defendant to show "attributes of business operation that connote the activity of an independent business entity." Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 111 (2021).

In franchising, the initial finding of the subordinate firm's limited mobility can be shown in the franchise agreement. Limiting independent business ventures, imposing price and geographic limitations and myriad operational requirements, and requiring upfront capital equipment, supplies, and products, backed by the lead firm's unilateral and expansive right to terminate and not renew the relationship, all lock subordinate firms into a relationship of dependency.[195] They limit opportunities for profit and loss, and demonstrate both the permanence of the working relationship and that the subordinate firm is an integral part of the lead firm's business. High upfront fees, required capital investments in franchise stores, and unilateral franchisor termination rights, show the franchisee's dependency on the franchisor for the continued operation of the business. The franchisees' skills, capital, assets, and other business operations are also relevant in a determination of dependency. Franchisees that have no plausible economic choice but to continue operating a franchise store are more likely to follow franchisor recommended and required policies as if the franchisor were a joint employer. These mobility limitations enable the lead firm to integrate the subordinate firm's employees in its production process, with limited opportunity for the subordinate firm to realize a profit or loss independent of that relationship.

A threshold finding that a franchisee depends on its franchisor for economic survival justifies shifting the burden to the franchisor. The franchisor can rebut the joint employer presumption by showing that these mobility limitations nonetheless do not provide the franchisor with "overall influence and power to co-determine the work" in franchise stores.[196] This could be shown, for example, with a showing that the franchisee can ignore mobility limitations in the franchise agreement without fear of adverse consequences.

Viewing mobility limitations as a form of dependency can guide courts to identify, as *Zheng* proposes, economic arrangements that "should attract heightened scrutiny."[197] Franchisor-imposed geographic limitations or required hours of operation, for example, constrain franchisee discretion about delivery radius and work shifts. A franchisee who is dependent on the franchisor for her economic livelihood is more likely to remain open at times that no customers patronize the store because the franchisor demands it, and to remain in

[195] Hadfield, *supra* note 174, at 934.
[196] Elmore & Griffith, *supra* note 3, at 1368.
[197] *Zheng*, 355 F.3d at 73.

a geographic area despite nearby franchisor store openings that siphon customers from the store. Ongoing franchisor monitoring, communications, and evaluations of franchisee store practices, alongside franchisor-recommended workplace practices, likewise, permit franchisors to shape the workplace practices of franchisees dependent on franchisor approval for their continued operation.[198] Franchisors that reserve and exercise these forms of control in franchise store workplaces should bear the burden to show that they are not joint employers.

This approach would, additionally, enable courts to find extreme mobility restraints like required non-compete and no-poaching agreements dispositive on the question of joint employment. A lead firm that imposes a no-poaching agreement exerts direct control over hiring, a core employer responsibility. Non-competition agreements that preclude competition with the lead firm during the term of the agreement can effectively convert subordinate firms into managers for the lead firm. They permit franchisors to directly control franchise store employees, using franchise store managers as intermediaries, as they would their own managers.[199] They are extreme mobility restraints that require no further showing of control to establish a joint employment relationship.

To be sure, centering subordinate firm dependency by applying judicial presumptions in favor of the joint employer status is more likely to find franchisors to be joint employers. And extending a presumption of joint employment to many franchisors requires overcoming a familiar judicial bias against extending liability to parties that did not directly cause the harmful conduct.[200] But, on balance, extending joint employment liability on the ground of subordinate firm dependency is

198 Elmore & Griffith, *supra* note 3, at 1351-52, 55 (explaining examples in which franchisors evaluate franchisee staffing and expect franchisees to use the franchisor's scheduling software, to lower labor costs).

199 As Kati Griffith explains in her intermediary theory of employment, lead firm control of subordinate firm managers enables control over employees by influencing hiring and firing, staffing, and training. Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 187-98 (2019).

200 This is a common objection to enterprise liability in tort law. *See, e.g.*, James A. Henderson, Jr., *Civil Liability for Encouraging Bad Behavior: From Cheering at A Gang Rape to Promoting Opioid Abuse*, 71 FLA. L. REV. 123, 153 (2019) (arguing that "court-made enterprise liability has never taken hold in this country" because it is "unmanageable, inefficient, and unfair").

fair, even if it sweeps in borderline cases.[201] It would avoid pricing franchise store employees out of litigating meritorious claims, and hold lead firms liable for practices in their control that they can deter. It would permit these firms to reduce liability for subordinate firm conduct out of their control with insurance and indemnity agreements and by imposing capital requirements on subordinate firms.[202] Whatever increased costs borne by franchisors must be balanced against its deterrence value, the shifting of costs away from vulnerable workers, and the removal of incentives to restructure operations as a form of regulatory arbitrage.

Even without a presumption, centering subordinate firm dependency has important implications in current joint employer doctrine, not just for franchising but also for other economic relationships. Reserved control in contracts, remote workplace surveillance, and recommendations that are effectively required, are common features of companies with buyer market power.[203] While cost-plus contracts are often rejected as evidence of a joint employment relationship,[204] lead firms with the power to limit subordinate firm mobility can use them to effectively set wages. And while courts often reject detailed operational instructions and inspections for quality control[205] as control measures, lead firms can use them to supervise employees. In these cases, a focus on subordinate firm dependency can guide a court to weigh these terms as forms of control.

[201] *See* Goldman & Weil, *supra* note 194, at 102 (arguing that presumption of employment status in misclassification claims is "predictable, easier to administer, and produc[es] fewer disputed outcomes").

[202] *See* Elmore, *supra* note 2, at 955-56.

[203] *See* Carrillo v. Schneider Logistics Trans-Loading & Distrib., No. 11-cv-8557, 2014 WL 183956, at *16 (C.D. Cal. Jan. 14, 2014) (finding that the power Wal-Mart had over a subcontractor led the subcontractor to understand that Wal-Mart's recommendations could be understood as requirements/directives).

[204] *See, e.g.*, Browning-Ferris Indus., Inc. v. NLRB, 911 F.3d 1195, 1220 (D.C. Cir. 2018) (distinguishing cost-plus contracts, which are a standard feature of contracting relationships, and other forms of indirect control that can show a joint employment relationship); Int'l Longshoremen's Assoc. Local 1937 v. Norfolk S. Corp., 927 F.2d 900, 903 (6th Cir. 1991) ("A cost-plus contract, by itself, does not establish a joint employer relationship.").

[205] *See, e.g.*, Lepkowski v. Telatron Mktg. Grp., 766 F. Supp. 2d 572, 579 (W.D. Pa. 2011) (explaining courts have frequently held detailed instructions and strict quality control will not on its own indicate an employment relationship); Jacobson v. Comcast Corp., 740 F. Supp. 2d 683, 690 (D. Md. 2010) ("[D]etailed instructions and close monitoring are key components in many independent contractor and franchise relationships.").

Some courts have already moved toward broadening the joint employment doctrine. It is consistent with how some courts have accounted for the dependence of subordinate firms on national retailers, such as Amazon and Wal-Mart. *Edmonds v. Amazon.com, Inc.*,[206] found that Amazon's permanent relationship with a delivery company, and its employee's job of delivering packages for "the largest digital retailer in the United States," demonstrated permanence and integration.[207] This justified giving significant weight to Amazon's indirect control, such as its "exact schedule that dictates the order of delivery and provides the exact route to utilize," as well as required trainings and uniforms, and flat rate of pay, which were sufficient to allege a joint employer relationship.[208] Similarly, in *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*,[209] the trial court held that Wal-Mart could jointly employ its warehouse subcontractor's workforce because Wal-Mart's integration of the subcontractor made its employees dependent on Wal-Mart's overall production process.[210] This permitted a broad interpretation of Wal-Mart's screening requirements, approved staffing levels, and productivity standards as forms of indirect control.[211] It also justified considering Wal-Mart's "suggestions about how to improve productivity" as evidence of control because of the expectation that the subordinate firms "would follow these suggestions."[212]

Edmonds and *Carrillo* evince a judicial receptivity to a broad joint employment standard if the lead firm has significant buyer market power over its subordinate firms, even lacking the mobility restraints common in the franchise relationship. I will return to this theme, and the need for administrative guidance about how buyer market power can show a joint employment relationship, in Part IV(C).

Lastly, centering dependency can establish joint employment status for those franchisors that use extreme mobility restraints even in some states with franchisor-shield laws. At least five of these eighteen states create exceptions that no-poaching and non-compete requirements can satisfy. A court applying the narrow "directly and immediately" control test in Michigan and Louisiana can find that a franchisor no-poaching requirement permits the franchisor to directly control hiring, and that a non-compete requirement allows franchisors to directly supervise

206 No. C19-1613, 2020 WL 1875533 (W.D. Wash. Apr. 15, 2020).
207 *Id.* at *4-6.
208 *Id.* at *5.
209 No. 11-CV-8557, 2014 WL 183956 (C.D. Cal. Jan. 14, 2014).
210 *Id.* at *12.
211 *Id.*
212 *Id.*

employees through intensive monitoring and evaluation. This may even satisfy the "atypicality" exception to the franchisor exemption in Texas, Utah, and Wisconsin, to the extent that the mobility restraint is not widely used.

III. Franchisee Dependency Justifies Presuming that Franchisors Are Joint Employers Under the ABC Test

The dependency of franchisees on franchisors for continued operation can also justify a presumption of joint employment notwithstanding judicially-recognized forms of control in many of the twenty-two states that presume employment status in their employment laws in some version of the ABC test (named for its three elements).[213] For example, California presumes that covered workers are employees unless the hiring entity establishes three separate elements of independence, or prongs A, B, and C, as follows:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[214]

It is an open question whether the ABC test applies to the joint employment doctrine. The ABC test does not limit its scope to direct employment. Some courts have broadly construed it to include joint employers,[215] including franchisors,[216] on the ground that requiring a

[213] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 58-60 (2015) (explaining that New Jersey, Massachusetts, and Connecticut use a similar "ABC" test to determine if an entity is an employer in their states' wage and hour laws).

[214] Cal. Lab. Code § 2750.3(a)(1)(A)-(C) (repealed 2020); *see also* Dynamex Operations W., Inc. v. Superior Ct., 416 P. 3d 1, 7 (Cal. 2018).

[215] *See* Moreno v. JCT Logistics, Inc., No. EDCV 17-2489, 2019 WL 3858999, at *7 (C.D. Cal. May 29, 2019) (applying *Dynamex* to both putative direct and joint employers).

[216] The Massachusetts Supreme Court reasoned in Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013), that the ABC test can apply to franchisors who contract with "master franchisees" to hold the contracts with workers classified as independent contractors. *Id.* at 623-25; *see also* Haitayan v. 7-Eleven, Inc., No. CV 17-7454, 2020 WL 1290613, at *3 (C.D. Cal. Feb. 19, 2020) (denying franchisor summary judgment

direct contractual relationship would afford the franchisor an "end run" around the statute.[217] But the ABC test primarily responds to the misclassification of employees as independent contractors,[218] which was the claim in *Dynamex*. Courts have found that the ABC test does not apply in workplaces in which the worker is already an employee.[219] The Ninth Circuit in *Salazar v. McDonald's* flatly held that *Dynamex* "has no bearing here, because no party argues that Plaintiffs are independent contractors."[220] Since the franchisee employed plaintiffs, "the relevant question is whether they are also McDonald's' employees."[221]

Judges may be reluctant to extend the ABC test to presume joint employer status because of a fear that this will unfairly sweep in all companies that hire subcontractors.[222] In fact, asking whether a *subordinate firm* is "customarily engaged in an independently established trade," — prong (C) of the ABC test — can measure the power of lead firms to shape subordinate firm workplaces without sweeping in all contractors. Subordinate firms that have no independent business depend on the lead firm for their economic livelihood — a

motion on the ground that material disputes of fact existed under either ABC or multifactor test).

217 *Depianti*, 465 Mass. at 623-24.

218 *See* Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS. 107, 126 (2018).

219 Henderson v. Equilon Enters., 253 Cal. Rptr. 3d 738, 751-54 (Cal. Ct. App. 2019) ("*Dynamex* was concerned with the problem of businesses misclassifying workers as independent contractors so that the business may obtain economic advantages that result from the avoidance of legal and economic obligations imposed on an employer by the wage order and other state and federal requirements."); *see also* Curry v. Equilon Enters., 233 Cal. Rptr. 3d 295, 311-14 (Cal. Ct. App. 2018) (finding that the public policy reasons supporting the *Dynamex* decision are not present in a joint employer claim because "taxes are being paid and the worker has employment protections").

220 Salazar v. McDonald's Corp., 944 F.3d 1024, 1032 (9th Cir. 2019).

221 *Id.*

222 *Henderson*, 253 Cal. Rptr. 3d at 751-54 (rejecting application of the ABC test to joint employment because prong C, requiring a showing that the worker is involved in an "independent occupation or trade," would effectively deem all contractors joint employers in claims in which the individual is already an employee of a direct employer). Prong A as applied to joint employment in *Martinez* does not raise an overbreadth concern. *Martinez* held that on-site inspections and supervision for quality control and reserved power to cancel orders for inferior quality were insufficient to establish a joint employer relationship. Martinez v. Combs, 231 P.3d 259, 281-82 (Cal. 2010). As with the traditional multi-factor test discussed in Part II, the breadth of prong A hinges on whether the court broadly considers indirect control. *See, e.g.*, Torres v. Air to Ground Servs., No. CV 13-03164, 2014 WL 12564098, at *3-6 (C.D. Cal. Oct. 2, 2014) (finding FedEx to be a joint employer of a subcontractor's delivery workers, based on similar quality control measures as in *Martinez*, and the subcontractor having previously informed FedEx about its unlawful pay practices).

justifiable case for joint-employer status. Courts in states that use the ABC test may presume that franchisors are joint employers, and find in favor of the franchise store employee unless the franchisor produces evidence that the franchisee operates an independently established trade. This approach is consistent with the approach affirmed in *Martinez v. Combs*,[223] of supplementing the control-based test with other measures of joint employment that are often ignored in judicial interpretations of control.

Applying this version of the "independently established trade" test to franchisors would effectively overrule the presumption against franchisor joint employment in *Patterson*,[224] and may extend joint employment liability to many, if not most, fast food franchisors.[225] But franchisors that do not require or recommend workplace practices or limit franchisee mobility, and that permit franchisees genuine independence in their operation of franchise stores, could meet this version of the independently established trade test. It would not sweep in parties with standard arms-length business agreements. Companies that contract out to independent contractors that perform ancillary services would satisfy the independently established trade test because the lead firm does not regularly engage in the ancillary service and the independent contractor owns its own, independent business. So long as the companies do not integrate dependent subordinate firms in their operations, they would not be considered joint employers under this prong of the ABC test.

While extension of the ABC test to joint employment raises the same fairness concerns as detailed in Part II(B), a fairness analysis must consider the fairness of the current regime for subordinate firm employees. A control-based joint employment test requires complex, costly litigation that prices out plaintiffs with individual, low-value claims, and shifts the costs of legal noncompliance to them if the subordinate firm is judgment proof. It also creates few incentives for lead firms to require and monitor legal compliance. As the court in *Depianti* argued, exempting companies that do not directly contract

[223] The approach affirmed in *Martinez* supplements the control test with a nondelegable duty for contractors to prohibit illegal workplace practices they are aware of and have the power to stop. *Martinez*, 231 P.3d at 281-82.

[224] As the Ninth Circuit held in Vazquez v. Jan-Pro Franchising Int'l, Inc., 939 F.3d 1045 (9th Cir. 2019), this is in order because, "reliance on *Patterson* and the 'special features of the franchise relationship' was misplaced." *Id.* at 1048.

[225] Most franchisors are "hybrid," both operating their own stores and franchising others, and cannot claim that the franchisees' business is "outside" the franchisor's normal business. JEFFREY L. BRADACH, FRANCHISE ORGANIZATIONS 51-59 (1998).

with workers from the ABC test creates an incentive to hire a labor intermediary such as a franchisee to avoid labor and employment law obligations.[226] Extending the ABC test to joint employment would promote legal compliance, shift the costs of noncompliance away from vulnerable workers, and deter regulatory arbitrage. If courts refuse to extend the ABC test to joint employment relationships because of perceived unfairness to lead firms, these benefits justify legislative and administrative reform to overcome this judicial bias, a theme I will return to in Part IV.

Lastly, the Lanham Act, which regulates franchisor trademarks and protects against unfair and deceptive practices,[227] does not preempt application of a presumption of joint employer status to franchisors.[228] The Lanham Act does not expressly preempt state law or occupy the field of the franchise relationship,[229] and the ABC test is not an obstacle to federal franchise regulation.[230] As the Ninth Circuit reasoned in *International Franchise Association v. City of Seattle*,[231] state employment

226 Before the passage of Proposition 22, Uber considered converting to a franchise system in order to avoid an employer status under the ABC test. *See* Mulvaney & Smith, *supra* note 105. That question will likely reoccur if the trial court decision finding Proposition 22 unconstitutional is affirmed on appeal, and with the push for ABC test exemptions in other states.

227 15 U.S.C. § 1127 (2018).

228 Historic police powers of the states, such as workplace regulation, are presumed not to be superseded by federal law absent a showing that this is "the clear and manifest purpose of Congress." Wyeth v. Levine, 555 U.S. 558, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 585 (1996)); *see also* Int'l Franchise Ass'n v. City of Seattle, 803 F.3d 389, 410 (9th Cir. 2015) (applying the presumption against preemption to state workplace regulation). The Lanham Act contains no such statement of purpose. *See* 16 C.F.R. § 436.1 (2021). The FTC, moreover, has never suggested that the Lanham Act preempts state workplace regulation, and the FTC Franchise Rule expressly disclaims an intent to preempt state law unless inconsistent with the regulation. *Id.* § 436.10(b) ("The FTC does not intend to preempt the franchise practices laws of any state or local government, except to the extent of any inconsistency with part 436.").

229 *See* City of Seattle, 803 F.3d at 409; Attrezzi, LLC v. Maytag Corp., 436 F.3d 32, 41 (1st Cir. 2006); Mariniello v. Shell Oil Co., 511 F.2d 853, 857 (3d Cir. 1975).

230 As the Third Circuit explains, the purpose of the Lanham Act was "so that the public can buy with confidence, and the trademark holder will not be pirated." *Mariniello*, 511 F.2d at 858. State laws do not conflict with the Lanham Act unless they directly interfere with or regulate marks. The Fourth Circuit, for example, upheld state limitations on the hours of operations, rent, and number of outlets a franchisor could require in a franchise agreement with a franchisee against a Lanham Act obstacle preemption suit. Mobil Oil Corp. v. Va. Gasoline Marketers & Auto. Repair Ass'n, Inc., 34 F.3d 220, 223-26 (4th Cir. 1994). For an example of a common law infringement claim that is preempted by the Lanham Act, see Kiva Health Brands LLC v. Kiva Brands Inc., 439 F. Supp. 3d 1185, 1198-99 (N.D. Cal. 2020).

231 803 F.3d 389 (9th Cir. 2015).

standards do not implicate the Lanham Act because they do "not interfere with a franchise's ability to maintain quality, compromise the public's confidence in trademarks, allow misappropriation, or directly interfere with or regulate marks."[232]

For these reasons, a recent suit by the IFA, claiming that the Lanham Act preempts application of ABC test to franchisors,[233] does not offer a persuasive case for obstacle preemption.[234] But the suit is nonetheless instructive because it illuminates the true stakes in the controversy. In it, the IFA seems to assert that the Lanham Act enshrines franchising as a special economic relationship that will be disrupted by the designation of franchisors as joint employers in the ABC test.[235] This claim, though legally[236] and factually[237] contestable, is familiar. Franchisors have pursued versions of this efficiency justification to avoid workplace regulation since the 1970s, with recent success in *Patterson*. But it proves too much. All regulation imposes some cost. Such a sweeping theory of preemption would invalidate any employment law that might

232 *Id.* at 409-10. In *City of Seattle*, the IFA claimed that the Lanham Act preempted an ordinance that requires larger employers to comply with a new minimum wage before smaller employers, and classifies franchise stores as larger businesses if those franchisor's franchisees together meet the large employer threshold. *Id.* at 397-98.

233 *See* Complaint at 22, Int'l Franchise Ass'n v. California, No. 20-CV-02243 (S.D. Cal. Nov. 17, 2020), ECF No. 1.

234 The strongest claim IFA offers is that the FTC Franchise Rule requires franchisors to maintain their trademarks in ways that, it argues, should not be considered control in the joint employment doctrine. But the FTC Franchise Rule and guide, while offering that franchisors provide control and assistance to franchisees, use these terms interchangeably, and define them as including activities peripheral to the ABC test. The FTC Franchise Rule and guide, moreover, expressly state that they are not binding on the FTC, and express no opinion about whether franchisors are joint employers. *See* 16 C.F.R. § 436.1 (2021); FED. TRADE COMM'N, FRANCHISE RULE COMPLIANCE GUIDE, at ii, 15 (2008).

235 This is, in substance, the same argument that franchisors and their advocates pursued in arguing against the NLRB's *Browning-Ferris* rule for joint employment, which considers the indirect control exerted by franchisors in the joint employer analysis. *See, e.g.*, David J. Kaufmann, Felicia N. Soler, Breton H. Permesly & Dale A. Cohen, *A Franchisor Is Not the Employer of Its Franchisees or Their Employees*, 34 FRANCHISE L.J. 439, 467-468 (2015) (offering the FTC Franchise Rule as evidence that a finding that a franchisor is a joint employer is contrary to state and federal franchise regulation).

236 A trademark does not entitle its owner to engage in "quality control" free from state regulation. *See* Iberia Foods Corp. v. Romeo, 150 F.3d 298, 304 (3d Cir. 1998) (reasoning that "'quality control' is not a talisman the mere utterance of which entitles the trademark owner to judgment").

237 Joint employer status only creates franchisor liabilities if franchisees do not indemnify franchisors for them, which franchisors can prevent with capital requirements for franchise applicants and indemnity clauses in franchise agreements.

subject a franchisor to liability. As explained in Part II(A), *Patterson* is grounded in unwarranted assumptions about the franchise relationship, and should be rejected on its own terms. And courts have, correctly, declined franchisors' invitation to convert the Lanham Act and FTC Franchise Rule into a form of Lochnerism.[238]

IV. LEGISLATIVE AND REGULATORY PROPOSALS TO ACCOUNT FOR SUBORDINATE FIRM DEPENDENCY IN THE JOINT EMPLOYMENT DOCTRINE

To address mobility restraints that lead firms impose on subordinate firms to shape workplace practices, employment law needs to move past a narrow definition of control. This project can benefit from, and in some cases require, statutory and regulatory reforms. While courts can account for mobility restraints in the joint employment doctrine (or ABC test), courts are reluctant to jettison formal indicia of control as its core test. As a result, courts minimize subordinate firm dependency, even when applying the ABC test.[239] And courts must find that franchisors are not joint employers in fourteen of the eighteen states with franchisor shield laws, which either categorically exclude franchisors or only permit a joint employment finding with the franchisor's consent.[240]

This Part makes three proposals to address mobility limitations in the joint employer standard in employment and employment discrimination law: (1) a legal presumption in federal law that a lead firm is a joint employer unless the subordinate firm is customarily engaged in an independently established business or trade; (2) a per se rule that lead firms that impose mobility restraints, such as no-poaching and non-compete agreements, on their subordinate firms are joint employers; and (3) agency enforcement, guidance, and coordination to regulate lead firms that shape subordinate firm workplaces by limiting subordinate firm mobility.

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238 *See, e.g.*, Fleming v. Matco Tools Corp., No. 19-CV-00463, 2020 WL 6461327, at *4 n.1 (N.D. Cal. Nov. 3, 2020) (rejecting defendant's invitation to "restore[] some of the *Patterson* 'gloss' insofar as it makes clear that franchises employ a unique business model, the very existence of which relies on uniformity in the relationships between franchisors and franchisees").

239 Even when applying a broader standard, such as the ABC test, courts can narrowly interpret those prongs in order to require a showing of judicially recognized forms of control. *See, e.g.*, Curry v. Equilon Enters., 233 Cal. Rptr. 3d 289, 314-15 (Cal. Ct. App. 2018) (minimizing ABC test to find that Shell, a lessor which established a quasi-franchise relationship with its gas station lessee, did not jointly employ the gas station manager because the plaintiff "worked at an independent business and Shell did not exercise control over her").

240 Grow & Saltz, *supra* note 99, at 370.

A. A Federal "Independently Established Occupation or Trade" Test

A broad, durable standard that extends joint employment liability to lead firms that limit the mobility of subordinate firms in order to shape their workplaces will require law reform. Legislation can guide courts in subjecting specific economic relationships to greater scrutiny. The ABC test has shown the value of independent, overlapping rules to apply a broad definition of employment to different economic relationships. As explained *infra* Part III, prong C of this test, presuming a joint employment relationship absent a showing that the subcontractor is involved in an "independent occupation or trade," would extend joint employment liability to lead firms that hire subordinate firms with no independent business outside the lead firm's production process. Extending joint employment liability to these lead firms would improve legal compliance, shift the costs of noncompliance away from vulnerable workers, and deter regulatory arbitrage, without courting overbreadth concerns.

Other recent innovations to expand the employment definition are less tailored to subordinate firm dependence. The non-delegable duty from *Martinez* would require a showing that the lead firm had reason to be aware of the illegal conduct to be a joint employer.[241] This would exclude lead firms without notice of the illegal conduct, even if those lead firms had — and benefitted from — the power to set the subordinate firm's work terms. While appropriate for economic relationships in which the subordinate firm operates an independent business, a notice requirement is unnecessarily restrictive for lead firms that shape the workplaces of dependent subordinate firms.

Prong B of the state ABC test, the "outside the usual course of the hiring entity's business" test, in contrast, would extend joint employer status to all franchisors that require franchisees to use their business formats. In *Awuah v. Coverall North America, Inc.*,[242] for example, a Massachusetts trial court applying the ABC test found this prong dispositive. The court held that contrary to Coverall's claim that it is a "distribution system," that Coverall "sells cleaning services, the same services provided" by the franchisees.[243] Similar defenses by business format franchisors, and other lead firms that hire subordinate firms to produce and distribute their products and services, would likely be

[241] *See* Martinez v. Combs, 231 P.3d 259, 281-82 (Cal. 2010) (finding that defendants had no notice of violations).

[242] 707 F. Supp. 2d 80 (D. Mass. 2010).

[243] *Id.* at 84.

rejected on the same ground. This test would essentially deem these entities to be guarantors of their subordinate firms' work law practices.

Deeming all franchisors joint employers can be justified by the anti-domination principle of extending co-liability to lead firms to protect workers from poor or degrading work conditions.[244] Lead firms that benefit from their dominance over subordinate firms deserve to be held responsible for the negative consequences of their relationships, particularly if subordinate firms frequently violate employment law and are judgment proof.[245] On these grounds, some states deem garment and construction lead firms "guarantors" of their subordinate firm employees' wages.[246] The United States House of Representatives introduced the Worker Flexibility and Small Business Protection Act of 2020[247] to extend this approach to franchising. This approach is more predictable and efficient than a rebuttable presumption, and can be justified in the fast food sector, in which subordinate firms are often judgment proof and frequently violate employment and employment discrimination law.[248] But this approach is more susceptible to overbreadth criticisms. For this reason, the independently established occupation or trade test is a more plausible extension of joint employer doctrine, at least in the near term.

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[244] Rogers, *supra* note 22, at 500-01.

[245] Enterprise liability in tort law has been justified on similar fairness grounds. *See* Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857, 1886-87 (2004) (arguing that "the burdens of accidental injury should be distributed across those who benefit from the risks which result in those injuries").

[246] California recently passed the Garment Worker Protection Act, which holds garment manufacturers, their contractors, and any "brand guarantor," jointly and severally liable for their subcontractor's wage and hour law violations. S.B. 62 (Cal. 2021); Press Release, Governor Newsom Signs Legislation Creating Nation-Leading Worker Protections for Garment Industry, Additional Measures to Combat Unfair Pay Practices and Improve Workplace Conditions (Sept. 27, 2021), https://www.gov.ca.gov/2021/09/27/governor-newsom-signs-legislation-creating-nation-leading-worker-protections-for-garment-industry-additional-measures-to-combat-unfair-pay-practices-and-improve-workplace-conditions/ [https://perma.cc/WD23-UW79]. California, Maryland, and New York extend guarantor status to general contractors for owed wages of their subcontractors in the construction industry. CAL. LAB. CODE § 218.7 (declaring that general contractors on private construction projects "assume, and [are] liable for any debt" of a subcontractor for unpaid wages); MD. CODE ANN. § 3-507.2 (2021); S.B. 2766, 244th Leg. Sess., Reg. Sess. (N.Y. 2021); *see* Christine Pulfrey, *New York Contractors to Be Liable for Subcontractors' Wage Theft*, BLOOMBERG TAX (Sept. 7, 2021, 11:52 AM), https://news.bloombergtax.com/payroll/new-york-contractors-to-be-liable-for-subcontractors-wage-theft [https://perma.cc/J7TY-B3QM].

[247] H.R. 8375, 116th Cong. (2020).

[248] *See* Elmore & Griffith, *supra* note 3, at 1318 & n.1.

As with the ABC test, the independently established occupation or trade test should not supplant other tests that extend liability to putative joint employers on other grounds. The control test and non-delegable duty from *Martinez* would extend joint employment coverage to other relationships regardless of dependency, while the outside the usual course of the hiring entity's business test addresses the problem of misclassification of employees as independent contractors. While these tests can overlap, as with the different prongs of the state ABC test, they are additive in nature and should not undermine complementary liability regimes.

B. Per Se *Rule that Lead Firms that Require No-Poaching and Non-Compete Agreements Are Joint Employers*

Federal and state law should incorporate a *per se* rule that lead firms that use non-competition and no-poaching agreements with their subordinate firms are joint employers. While a *per se* rule of joint employment is foreign to the traditional control test, it is familiar to antitrust law, and would serve a similar purpose here. In antitrust law, *per se* categories are narrow and considered *per se* illegal because they are consistently anticompetitive. The FTC and the U.S. Department of Justice's Antitrust Division, for instance, issued guidance in 2016 that no-poaching agreements can be *per se* violations of antitrust law.[249] Marinescu and Posner, likewise, propose a *per se* standard for contractor restraints that have consistently anticompetitive effects, including no-poaching agreements.[250]

Non-competition and no-poaching agreements are two classes of mobility restraints that should fall within a *per se* rule of joint employer status. A lead firm that requires a subordinate firm to enter into a no-poaching agreement exerts direct control over a core employer responsibility, while non-competition agreements can effectively convert franchisees into managers for the franchisor.[251] In both cases, a *per se* rule is in order, because they are strong enough evidence of considerable control. States with franchisor shield laws would have to

[249] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/BTQ5-GG6R].

[250] Marinescu & Posner, *supra* note 4, at 1382-93.

[251] *See supra* note 199.

amend those laws to include this *per se* rule. This would align these statutes with a bipartisan, rising concern about private domination.[252]

C. Agency Enforcement, Guidance, and Coordination to Address Harmful Effects of Mobility Limitations on Workers

This Article has argued that existing doctrinal tools can account for mobility limitations in joint employment tests. This analysis has important implications for administrative agencies considering claims that a franchisor is a joint employer. Even though constrained by its current "direct and immediate" joint employer rule, the NLRB could consider franchisors to be joint employers if they use no-poaching, non-compete, or other mobility restraints that evince "direct" or "immediate" control. The EEOC, and DOL, which recently rescinded its similarly-narrow Trump-era DOL joint employer regulation,[253] could take account of a broad range of mobility limitations in administrative guidance. While DOL is likely to revisit the Obama-era Administrator's Interpretation ("AI") from 2016,[254] that AI did not specifically discuss the franchise relationship or address the relevance of subordinate firm dependency.[255] DOL can improve on its 2016 AI by clarifying that a presumption against joint employment in franchising is unsound, and that it will presume that lead firms that limit the mobility of subordinate firms are joint employers in its own enforcement actions. DOL guidance could, furthermore, offer specific features of the franchise relationship that make a joint employment relationship more likely, such as mobility restraints like no-poaching and non-compete requirements, reserved

[252] Ben Casselman & Jim Tankersley, *Looking for Bipartisan Accord? Just Ask About Big Business*, N.Y. TIMES (May 14, 2021), https://www.nytimes.com/2021/05/14/business/economy/big-business-politics-economy.html [https://perma.cc/NWZ4-6KZ4]. This would track recent antitrust law reform efforts, which have sought to reorient antitrust law to check private domination. *See* Lina M. Khan, *The End of Antitrust History Revisited: The Curse of Bigness: Antitrust in the New Gilded Age*, 133 HARV. L. REV. 1655, 1682 (2020); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1104 (2020).

[253] Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 29 C.F.R. § 791 (2021).

[254] *See* Ben Penn, *DOL Proposes Ditching Trump's Narrowed Joint Employer Rule (1)*, BLOOMBERG L. (Mar. 11, 2021, 5:52 AM), https://news.bloomberglaw.com/daily-labor-report/biden-dol-proposes-ditching-trumps-narrowed-joint-employer-rule [https://perma.cc/LXX8-ACJX].

[255] *See* U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (FLSA) (2016), at 2-4 (instructing that in vertical joint employment inquiries, the focus is on the relationship between the employee and the putative joint employer, rather the relationship between the putative joint employers to each other).

control in franchise agreements, "recommended" personnel policies accompanied by adverse consequences for franchisees who do not adopt them, and intensive, ongoing monitoring, communications, and evaluations.

Further administrative enforcement, guidance and coordination is needed, moreover, to account for subordinate firm dependence on lead firms outside of the franchise relationship. Companies like Amazon and Wal-Mart have significant buyer market power to shape the workplace practices in their subordinate firms, even without the mobility restraints that are common in franchising. Since 2013, seeking to wrest control over delivery schedules and volume from the major ground delivery companies, Amazon has established its own transportation division to direct shipments through "delivery service partners," or DSP's.[256] Amazon shifts the costs and responsibilities of employing drivers to DSP's by designating them as the direct employer of the drivers.[257] Coordinating deliveries through 1,300 startup DSP's, which work almost exclusively for Amazon, has also allowed Amazon to embed significant control in its contracts with DSP's. DSP's, for instance, must install Amazon tracking and surveillance technology in DSP vans, require drivers to use specific delivery routes set by an Amazon algorithm, and follow detailed, uniform Amazon personnel policies for these drivers, including required pay and benefits, hygiene, and social media use.[258] Wal-Mart has controlled warehousing subcontractors' hiring practices in similar ways, and, like franchisors, makes personnel recommendations that it expects subcontractors to follow.[259]

These practices can harm workers in ways that echo the violations of employment and employment discrimination law common in the franchise relationship. Shifting the legal responsibility for delivery safety to DSP's, for instance, permits Amazon to provide DSP's with detailed safety instructions but bear no liability when DSP's instruct drivers to bypass them in order to meet Amazon's productivity

[256] BRAD STONE, AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE 225-29 (2021).

[257] *Id.* at 228 (explaining that Amazon established its DSP network to lower labor costs, as a potent union avoidance strategy, and to shift the cost of "botched deliveries, driver misbehavior, or worse, car accidents and deaths" away from Amazon).

[258] Josh Eidelson & Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, BLOOMBERG L. (May 5, 2021, 3:00 AM PDT), https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers [https://perma.cc/E344-NDTG].

[259] *See* Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 11-CV-8557, 2014 WL 183956, at *12 (C.D. Cal. Jan. 14, 2014).

requirements.[260] Courts, as in *Edmonds*, may consider the subordinate firm's dependency as enabling lead firm control.[261] But this approach is only easy to apply in cases, like Wal-Mart and Amazon, in which the defendants' buyer market power is uncontested.

There is a need for DOL guidance about how lead firms can shape workplace practices in joint employment claims outside of judicially-recognized forms of control, including buyer market power. Economic research to measure buyer market power in joint-employer claims can expand its reach,[262] but is too expensive and complex for most individual, private employment and employment discrimination litigation. Employment and employment discrimination law claims would benefit from a simplified approach to assess the buyer market power of putative joint employers,[263] and for agency guidance about how courts should weigh buyer market power in the joint employer analysis. Coordination with the FTC can expand agency expertise in measuring buyer market power and will be necessary to deter mobility

260 Annie Palmer, *Amazon Delivery Companies Routinely Tell Drivers to Bypass Safety Inspections*, CNBC (July 30, 2021, 12:20 PM EDT), https://www.cnbc.com/2021/07/30/amazon-dsps-tell-drivers-to-bypass-safety-inspections.html [https://perma.cc/B9LH-D254]. Amazon has been widely criticized for prizing speed over safety practices in deliveries. Amazon DSP's report high rates of driver and pedestrian injuries and deaths, for which Amazon has been held harmless. James Bandler, Patricia Callahan, Doris Burke, Ken Bensinger & Caroline O'Donovan, *Inside Documents Show How Amazon Chose Speed over Safety in Building Its Delivery Network*, PROPUBLICA (Dec. 23, 2019, 3:00 PM EST), https://www.propublica.org/article/inside-documents-show-how-amazon-chose-speed-over-safety-in-building-its-delivery-network [https://perma.cc/N645-F33P]; Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 5, 2019), https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html [https://perma.cc/2DKB-PY23].

261 In *Edmonds*, Amazon's permanent relationship with a delivery subcontractor, and its employee's job of delivering packages for "the largest digital retailer in the United States," demonstrated permanence and integration. Edmonds v. Amazon.com, Inc., No. C19-1613, 2020 WL 1875533, at *4-6 (W.D. Wash. Apr. 15, 2020).

262 Callaci, *supra* note 10, at 418; Hafiz, *supra* note 18, at 703. Economists and law scholars have made similar calls to measure buyer market power in antitrust challenges. *See* Marinescu & Posner, *supra* note 4, at 1345-46; Naidu et al., *supra* note 35, at 539-40, 574-83 (proposing economic analysis to determine market definition and concentration, and to measure downward wage pressure).

263 One proposed change to New York law prohibits abuse of a lead firm's labor market power. It would relieve a plaintiff from having to define the relevant market in state antitrust suits, by deeming firms that employ over thirty percent of employees in an occupation as having "labor market dominance." The bill would, additionally, remove the defense in an antitrust claim that an abusive practice has procompetitive effects. The bill passed the state senate but did not become law in this legislative session. *See* S.B. 933A, 2021 Leg., Reg. Sess. (N.Y. 2021).

restraints that violate antitrust law[264] and the lead firm use of mobility restraints that harm workers classified as independent contractors.[265] DOL guidance and coordination with the FTC and state agencies can also inform DOL's strategic enforcement of wage and hour law. Misclassification task forces, coordinated by DOL until 2016 and active in at least fourteen states,[266] show the potential of inter-agency coordination in addressing lead firm dominance over subordinate firms and their employees.[267] State agencies in multi-agency coordination could recommend law reform in their state joint employer tests to account for the power of lead firms to set their subordinate firms' work terms, outside of judicially recognized forms of control.

CONCLUSION

Mobility limitations are a significant source of power for lead firms to control their subordinate firms' employees. However, while recognized in economics and increasingly in antitrust law, they are often ignored in employment and employment discrimination law. This Article proposes that taking account of mobility limitations can correct a trend in which courts presume that franchisors and other lead firms that embed control in mobility limitations are not joint employers. It can also justify a presumption of joint employment, either by restructuring the control-based joint employer doctrine or by extension of the

[264] DOJ and FTC issued guidance in 2016, for example, that no-poaching agreements can be *per se* unlawful under antitrust law. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 249, at 3. DOL and FTC have previously coordinated in investigating a wide-ranging conspiracy by poultry producers to fix worker wages at unlawfully low rates. Robin van der Meulen & Brian Morrison, *An Update on Anti-Poach Enforcement and Class Actions*, LAW360 (July 11, 2018, 4:39 PM EDT), https://www.law360.com/articles/1062322/an-update-on-anti-poach-enforcement-and-class-actions [https://perma.cc/6497-X59R].

[265] *See Amazon to Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers*, FED. TRADE COMM'N (Feb. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some [https://perma.cc/GK3Y-9H4Q].

[266] ANDREW ELMORE & MUZAFFAR CHISHTI, MIGRATION POL'Y INST., STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS 5 (Migration Policy Inst. 2018).

[267] Those task forces permitted participating enforcement agencies to use data housed across other state agencies for strategic enforcement, and to recommend broadening of state employment laws to an ABC test to state legislatures. *Id.*; Deknatel & Hoff-Downing, *supra* note 213, at 64; *see, e.g.*, The New York State Construction Industry Fair Play Act, S. 5847 (N.Y. 2009) (using the ABC test in the construction industry in New York State because of the recommendation of its misclassification task force).

presumption of employment in the state ABC test to joint employers. Shedding light on the harmful effects of mobility limitations on workers, finally, suggests a law reform agenda of regulating subordinate firm dependency, notwithstanding judicially recognized forms of control.