

AN EMPIRICAL STUDY OF FAST-FOOD FRANCHISING CONTRACTS: TOWARDS A NEW “INTERMEDIARY” THEORY OF JOINT EMPLOYMENT

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Abstract: The “Fight for Fifteen and a Union” movement among fast-food workers and their allies has raised awareness about wage inequality in the United States. Rather than negotiating for better wages and working conditions with economically weak restaurant-level franchisees, the movement aims to affect the practices of what they view as the all-powerful brands—the franchisors. Few would dispute the notion that the franchisor brands, not their franchisees, set industry-wide standards and, thus, have the ability to offset rising wage inequality and improve working conditions. And yet, the movement has raised controversial law and policy questions about the legal responsibilities of these fast-food Goliaths under current labor and employment laws. Should fast-food brands, as franchisors, be legally responsible as “employers” for the wage-and-hour violations suffered by the individuals who serve us fast food in their franchised stores, pursuant to the Fair Labor Standards Act (FLSA)? Do they have a legal obligation, under the National Labor Relations Act (NLRA), to bargain with the labor unions representing fast-food workers in their franchised stores? This Article addresses these timely questions with original empirical research of forty-four contracts between top fifty fast-food franchisors and their franchisees in 2016. The contractual analysis reveals a new theory of joint employment via franchisor influence over franchisees’ managers. Unlike prior foci on franchisor-franchisee relations, and franchisor-crew member relations, this Article brings a new party to light: franchisees’ supervisory managers. Jurisprudential analogy to the agricultural context, and case law regarding farm labor contractors as grower intermediaries, supports this proposed analytical lens. In sum, the theory developed from this rare dataset postulates why some of the Goliaths of fast food may indeed be “employers” with legal obligations to the workers in their franchised restaurants. Thus, courts, administrative agencies and legislators should be mindful of franchisor influence through intermediaries, as well as the complex relationships embedded in the franchise system that make disaggregating direct from indirect forms of influence difficult to impossible.

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INTRODUCTION

The “Fight for Fifteen and a Union” movement among fast-food workers and their allies has raised awareness about wage inequality in the United States. Indeed, the 2014 poverty rate for restaurant workers was a whopping 16.7%, in contrast to a 6.3% poverty rate in other occupations.¹

1. HEIDI SHIERHOLZ, ECON. POLICY INST., LOW WAGES AND FEW BENEFITS MEAN MANY RESTAURANT WORKERS CAN’T MAKE ENDS MEET 3 (2014). Wage levels for fast food workers are lower than other occupations. See Rosemary Batt, Tashlin Lakhani, Jae Eun Lee & Can Ouyang, *The Quality of Jobs in Restaurants*, in GOOD COMPANIES, GOOD JOBS (Paul Osterman ed., forthcoming 2019) (referring to the low wages of restaurant workers and stating “[t]hey make less than laundry and dry cleaning workers, vehicle cleaners, packers and packagers, personal care aides, and non-farm

Rather than negotiating for better wages and working conditions with economically weak restaurant-level franchisees, the movement aims to affect the practices of what it views as the all-powerful brands—the franchisors.²

From the perspective of these workers and their advocates, the Goliaths of the fast-food industry are the franchisors, not the franchisees. To many, the assessment of who holds the power in this industry is not controversial as an economic matter. Few would dispute the notion that the franchisor brands, not their franchisees, set industry-wide standards. Thus, brands have a superior ability to offset rising wage inequality and to improve working conditions in the fast-food industry.³

And yet, the movement has raised controversial law and policy questions about the legal responsibilities of these fast-food Goliaths under current labor and employment laws in the United States. Should fast-food brands, as franchisors, be legally responsible as “employers” for the wage-and-hour violations suffered by the individuals who serve us fast food in their franchised stores, pursuant to the Fair Labor Standards Act (FLSA)? Do they have a legal obligation, under the National Labor Relations Act (NLRA), to bargain with the labor unions representing fast-food workers in their franchised stores?

This Article addresses these timely questions with original empirical research of forty-four contracts between the top fifty fast-food franchisors and their franchisees in 2016.⁴ It uses a comprehensive review of these contracts, along with jurisprudential analogies to the agricultural context, to support a new theory explaining why some of the Goliaths of fast food may indeed be “employers” for the purposes of the FLSA and the NLRA. Existing theories direct their attention to a franchisor’s relations with its franchisee, or with the franchisee’s front-line workers. In contrast, the proposed theory redirects attention to franchisor relations with an often-overlooked party: the franchisees’ supervisorial managers. These managers oversee wages and working conditions of front-line fast food workers on a daily basis. The theory proposes that some franchisors may exert considerable influence over the managers at their franchised stores, who in turn influence front-line workers. In this way, franchisee managers may serve as intermediaries between franchisors and front-line workers

animal caretakers”); JOHN SCHMITT & JANELLE JONES, CTR. FOR ECON. & POLICY RESEARCH, SLOW PROGRESS FOR FAST-FOOD WORKERS (2013).

2. For an introduction to business format franchising, see generally JEFFREY L. BRADACH, FRANCHISE ORGANIZATIONS (1998).

3. See generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

4. For a description of the methodology, see *infra* Part III.

such that, in some cases, franchisors are joint employers (along with the franchisee) of front-line workers.

This new “intermediary” theory of joint employment adds analytical rigor to joint-employment determinations in the franchising context. It also shifts the discussion away from the current spotlight on the need to disaggregate direct from indirect forms of influence. Instead, it encourages us to consider franchisor influence over supervisory managers, be it direct or indirect. In recent years, legislators, executive branch agencies,⁵ and courts⁶ have consistently emphasized the direct versus indirect framing of joint employment. For instance, the proposed Save Local Business Act⁷ aims to limit wage-and-hour law liability under the FLSA, and collective bargaining obligations under the NLRA, solely to entities who exercise “direct and immediate,” rather than indirect, forms of influence.⁸ One of the goals of the proposed Act, as its name connotes, is to protect the viability of the franchising business model.⁹

The Article challenges the implied assumption of this debate that decision-makers can consistently disaggregate direct forms of influence from indirect forms. Whether intermediary managerial influence represents direct or indirect influence is sometimes a difficult analytical distinction to make, even if only “direct” forms of influence are relevant in joint employer cases moving forward.

5. The National Labor Relations Board (NLRB), which enforces employee rights around union and collective activity, proposed a rule to significantly limit the scope of employment relationships. See Hassan A. Kanu, *Trump Administration Moves to Limit Franchisor Labor Liability*, BNA NEWS (Sept. 13, 2018), <https://www.bna.com/labor-board-files-n73014482514/#> [<https://perma.cc/2N7U-SRX8>] (“[T]he NLRB said in the notice. . . . [A]n employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine.”). The fate of the rule is challenged by a recent D.C. Circuit decision. See *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018) (reversing in part, affirming in part, and remanding the NLRB decision).

6. For more on direct versus indirect distinction in existing jurisprudence, see *infra* Section IV.C, which calls for a move away from the direct versus indirect dichotomy.

7. H.R. 3441, 115th Cong. (2017).

8. *Id.* § 2(a)(B) (stating that a joint employer is a person who “directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline”).

9. STAFF OF H. COMM. ON EDUC. & THE WORKFORCE, 115TH CONG., FACT SHEET: SAVE LOCAL BUSINESS ACT (2017); John T. Bender, *Barking Up the Wrong Tree: The NLRB’s Joint-Employer Standard and the Case for Preserving the Formalities of Business Format Franchising*, 35 FRANCHISE L.J. 209, 211 (2015); 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, 441 (2015) (“Or [franchisors] may cease franchising altogether (and perhaps, under the judicial doctrine of ‘frustration of contractual purpose,’ seek to terminate all existing franchise agreements and purchase their franchisees’ assets, resulting in pure company-owned networks).”).

This Article proceeds as follows. Part I highlights that existing joint-employer analyses tend to examine two mechanisms of influence: the relationship between (1) the franchisor and the franchisee's front-line employees and/or (2) the franchisor and the franchisee. This Part reveals that the dominant joint-employer theories have not yet considered the potential intermediary role of franchisees' supervisory managers. Part I closely examines franchising joint-employer case law, particularly in the FLSA context. However, the observations presented about the failure to consider the intermediary role of managers apply to both the FLSA and the NLRA.

Part II describes the limits and opportunities of using franchisor-franchisee contracts as an analytical tool. Part III presents an empirical analysis of the top forty-four franchisor-franchisee contracts in 2016 to support the new intermediary theory of joint employment via franchisees' supervisory managers. This Part evinces the lines of inquiry that the new theory creates for courts, scholars, and executive branch agencies moving forward. The analysis considers franchisor relations with franchisees' managers in a number of dimensions, including ongoing training and advising relationships. Along with the findings from the contractual analysis, Part III draws jurisprudential analogies from agricultural cases involving joint employment questions to further flesh out its proposed theory of influence through an intermediary party.

Part IV describes the study's implications for joint-employer law and policy in the FLSA and the NLRA contexts. It also proposes that, regardless of the role of managers, franchisees themselves may serve as intermediaries for franchisor influence in some brands. Finally, as mentioned above, Part IV questions the prevailing direct versus indirect frame of current debates in all three branches of government and proposes that we move toward a theory that considers the myriad ways the franchisor can influence the employment conditions of front-line workers.

I. EXISTING JOINT EMPLOYER THEORIES

A. *A FLSA Primer for the Franchising Context*

The FLSA holds employers responsible for the wages and overtime premiums paid to employees. If more than one entity is an employer, courts and the U.S. Department of Labor (DOL) often refer to them as

“joint employers.”¹⁰ A prevailing FLSA plaintiff can recover damages for the wage-and-hour violations they suffer from one, or both, of the defendant employers.¹¹

The FLSA is silent with respect to franchising, or any other type of business organizational form. Instead, it has broad,¹² flexibly worded, definitions of “employ,” “employer,” and “employee” that give judges and the DOL interpretive latitude. The FLSA expansively defines “employ,” for instance, as to “suffer or permit to work.”¹³ The definition of employer includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁴

Courts have developed various legal tests for joint employment, containing multiple legal factors to determine who is an employer. The Supreme Court has proclaimed that determinations should not depend on “isolated factors but rather upon the circumstances of the whole activity.”¹⁵ Common factors include an entity’s influence, or lack thereof, on wages, hiring and firing, job qualifications, training, scheduling and other working conditions.¹⁶ The FLSA’s language, supported by its legislative history, suggests that all entities that permit the performance of work and that are able to restrict wage-and-hour abuses, have obligations as an “employer.”¹⁷

Before diving in, two caveats about FLSA joint-employer law are necessary. First, nothing in the FLSA itself connects the definition of “employer” only to entities that exhibit “control.”¹⁸ Along these lines, the

10. Joint employer liability is widely acknowledged in the FLSA context. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947); *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917–18 (9th Cir. 2003); 29 C.F.R. § 791.2 (2018).

11. When there are two or more employers, the entities are jointly and severally liable for wage-and-hour compliance in the franchisee’s restaurant. See *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984); 29 C.F.R. § 791.2(a).

12. The U.S. Supreme Court has noted that FLSA’s definition is “the broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). The Court has often remarked that Congress used broad language to include relationships as “employment relationships” that would not have been found to be employer-employee relationships under common law right-to-control standards. See *Rutherford Food Corp.*, 331 U.S. at 729.

13. 29 U.S.C. § 203(g) (2018).

14. *Id.* § 203(d). It also defines employees as individuals employed by employers. *Id.* § 203(e).

15. *Rutherford Food Corp.*, 331 U.S. at 730.

16. See *infra* Sections III.A(2)–(5).

17. Bruce Goldstein, Marc Linder, Laurence E. Norton & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1103 (1999) (arguing for a broad interpretation of “employ”).

18. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. (forthcoming 2019) (manuscript at 34) (on file with author) (systematically

U.S. Supreme Court has repeatedly instructed lower courts that the touchstone of the inquiry in the FLSA context is not common law agency relationships, but instead the “economic reality” of the relationship.¹⁹ Despite these broad concepts of employment in the FLSA context, however, this Article will sometimes engage the term “control,” instead of more encompassing terms like “economic reality” or “influence.” Using this term facilitates an application to case law, legislative debates, and administrative battles that frequently engage the meaning of “control.” The concept of control also enables adaptation of the proposed intermediary theory of joint employment to the NLRA context, which relies on common law notions of control.

Second, this Article also does not engage in the burgeoning debate about the extent to which a franchisor’s influence over working conditions to protect the brand is relevant to joint employment determinations. While this is an important question with extensive ramifications, opening up intermediary theories of influence in the joint employer context is the express purpose of this Article. The mechanism applies regardless of the outcome of the brand protection debate. Future work will need to develop frameworks that can disaggregate franchisor influence that is truly for brand protection (and thus excluded from the determination of whether a business has legal obligations).²⁰

As the two following sections depict, courts consistently overlook the intermediary role of franchisee managers, instead focusing their inquiries toward franchisor influence over front-line workers and franchisor influence over franchisees. These sections specifically consider the

reviewing the FLSA’s language and legislative history and concluding that Congress intended a broad definition of employ beyond common law notions of control).

19. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961). The “economic reality” touchstone has received judicial and scholarly criticism. See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) (“It is comforting to know that ‘economic reality’ is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But ‘reality’ encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.”); Michael C. Harper, *The Restatement of Employment Law’s “Independent Business-Entrepreneurial Control” Test for Employee Status*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER? 45 (Kati L. Griffith & Sam Estreicher eds., 2015) (referencing vagueness and unpredictability related to FLSA’s economic realities test).

20. See Michael Iadevaia, *Separating the Fries from the Bag: A Proposed Framework for Separating Brand Control from Worker Control Under the NLRA* (2018) (unpublished comment, Cornell University) (on file with author) (using the NLRA’s mandatory versus permissive subjects bargaining distinction as a proposed analytical framework for separating worker control from brand control).

eighteen cases available on Lexis Advance involving front-line worker claims that a franchisor was an employer under the FLSA,²¹ but the dynamics are similar in other areas of labor and employment law outside of the FLSA franchising context.²² Nine of the cases concluded that the franchisor was not an employer of the franchisee's front-line work force.²³ The other nine, however, left room for this possibility and allowed the litigation to move forward. In other words, in nine of the eighteen cases, judges either denied motions to dismiss complaints against franchisors or granted plaintiffs' motions to amend complaints to add the franchisor as a defendant in the case.²⁴

21. The author and the author's research assistants ran a variety of searches, but the primary research involved reviewing all federal case law containing both of the words "FLSA" and "franch."

22. See generally Charlotte Alexander, *Direct and Indirect Employment Under Title VII*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?, *supra* note 19, at 335; Marshall Babson, *The Restated Joint-Employer Test as Articulated by the National Labor Relations Board*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?, *supra* note 19, at 261; Richard Griffin, *Developments at the National Labor Relations Board*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?, *supra* note 19, at 253; Phillip Miscamorra, *Who's On First (As the NLRA Turns 80): The NLRB, Congress and the Courts?*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?, *supra* note 19, at 279.

23. *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014) (reversing the denial of a franchisor's motion for judgment as a matter of law after jury trial in favor of the front-line worker); *In re Domino's Pizza Inc.*, No. 16-CV-2492(AJN)(KNF), 2018 U.S. Dist. LEXIS 169607, at *39 (S.D.N.Y. Sept. 30, 2018) (granting franchisor's motion for a summary judgment); *In re Jimmy John's Overtime Litig.*, Nos. 14-C-5509, 15-C-1681, 15-C-6010, 2018 U.S. Dist. LEXIS 107157, at *76-77 (N.D. Ill. June 14, 2018) (same); *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 889-91 (W.D. Wis. 2017) (same); *Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061, at *62-63 (D. Or. Dec. 13, 2016) (same); *Reese v. Coastal Restoration & Cleaning Servs.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *14-15 (S.D. Miss. Dec. 15, 2010) (same); *Abdelkhaleq v. Precision Door*, No. 5:07-CV-03585, 2008 U.S. Dist. LEXIS 64464, at *16 (N.D. Ohio Aug. 21, 2008) (granting franchisor's Rule 12(b)(6) motion to dismiss worker's claim); *Singh v. 7-Eleven, Inc.*, No. C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677, at *9 (N.D. Cal. Mar. 8, 2007) (granting franchisor's motion for a summary judgment); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at *18-19 (N.D. Fla. Nov. 1, 1993) (same); see also *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].").

24. *Bonaventura v. Gear Fitness One NY Plaza LLC*, No. 17-Civ.-2168(ER), 2018 U.S. Dist. LEXIS 53269, at *13-18 (S.D.N.Y. Mar. 29, 2018); *Parrott v. Marriott Int'l, Inc.*, No. 17-10359, 2017 U.S. Dist. LEXIS 144277, at *10 (E.D. Mich. Sept. 6, 2017); *Lora v. Ledo Pizza Sys., Inc.*, No. DKC-16-4002, 2017 U.S. Dist. LEXIS 118474, at *17 (D. Md. July 27, 2017); *Ocampo v. 455 Hospitality LLC*, No. 14-CV-9614(KMK), 2016 U.S. Dist. LEXIS 125928, at *23-31 (S.D.N.Y. Sept. 15, 2016); *Shupe v. DBJ Enters., LLC*, No. 1:14-CV-308, 2015 U.S. Dist. LEXIS 22284, at *4 n.2 (M.D.N.C. Feb. 25, 2015); *Benitez v. Demco of Riverdale, LLC*, No. 14-Civ.-7074(CM), 2015 U.S. Dist. LEXIS 20325, at *5-6 (S.D.N.Y. Feb. 19, 2015); *Cordova v. SCCF, Inc.*, No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *23 (S.D.N.Y. July 16, 2014); *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 208 (S.D.N.Y. 2014); *Cano v. DPNY*, 287 F.R.D. 251, 262 (S.D.N.Y. 2012); see also *Orozco*, 757

B. Franchisor's Influence over Franchisee's Front-Line Workers

Courts commonly home in on the immediate relationship between the franchisor and the franchisee's front-line workers, referred to as crewmembers by some brands.²⁵ A typical joint employer theory, thus, calls for a primary focus on franchisor's (rather than franchisee's) overt influence over the wages and working conditions of franchisee's employees. In these cases, courts ask questions such as the following: Does the franchisor plainly set the wages of front-line workers?²⁶ Does the franchisor supervise the front-line workers regularly? Does the franchisor affect key aspects of the front-line employees' experiences at work, through benefits, scheduling, training, or other work-related requirements?²⁷

Simply put, the cases utilizing this analytical window do not predominantly examine the franchisor's relationship with the franchisee, nor the franchisor's relationship with the franchisee's supervisory managers. Rather, their main windows of inquiry predominantly consider the franchisor's ongoing relationship with the franchisee's front-line workers. The logic follows that, in some cases, the franchisor and the franchisee may each have sufficient influence over the wages and working conditions of front-line workers such that they are both employers with joint liability. There are numerous examples of this theory in FLSA case law involving wage claims against franchisors. For example, when dismissing a FLSA case against a window cleaning franchisor, a district court stated that "a joint employer relationship exists when *each* alleged employer exercises control over the working conditions" of the workers.²⁸

Other courts that have dismissed FLSA claims against franchisors have similarly stressed these separate lines of inquiry by noting that a joint employer determination results only if "each alleged employer" exhibits sufficient influence.²⁹ A recent case from the Northern District of Illinois

F.3d at 452 (dismissing FLSA claim against franchisor but also clarifying, "[w]e do not suggest that franchisors can never qualify as the FLSA employer for a franchisee's employees").

25. See *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1235–36 (N.D. Cal. 2015); *Juarez v. Jani-King of California, Inc.*, No. 09-3495(SC), 2012 U.S. Dist. LEXIS 7406, at *10–13 (N.D. Cal. Jan. 23, 2012); *Reese*, 2010 U.S. Dist. LEXIS 132858, at *14; *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 727–30 (Cal. 2014).

26. See *Cordova*, 2014 U.S. Dist. LEXIS 97388, at *21 (stating that one key inquiry was whether the defendant had control over "compensation policies" and wages).

27. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (referencing factors that get at a business's influence over wages and working conditions).

28. *Pope*, 228 F. Supp. at 889 (emphasis added).

29. E.g., *In re Jimmy John's Overtime Litig.*, Nos. 14-C-5509, 15-C-1681, 15-C-6010, 2018 U.S. Dist. LEXIS 107157, at *42 (N.D. Ill. June 14, 2018) ("A joint employer relationship exists where

involving the Jimmy John's brand characterized joint employer findings as cases whereby "each alleged employer exercises control over the working conditions of the employees."³⁰

While this joint employer theory requires each entity to have sufficient influence over the front-line workers, some courts acknowledge that joint employers do not need to exert equal amounts of influence over the worker to find an employment relationship. As a judge in the Southern District of New York recently put it, "[e]ven where one entity exerts ultimate control over a worker, another entity may still exert a sufficient amount of control over the employee to qualify it as a joint employer under the FLSA."³¹

C. Franchisor's Influence over Franchisee

Theories of joint employment do not solely concentrate on the franchisor's relationship with front-line workers. A strain of joint employer theory in the wage-and-hour context, as well as the franchising literature more broadly,³² interrogates the relationship between the franchisor and the franchisee.³³ The franchisor-franchisee relationship is the central point of inquiry.

Some of these courts employ a type of aggregation theory. They add franchisor influence over front-line workers to franchisee influence over front-line workers to determine if the two entities' combined influence is sufficient to establish a joint employer relationship. For instance, a Maryland district court, applying the Fourth Circuit's joint-employer framework,³⁴ inquired whether the franchisor and franchisee "[share] or

each alleged employer exercises control over the working conditions of the employees."); *accord Orozco*, 757 F.3d at 448 ("In joint employer contexts, each employer must meet the economic reality test."); *Reese*, 2010 U.S. Dist. LEXIS 132858, at *6 ("A claim brought under the FLSA first requires facts showing the existence of an employment relationship between Plaintiff and Defendant, in this case between Reese [worker] and SERVPRO [franchisor].").

30. *In re Jimmy John's*, 2018 U.S. Dist. LEXIS 107157, at *42.

31. *Bonaventura v. Gear Fitness One NY Plaza LLC*, No. 17-Civ.-2168(ER), 2018 U.S. Dist. LEXIS 53269, at *8 (S.D.N.Y. Mar. 29, 2018) (citing *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 258 (S.D.N.Y. 2012)).

32. See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 928 (1990); Peter C. Lagarias, *Franchising in California: Uniformity in California Franchise Agreements*, 21 FRANCHISE L.J. 136, 136 (2002); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN. ST. L. REV. 105, 106 (2004).

33. *Lora v. Ledo Pizza Sys., Inc.*, No. DKC-16-4002, 2017 U.S. Dist. LEXIS 118474, at *14 (D. Md. July 27, 2017) ("[T]he allegations in the amended complaint must show a relationship among the franchisor, the franchisee, and the plaintiff that demonstrates an employment relationship.>").

34. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 142 (4th Cir. 2017).

[codetermine] the essential terms and conditions of a worker's employment."³⁵ The Fourth Circuit similarly critiqued a district court's omission of consideration of the relationship between the two parties by stating that it "ignored important elements of coordination between Defendants, as well as many of Defendants' shared levers of influence over Plaintiffs' work."³⁶

Other courts scrutinize how the franchisor influences the franchisees' behavior. In *Cordova v. SCCF, Inc.*,³⁷ the court found that the franchisor's relationship with the franchisee was potentially relevant to the FLSA claim, so it refused to dismiss the complaint against the franchisor.³⁸ Specifically, it highlighted franchisor activities like creating delivery procedures for the franchisee and providing software programs so that the franchisee could track the workers' delivery times, wages, hours, and performance. Moreover, *Reese v. Coastal Restoration & Cleaning Services*³⁹ suggests that courts can consider—and reject—franchisor influence over franchisee arguments.⁴⁰ It concluded that the evidence on the record did not support the worker's theory "that his employment 'extended through'" the franchisee to the franchisor "by virtue of the franchise license agreement" between the two parties.⁴¹

Courts have even considered whether some franchisors and franchisees are so interconnected as to be a "single enterprise" and, thus, constitute a combined employer of front-line workers. This notion has garnered some resistance.⁴² Other courts have contemplated whether the franchisee is an employee of the franchisor, such that the front-line workers are the

35. *Lora*, 2017 U.S. Dist. LEXIS 118474, at *14–17 (citing *Salinas*, 848 F.3d at 142); see also *Hall v. DIRECTV, LLC*, 846 F.3d 757, 767 (4th Cir 2017) (stating that "we first must determine whether the defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work").

36. *Hall*, 846 F.3d at 770.

37. No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388 (S.D.N.Y. July 16, 2014).

38. *Id.* at *6–7.

39. No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858 (S.D. Miss. Dec. 15, 2010).

40. *Id.* at *14.

41. *Id.*; see also *Ping Chen v. Domino's Pizza, Inc.*, No. 09-107(JAP), 2009 U.S. Dist. LEXIS 96362, at *10 (D.N.J. Oct. 16, 2009) ("Courts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee's employees.").

42. See, e.g., *Marshall v. Shan-An-Dan*, 747 F.2d 1084, 1089 (6th Cir. 1984) ("[T]he shared right to use the brand name of a manufacturer or distributor between a franchisor and a franchisee does not make the two a single entity for purposes of FLSA."); *Ping Chen*, 2009 U.S. Dist. LEXIS 96362, at *10 (same).

franchisor's employees.⁴³ There are also cases that examine franchisor-franchisee relations, but do not involve front-line workers at all. Instead, these cases involve franchisee claims that they are employees and that the franchisor did not properly pay them minimum wages and overtime premiums under the FLSA. Some courts have allowed a franchisee's wage-and-hour claim against a franchisor to move forward,⁴⁴ while others have swiftly granted dismissals to franchisor defendants.⁴⁵

Even though this Article has separated the two common mechanisms of influence to make an analytical point, courts are not always exclusively in one category or the other. FLSA franchising cases sometimes show a simultaneous consideration of franchisor relations with the franchisee's front-line workers and franchisor relations with the franchisee itself. In *Olvera v. Bareburger Group LLC*,⁴⁶ for example, the court found the franchisor's direct relationship with front-line employees relevant.⁴⁷ It denied a motion to dismiss the complaint, in part because plaintiff crewmembers had alleged that the franchisor "monitored employee performance."⁴⁸ The court also found relevant, however, the franchisor's relationship with the franchisee. It considered such factors as franchisor guidance to franchisees "on 'how to hire and train employees.'"⁴⁹

An interrogation of the existing case law suggests that courts have not seriously considered the relationship between franchisors and franchisees' managers. In the following sections, this Article systematically examines franchisor-franchisee contracts and highlights how such an analysis exposes the importance of franchisor relations with franchisee managers.

43. *Howell v. Chick-Fil-A*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at *6-8 (N.D. Fla. Nov. 1, 1993) (concluding that franchisor was not the employer of the franchisee, and thus not the employer of the franchisee's front-line workers).

44. *See, e.g., Fernandez v. JaniKing Int'l, Inc.*, No. H-17-1401, 2018 U.S. Dist. LEXIS 13300, at *12-13 (S.D. Tex. Jan. 8, 2018) (allowing plaintiff franchisees to amend complaints claiming franchisors were "employers" under FLSA); *Naik v. 7-Eleven, Inc.*, No. 13-4578(RMB/JS), 2014 U.S. Dist. LEXIS 107139, at *28-29 (D.N.J. Aug. 5, 2014) (concluding that plaintiff franchisees had properly alleged employer-employee relationship with their franchisor).

45. *See Haitayan v. 7-Eleven, Inc.*, No. CV-17-7454-JFW (JPRx), 2018 U.S. Dist. LEXIS 82683, at *20 (C.D. Cal. Mar. 14, 2018); *7-Eleven, Inc. v. Sodhi*, No. 13-3715(MAS)(JS), 2016 U.S. Dist. LEXIS 70794, at *22 (D.N.J. May 31, 2016).

46. 73 F. Supp. 3d 201 (S.D.N.Y. 2014).

47. *Id.* at 206-08.

48. *Id.* at 207.

49. *Id.*; *see also Ocampo v. 455 Hosp. LLC*, No. 14-CV-9614(KMK), 2016 U.S. Dist. LEXIS 125928, at *19-30 (S.D.N.Y. Sept. 15, 2016).

II. CONTRACTS AS AN ANALYTICAL TOOL

Why use formal legal instruments, like contracts, to understand real world relationships between parties? When it comes to defining what it means to “employ” someone, the FLSA is unwavering in its emphasis on how relationships actually play out in practice. Undoubtedly and importantly, contracts can only tell us about the formal legal boundaries of a relationship. They cannot tell us about the day-to-day realities of a workplace. They cannot paint a comprehensive picture of the franchisor’s role in the work lives of franchisees’ employees. They are merely suggestive of reality, not determinative.⁵⁰ Ultimately, all questions about whether a business is an “employer” require close and exhaustive examination of how that business relates to the worker’s working conditions and wages.⁵¹

These substantial qualifications notwithstanding, there are a number of reasons for turning to legal contracts in studies of employment relationships. First, sometimes the contract is evidence of the existence of an employment relationship. In this vein, some courts have declared that while a business’s “self-serving label” of someone as an “independent contractor” is not relevant, the business’s labeling of someone as an “employee” is “highly probative” of an employment relationship.⁵² The Fifth Circuit relied on a business’s treatment of a plaintiff as an “employee” under tax law as a probative factor indicating employment status.⁵³ Even though tax law has separate definitions of employee status,

50. For cases noting the limits of contractual language, see *Ochoa v. McDonald’s Corp.*, 133 F. Supp. 3d 1228, 1235–39 (N.D. Cal. 2015) (discounting relevance of contractual language to joint employer determination); *Reese v. Coastal Restoration & Cleaning Servs., Inc.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *9–12 (S.D. Miss. Dec. 15, 2010) (referring to contractual language a simply relating to quality control standards); compare *Alberter v. McDonald’s Corp.*, 70 F. Supp. 2d 1138, 1144–45 (D. Nev. 1999) (referring to contract language as requiring licensee “to adhere to the policies set forth in the business manuals, including the personnel policies” but also saying that manual itself “states that licensees may choose to adopt the policies it sets out or may set their own policies with respect to personnel”).

51. See generally *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (discussing the importance of broadly considering all relevant factors in the relationship between the putative employer and the workers who suffered FLSA violations).

52. See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983) (declaring that “[a]n employee is not permitted to waive employee status,” and holding welders to be employees even though they had signed independent contractor agreements); *Powers v. Emcon Assocs.*, No. 14-cv-03006-KMT, 2017 U.S. Dist. LEXIS 148751, at *16 (D. Colo. Sept. 14, 2017) (stating that it is relevant that the employment agreement “repeatedly refers to Plaintiff Powers as an ‘employee’ and never refers to him as an ‘independent contractor’”).

53. *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 268 n.5 (5th Cir. 1987), *modified on other grounds on reh’g*, 826 F.2d 2 (1987).

this fact helped paint a picture of a dependency relationship between the business and the worker in that case.⁵⁴ In the U.S. Supreme Court's seminal FLSA case involving the definition of employment, the Court gave no weight to a business's use of the independent contractor label. The Court concluded that, while there were contracts, they were for labor that was central to the enterprise, not for specialized work typically conducted by an independent contractor.⁵⁵

Second, analyzing contracts is useful because it sheds light on the power relations between the contractual parties, which may be relevant to questions about who has the power to alter working conditions and wages on the ground. As Professor Cunningham-Parmeter adeptly put it when theorizing about how to view employment relations in the modern economy, "businesses that control contractual outcomes frequently control working conditions as well."⁵⁶ Scholars have observed that contracts are one way that franchisors affect the relationship they have with franchisees and influence the workings of franchisee establishments.⁵⁷ A primary strain of this research challenges, as Professor Andrew Elmore recently did, the notion that franchisors and franchisees engage in "an arms-length" business relationship.⁵⁸ In other words, it is a

54. *Id.* Lawyers have been proposing new contractual language in an effort to reduce franchisors' joint employer liability. *See, e.g.*, Susan A. Grueneberg, Joshua Schneiderman & Lulu Y. Chiu, *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*, 36 FRANCHISE L.J. 189, 196–218 (2016) (offering new language relating to such things as brand standards and training). For example, some propose language that states that the franchisee, not the franchisor, independently controls the wages and working conditions of franchisees' employees. Other proposed language declares that the franchisee is an "independent contractor," not an employee of the franchisor. *See* Citadel Panda Express, Inc. License Agreement § 5.1A, I, at 5–6 (Apr. 2016); Culver Franchising Systems, Inc. Franchise Agreement § 10.D, at B-13, § 3.B.2, at B-5 (Mar. 29, 2016); Del Taco, LLC Franchise Agreement § D7, at 9–11 (2016); Firehouse of America, LLC Franchise Agreement § 6.1, at 12, § 4.5(b), at 10, § 16.2, at 30 (Mar. 28, 2016); Jamba Juice Franchise Agreement § 17.1, at 40 (Apr. 22, 2016); Pizza Hut, Inc. Location Franchise Agreement § 4.1.A, at 6, § 4.1.B., at 6 (Apr. 1, 2016). For an explanation of where to locate these agreements, please see *infra* note 64.

55. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947); *see also* Griffith, *supra* note 18 (manuscript at 39–41) (detailing the ways that the FLSA's legislative history shows that Congress intended to ensure that a business' self-serving labels and formalities did not make it immune from the FLSA's reach).

56. Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U.L. REV. 1673, 1727–28 (2016).

57. Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 194 (2013) ("[C]ast[ing] doubt on the assumption that franchisees are well-informed business people.").

58. *See, e.g.*, Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PA. L. REV. ONLINE 73 (2017) [hereinafter Elmore, *Future of Fast Food*], <https://www.pennlawreview.com/essays/index.php?id=49> [<https://perma.cc/C5ZV-26DE>] (referring to relationship as one of "continuous dependence"); *id.* at 75–76 ("Franchisors extend this initially superior bargaining

fictitious idea that the parties are both acting in their own self-interests, and are not highly influenced by the other party.⁵⁹ This work is another example of the David-and-Goliath-style relationship between franchisors and franchisees brought to the forefront by the “Fight for Fifteen and a Union” movement, referenced in the Introduction.

Professor Gillian Hadfield’s oft-cited study of contractual relations between franchisors and franchisees in 1990 convincingly demonstrates that the franchisor, not the franchisee, dictates the essential terms of the contract.⁶⁰ Scholars widely agree that we can interpret contractual terms as franchisor’s requirements, even when they are not termed as such.⁶¹ The franchisee has very little bargaining power to change the terms of a brand’s boilerplate contract. Consistent with this view, many of the contracts analyzed for this Article were written from the first-person perspective of the franchisor. The contractual language, for example, often refers to “us” (franchisor) and “you” (franchisee) when listing the requirements of the contract.⁶²

Third, and finally, it is particularly appropriate to consider contracts when constructing legal theories and proposing avenues of inquiry. Courts and administrative agencies can later test these avenues through an examination of real-world circumstances on the ground. This Article uses contractual analysis in this limited manner. Contracts can illuminate the legal contours of the relationship between the franchisor and the franchisee’s business,⁶³ which can help administrative agencies, courts, researchers, and legislators understand some aspects of the broader context and nature of the relationship. An understanding of contractual terms can open up new areas of inquiry, as evidenced by the prevalence of contractual terms referencing franchisees’ managers, rather than franchisees’ front-line workers. This finding from the contract analysis forms the basis of a new theory of joint employment based on franchisor influence over front-line fast-food workers via franchisees’ managers.

position into the franchise relationship with incomplete contract terms that shift risk to franchisees and leave the franchisors’ duties to franchisees undefined.”); Andrew Elmore, *Franchise Regulation in the Fissured Economy*, 88 GEO. WASH. L. REV. 907 (2018) [hereinafter Elmore, *Franchise Regulation*].

59. See Elmore, *Future of Fast Food*, *supra* note 58, at 75–76.

60. Hadfield, *supra* note 32, at 991.

61. See *infra* discussion and footnotes in Section IV.B.

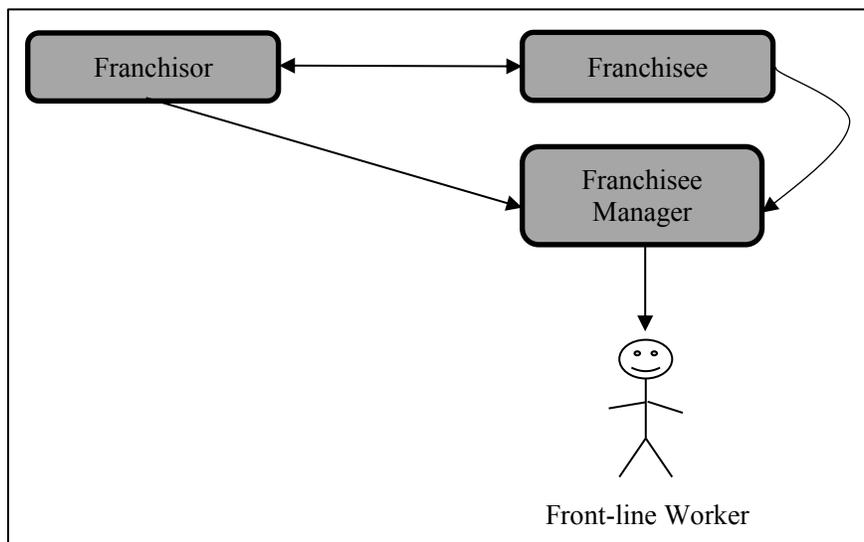
62. See, e.g., Grueneberg, Schneiderman & Chiu, *supra* note 54, at 196–218.

63. All of the franchise contracts set out legal obligations between the franchisor (brand) and the franchisee (sometimes referred to as the “operator”). See, e.g., Sonic Franchising LLC License Agreement (2016).

III. PROPOSED THEORY: FRANCHISOR'S INFLUENCE OVER FRANCHISEE'S MANAGERS

This Article proposes a third theory of joint employment, via franchisees' supervisory managers. Unlike franchisees, franchisees' managers do not have an ownership interest in the franchise. Nonetheless, franchisees' managers do have influence over front-line workers at franchised stores. If the franchisor influences the franchisees' supervisory managers and those managers influence the franchisees' front-line employees, it follows that the franchisor affects the franchisees' front-line employees. If the franchisor employs the manager, by force of logic, the front-line employee is an employee of the franchisor. On the other hand, even if the manager is not an employee of the franchisor, the manager may still serve as a pass-through device for franchisor influence over front-line employees in certain circumstances. Figure 1 illustrates the relationships of influence that this proposed intermediary legal theory highlights in the franchising context.

Figure 1:
Franchisor's Relations with Franchisee's Managers



Regardless of the direct or indirect distinction, this avenue would constitute franchisor influence over front-line workers in the FLSA context.

This Part relies on an analysis of forty-four contracts between franchisors and franchisees in the U.S. fast-food industry from 2016. The

research team found forty-four contracts through two portals available to the public: The Minnesota Commerce Department and the Wisconsin Department of Financial Institutions.⁶⁴ We searched for contracts for all fifty-two brands that a leading restaurant industry publication (QSR Magazine) listed in its “top 50” fast-food brands for either 2015 or 2016.⁶⁵ This search strategy did not yield contracts for all brands listed in the “top 50” because a handful of brands do not franchise (e.g., Starbucks), and because three others do not operate, or have information available, in the states of Minnesota or Wisconsin.⁶⁶ Nonetheless, the forty-four brand contracts analyzed here represent the vast majority of top fast-food brands.

This study’s analysis of contractual terms shows that franchisors’ influence over franchisees’ managers could be greater than their influence over franchisees’ front-line workers. The dominant analytical lenses do not consider franchisees’ managers, so courts and administrative agencies to date have not seriously considered managers as potential employees of the franchisor, or as pass-throughs for franchisors’ instructions relating to front-line workers. The findings here suggest a new story of franchisor influence through franchisee managers. Namely, the findings show that there is a comparatively higher volume of contract provisions pertaining to managers than to front-line employees in areas such as hiring/firing, job qualifications, scheduling/staffing, and training.

A. *Contract Data on Managers*

1. *A Comparatively Higher Level of Franchisor Influence*

As detailed by Table 1, when comparing managerial versus non-managerial labor terms, there were more contracts with franchisor

64. All of the franchise agreements cited throughout this Article are available online either at the Minnesota Commerce Department or the Wisconsin Department of Financial Institutions. See *Commerce Actions and Regulatory Documents Search*, MINN. COM. DEP’T, <https://www.cards.commerce.state.mn.us/CARDS/> [<https://perma.cc/CBS8-LUEQ>]; *Franchise Search*, WISC. DEP’T OF FIN. INSTS., <https://www.wdfi.org/apps/FranchiseSearch/MainSearch.aspx> [<https://perma.cc/D246-V4T7>].

65. See *The QSR 50*, QSR, <https://www.qsrmagazine.com/content/qsr50-2017-top-50-chart> [<https://perma.cc/MMX8-HGR7>].

66. To locate franchisor-franchisee contracts, the researchers searched for all brands listed using Minnesota’s Commerce Department website. When a 2016 contract was not available through Minnesota’s portal, the research team turned to Wisconsin’s portal to see if the contract was available. We did not code eight of fifty-two brands listed on the QSR top 50 lists for the following reasons: five do not franchise, and therefore do not have franchising contracts (Starbucks, Chipotle, White Castle, Boston Market, and In-n-Out Burger); two did not operate in Minnesota or Wisconsin (Whataburger and El Pollo Loco); and one operated in Wisconsin but not Minnesota (Church’s Chicken) and the 2016 link had expired by the time we conducted the search.

requirements about franchisees' managerial employees in the area of hiring/firing qualifications (eighteen contracts versus thirteen contracts), restrictions on job mobility from one franchisee to another (thirty-six versus thirty-two), staffing/scheduling (thirty-three versus nineteen), and training (thirty-eight versus twenty-five). At minimum, this comparison indicates that franchisors are likely to be more hands on with franchisees' managers than they are with franchisees' front-line employees.

**Table 1:
Managerial Versus Non-Managerial Labor Terms
in 2016 Franchisor-Franchisee Contracts (n=44)**

Contract Terms / Legal Factors	Non-Managerial Employees	Managerial Employees
Franchisor Required Hiring / Firing Qualifications	13	18
Franchisor Required Restrictions on Job Mobility / Poaching	32	36
Franchisor Required Staffing / Scheduling	19	33
Franchisor Required Training	25	38

The case law confirms that a business's involvement in areas represented in the left column of Table 1, along with wage setting and influence over other working conditions, is relevant to determinations of whether a business entity is "an employer."⁶⁷

2. *Franchisor's Influence over Hiring/Firing of Managers*

The analysis of forty-four fast-food contracts suggests that some franchisors exert influence over the working conditions of franchisees' managers by mandating a minimum number of managerial hires at each restaurant, by requiring that franchisees' managers have certain job qualifications, and/or by reserving the right to hire/fire franchisees' managers when they are not meeting franchisors' expectations. As Table 1 illustrates, close to half of all contracts contained clauses that included

67. See *infra* Sections III.A(2)–(5).

this content. These dynamics constitute an area that courts, regulators, and advocates should not ignore moving forward.

Some contracts specify the number of managers that a franchisee should hire at a particular restaurant, which is most often one or two managers at a time.⁶⁸ Steak N Shake's franchisor-franchisee contract goes further. It explicitly mentions that the franchisor, "from time to time," can "designate select managers available for hiring by franchisees."⁶⁹ Other contracts more obtusely require that the franchisee hire "a sufficient number," or "an adequate number," of franchisee managers to render good service at the restaurant.⁷⁰

A group of the contracts reveal that some franchisors may require franchisees' managers to have particular job qualifications. For general managers, or business managers, the requirements are sometimes quite explicit. The Five Guys contract states that the general manager "must satisfy our educational and business criteria" which are in the manuals and "must be individually acceptable to us."⁷¹

Even beyond general managers, some contracts expressly provide franchisors with the right to designate the qualifications of all franchisees' employees, including franchisees' managers.⁷² The Arby's contract

68. See Captain D's Franchise Agreement § 11, at 10 (May 1, 2016); Jason's Deli Management, Inc. Franchise Agreement § 9(d), at 11 (Apr. 1, 2016); McAlister's Deli Franchise Agreement § 11.1C, at 21 (Apr. 1, 2016); Panera, LLC Franchise Agreement § 8.04, at 13, § 8.05, at 13 (Mar. 2016); Popeyes Louisiana Kitchen Franchise Agreement § 8.03, at 23 (Mar. 2016); Qdoba Mexican Eats Franchise Agreement § 15.2 (Mar. 2017); Sonic Franchising LLC License Agreement § 6.04, at 10 (2016).

69. Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 12.3(C), at 65.

70. See Dunkin' Donuts Franchising, LLC Franchise Agreement § 7.0.6, at 7 (Mar. 30, 2016); Einstein Bros. Bagels Franchise Corporation Franchise Agreement § 8.7, at 20 (July 13, 2016); Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 1.5(C), at 7.

71. Five Guys Franchise Agreement item 15, at 38 (Apr. 29, 2016); see also, e.g., Einstein Bros. Bagels Franchise Corporation Franchise Agreement item 11, at 35 (July 13, 2016) ("The Franchised Business Manager must have at least three years of experience working in a management capacity in a quick service restaurant or fast casual restaurant . . ."); Qdoba Mexican Eats Franchise Agreement § 15.2 (Mar. 2017) ("[M]ust have at least one (1) year of experience as a General Manager in the restaurant industry."); Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 1.6(B), at 8-9 ("Franchisee shall not make an offer of employment to the General Manager or Restaurant Manager without first obtaining Franchisor's prior written consent that the foregoing requirements have been met and the proposed salary for the General Manager meets Franchisor's minimum salary guidelines."); Taco Bell Corp. Franchise Agreement § 3.1, at 2 (Mar. 25, 2016) ("Franchisee or a qualified manager of the Restaurant shall maintain his or her personal principal residence within a usual driving time of approximately one hour from the Restaurant.").

72. See, e.g., Jimmy John's Franchise, LLC Franchise Agreement § 4A(1), at 16, 18 (Apr. 20, 2016) ("[Y]our on-site managers must pass the operations-proficiency test and receive management certification. . . . All certified managers present at the RESTAURANT . . . must be able to speak, read, write, and understand the English language fluently so they can, as applicable, pass the portions of our training program.").

claims that the franchisor “has the right to designate in its sole judgment Restaurant personnel qualifications.”⁷³ Commonly, fast-food contracts require franchisees to replace franchisee managers that the franchisors “disapprove of.”⁷⁴ In this vein, Einstein Bros. Bagels’s contract states that “if we disapprove of any of the Highly Trained Personnel, then you agree to enroll a qualified replacement.”⁷⁵ Similarly, Firehouse Subs contractually requires franchisees to replace “any manager” if the franchisor determines “he or she is not qualified to manage the restaurant.”⁷⁶ McAlister’s Deli concludes that the franchisor reserves the right to “revoke certification for a Certified Management Trainer.”⁷⁷ These contractual terms suggest that some franchisors influence key areas of manager hiring and firing.

Courts widely recognize that the power to hire and fire is a critical determinant of a business’s employer status.⁷⁸ In *Cano v. DPNY, Inc.*,⁷⁹ for instance, the court, when granting leave to file a second amended complaint, noted the relevance of allegations that the franchisor (Domino’s) “developed and implemented hiring policies such as systems for screening, interviewing, and assessing applicants for employment at

73. Arby’s Franchisor, LLC License Agreement § 6.1, at 7 (2016).

74. *See, e.g.*, Checkers Drive-In Restaurants, Inc. Franchise Agreement § 8.04, at 20 (Mar. 2016) (“We reserve the right to approve or disapprove of any manager-level employee you appoint.”); Steak N Shake Enterprises, Inc. Unit Franchise Agreement 5.3(K), at 34 (“Franchisee shall replace any manager who the Franchisor determines is not qualified to manage a Restaurant in accordance with the System.”).

75. Einstein Bros. Bagels Franchise Corporation Franchise Agreement § 6.2.4, at 15.

76. Firehouse of America, LLC Franchise Agreement, § 6.1, at 12 (Mar. 28, 2016).

77. McAlister’s Deli Franchise Agreement § 11.1C, at 21 (Apr. 1, 2016).

78. *See Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2010) (acknowledging that a business’s ability to hire and fire is highly indicative of an employment relationship); *Marshall v. Shan-An-Dan, Inc.*, 747 F.2d 1084, 1087 (6th Cir. 1984) (same); *Gessele v. Jack in the Box, Inc.*, 2013 U.S. Dist. LEXIS 51941, at *63 (D. Or. Dec. 13, 2016) (same); *Brunner v. Liautaud*, No. 14-C-5509, 2015 U.S. Dist. LEXIS 46018, at *12 (N.D. Ill. Apr. 18, 2015) (same); *Benitez v. Demco of Riverdale, LLC*, No. 14-Civ.-7074, 2015 U.S. Dist. LEXIS 20325, at *3 (S.D.N.Y. Feb. 19, 2015) (same); *Cordova v. SCCF, Inc.*, No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *11 (S.D.N.Y. July 16, 2014) (same); *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 205 (S.D.N.Y. 2014) (same); *Cano v. DPNY, Inc.*, 238 F.R.D. 251, 258 (S.D.N.Y. 2014) (same); *Reese v. Coastal Restoration & Cleaning Servs.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *8 (S.D. Miss. Dec. 15, 2010) (same); *Ping Chen v. Domino’s Pizza, Inc.*, No. 09-107(JAP), 2009 U.S. Dist. LEXIS 96362, at *13 (D.N.J. Oct. 16, 2009) (same); *Singh v. 7-Eleven, Inc.*, No. C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677, at *9 (N.D. Cal. Mar. 8, 2007) (same); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at *10 (N.D. Fla. Nov. 1, 1993) (same); *Donovan v. Breaker of America, Inc.*, 566 F. Supp. 1016, 1019 (E.D. Ark. 1983) (same).

79. 287 F.R.D. 251 (S.D.N.Y. 2012).

all of their stores.”⁸⁰ If the franchisor is influencing personnel qualifications of franchisees’ managers, that would be a factor in favor of finding an employment relationship between the franchisor and the franchisees’ managers. Even if there is no employment relationship between the franchisor and franchisees’ managers, however, it still would be indicative of franchisor power over managers.

3. *Franchisor’s Influence over Job Mobility of Managers*

The majority of contracts suggest that franchisors may affect the job qualifications of franchisees’ managers through “anti-poaching” clauses. These contractual clauses formally restrict franchisees from hiring or recruiting managers from other franchisees within the same brand. These clauses, and practices surrounding them, demand further scrutiny as they relate to potential franchisor influence over job qualifications of franchisees’ managers and employees. As elaborated upon above, influence over hiring and job qualifications is a central factor across all aspects of joint employer theory.

In our 2016 sample of contracts, thirty-six out of forty-four contracts incorporated some form of anti-poaching clause. These clauses have received a lot of negative attention.⁸¹ A Fall 2017 *New York Times* article cited research by a pair of economists who suggested that these clauses may be holding down wages in the fast-food industry.⁸² In the language of these economists, Professors Alan Krueger and Eric Posner, “the proliferation of no-poaching agreements has increased franchise companies’ monopsony power over workers in recent decades.”⁸³ Moreover, anti-poaching clauses have been the subject of lawsuits. In 2018, close to a dozen state governments threatened to challenge their use

80. *Id.* at 260 (motion for leave to file a second amended complaint); *cf. Reese*, 2010 U.S. Dist. LEXIS 132858, at *10 (considering whether background check was an indicator of control over hiring and concluding that it was merely a quality control mechanism).

81. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 22 (Princeton Univ. Indus. Relations Section, Working Paper No. 614, 2017), <http://arks.princeton.edu/ark:/88435/dsp014f16c547g> [<https://perma.cc/VZ5G-UFGC>].

82. Rachel Abrams, *Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html> [<https://perma.cc/PY25-3D5R>].

83. ALAN B. KRUEGER & ERIC A. POSNER, THE HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 9 (2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [<https://perma.cc/3HT5-WBSS>].

in some states.⁸⁴ Amidst growing criticism, some brands have started to remove such clauses from their contracts with franchisees moving forward.⁸⁵

The vast majority of the clauses from the 2016 sample restrict franchisee solicitation of all employees (managerial and non-managerial) of other franchisees within the same brand. They restrict franchisees' employee recruitment efforts and franchisee managers' potential to shift to another franchisee's restaurant. Zaxby's is representative of this grouping of contracts. It limits franchisees' abilities to "solicit, entice, or induce" any employees of Zaxby's or its other franchisees.⁸⁶

Four of the thirty-six contracts with this term, however, limited their application to managerial (rather than non-managerial) employees. In this context, the category of managerial employee often includes all level of managers, including "shift leaders."⁸⁷ The Del Taco contractual provision prohibits a Del Taco franchisee's employment, or solicitation, of any manager (shift manager or above) without "the other [franchisee's] written consent."⁸⁸ Similarly, the Pizza Hut franchisor-franchisee contract

84. John Herzfeld, *11 States Probe Fast-Food Companies on 'No-Poach' Pacts*, BNA NEWS (July 9, 2018), <https://www.bna.com/11-states-probe-n73014477201/> [<https://perma.cc/4END-T3JS>] ("A coalition of 11 state attorneys general questioned fast-food restaurant chains on 'no-poach' agreements that restrict franchisees from recruiting or hiring from other outlets in the same chain."); Washington Post, *States Launch Investigation Targeting Fast-food Hiring Practices*, LA TIMES (July 9, 2018, 7:30 AM), <https://www.latimes.com/business/la-fi-fast-food-no-poach-20180709-story.html> [<https://perma.cc/JFV9-G5VY>] (referring to almost a dozen state attorney general lawsuits that target "a practice some economists say drags down wages for millions of Americans"); *see also id.* ("Sens. Cory Booker (D-N.J.) and Elizabeth Warren (D-Mass.) said in March that they would introduce legislation to make no-poaching agreements illegal, calling them an 'anti-competitive' practice."); *id.* ("The U.S. Department of Justice's antitrust division has also opened an inquiry into the practice.").

85. Herzfeld, *supra* note 84.

86. Zaxby's Franchising, LLC Licensing Agreement § 8(B)(3), at 26 (Apr. 2016); *see also* Arby's Franchisor, LLC License Agreement § 13.1, at 15 (2016); Jimmy John's Franchise, LLC Franchise Agreement § 7(d), at 27–28 (Apr. 20, 2016); McAlister Deli Franchise Agreement § 15.4(A)(v), at 31 (Apr. 1, 2016); Moe's Southwest Grill Franchise Agreement § 15.4(A)(v), at 31 (Apr. 1, 2016); Auntie Anne's Franchise Agreement § 15.4(A)(v), at 31 (Apr. 1, 2016); Popeyes Louisiana Kitchen Franchise Agreement § 13.02(B), at 39–40 (Mar. 2016); Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant § 7(c)(10), at 11 (2016).

87. *See, e.g.*, Carl's Jr. Restaurant Franchise Agreement § 17C(2)(b), at 31 (May 2016) ("Franchisee shall not . . . [k]nowingly employ or seek to employ any person then employed by CJR or any franchisee of CJR as a shift leader or higher, or otherwise directly or indirectly induce such person to leave his or her employment.").

88. Del Taco LLC Franchise Agreement § 32, at 34 (2016) ("During the term of this Agreement, neither Del Taco nor the Franchisee shall employ or seek to employ, directly or indirectly, any person serving in a managerial position for the other party or its subsidiaries or for any other franchisee in the Del Taco System, except with the other employer's written consent. For purposes of this Section, 'managerial position' shall include all restaurant employees who serve as shift managers and above."); *see also* Little Caesar Enterprises, Inc. Franchise Agreement § 15.2.3, at 35–36 (2016).

restricts franchisees' current managers, or managers that worked at a Pizza Hut during the prior six months, from moving to another Pizza Hut.⁸⁹

Furthermore, a majority of contracts go beyond solicitation restrictions and outright restrict employment of an employee who has worked for another franchisee within the brand. They specifically restrict solicitation *and* employment of recruits from other franchisees within the brand. While the language varies from contract to contract, and some contracts allow employment if the other employer (franchisee) consents, these twenty-four contracts from 2016 share an explicit job qualification.⁹⁰ Franchisor-created poaching clauses clearly restrict job qualifications for franchisee employees and franchisees' freedom in their hiring decisions. They are, at minimum, suggestive of franchisor influence over the hiring of franchisees' managers.

4. *Franchisor's Influence over Staffing/Scheduling of Managers*

A number of 2016 contracts reveal that franchisors may affect the staffing and scheduling of managers at their franchised restaurants. This finding calls for more interrogation regarding the ways that franchisors influence the staffing levels and scheduling of franchisees' managers.

Thirty-three out of forty-four contracts contained requirements relating to the ongoing staffing or scheduling of managers. Most typically, these

89. Pizza Hut, Inc. Location Franchise Agreement § 13.2, at 17 (Apr. 1, 2016) (Franchisee may not "employ, directly or indirectly, and individual in a managerial position who is at the time, or was at any time during the prior 6 months, employed in a managerial position by the other party.")

90. Bojangles' International, LLC Franchise Agreement § XI(A)(1)(b), at 30 (June 14, 2016); Burger King Franchise Agreement (Corporate) § 5(L), at 8 (Apr. 2016); Captain D's, LLC Franchise Agreement § 12, at 10 (May 1, 2016); Carl's Jr. Restaurant Franchise Agreement § 17C(2)(b), at 31 (May 2016); Citadel Panda Express, Inc. License Agreement § 8.2(A), at 11 (Apr. 2016); Culver Franchising System, Inc. Franchise Agreement § 20(C), at B-25 (Mar. 29, 2016); Domino's Pizza Franchising LLC Standard Franchise Agreement § 20.4, at 33 (Jan. 2013); Dunkin' Donuts Franchise Agreement § 7.0.6, at 7 (Mar. 30, 2016); Firehouse of America, LLC Franchise Agreement § 9(e), at 16 (Mar. 28, 2016); Five Guys Enterprises, LLC Franchise Agreement § X(C)(2)(b), at 24 (Apr. 29, 2016); Jack in the Box Inc. Franchise Agreement § 5(P), at 11 (Mar. 15, 2017); Jamba Juice Franchise Agreement § 12.4, at 32 (Apr. 22, 2016); Jason's Deli Management, Inc. Franchise Agreement § 15(c), at 29 (Apr. 4, 2016); Jersey Mike's Franchise Systems, Inc., Franchise Agreement § 16.3(b), at 24 (Apr. 1, 2016); Krispy Kreme Donut Corporation 2016 Form of Franchise Agreement §§ 17.1 (c)–(d), at 30–31 (2016); Long John Silver's Franchise Agreement § 12.02(b), at 29; McDonald's Franchise Agreement (Traditional) § 14, at 8 (May 1, 2016); Panera, LLC Franchise Agreement § 9.07, at 16–17 (Mar. 2016); Papa John's Franchise Agreement Standard Restaurant § 16(e), at 38; Qdoba Mexican Eats Franchise Agreement § 30.2.2, at 40 (Mar. 2017); Quality Is Our Recipe, LLC Unit Franchise Agreement § 2.05(b)(iv), at 9 (Mar. 30, 2016) [hereinafter Wendy's Unit Franchise Agreement]; Sonic Franchising LLC Number 7.1 License Agreement § 6.08, at 13 (2016); Steak 'N Shake Enterprises, Inc. Unit Franchise Agreement § 12.3, at 64–65; Tim Horton's Franchise Agreement (USA) § 13.05(c), at 93.

contracts require the franchisee to have one or more “trained” managers on duty at all times.⁹¹ The Jamba Juice contract asserts that the restaurant must always be “under the direct control of a Management Employee fully trained.”⁹² Carl’s Jr. (CJR) similarly requires that its restaurants are always under “the on-site supervision of . . . individuals, who must meet, to the satisfaction of CJR, CJR’s applicable training qualifications for their designated position.”⁹³ Sometimes the contracts more vaguely require that a franchisee has an “adequate number,” or a sufficient number, of trained managers.⁹⁴ This contractual language implies that the franchisor oversees, if not designates, what constitutes an adequate number of trained managers for a particular establishment.

These contractual terms suggest that in some cases, franchisors may be exerting considerable influence over the working conditions of franchisees’ managers. A broad array of courts acknowledge the relevance of a company’s power over scheduling and staffing issues to employment

91. *See, e.g.*, Tim Horton’s Franchise Agreement (USA) § 13.02(b), 92 (“At all times during this Agreement, Franchisee shall employ at least . . . one individual . . . who is responsible for the direct, personal supervision of the Tim Hortons Shop . . .”). Some base it on number of shifts. *See* Jimmy John’s Franchise, LLC Franchise Agreement § 4A(1), at 17 (Apr. 20, 2016) (“At least ten (10) full shifts at the RESTAURANT each week must be covered in their entirety by certified managers.”).

92. Jamba Juice Franchise Agreement § 7.2.5, at 18 (Apr. 22, 2016).

93. Carl’s Jr. Restaurant Franchise Agreement § 10(G), at 17 (May 2016); *see also* Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 1.6(B), at 8 (2016) (“The Restaurant shall be at all times supervised by a manager and at all times during this Agreement, all of Franchisee’s managers will have attended and successfully completed the prescribed manager training program . . .”); Burger King Restaurant Corporate Franchise Agreement § 8.C, at 10 (Apr. 2016); Checkers Drive-In Restaurants, Inc. Franchise Agreement § 8.04, at 20–21 (Mar. 2016); Citadel Panda Express, Inc. License Agreement § 10.4A, at 18 (Apr. 2016); Culver Franchising System, Inc. Franchise Agreement § 10(M), at B-15 (Mar. 29, 2016); Domino’s Pizza Franchising LLC Standard Franchise Agreement § 15.6, at 20 (Jan. 2013); Firehouse of America, LLC Franchise Agreement § 10.10, at 19, § 16.2, at 30 (Mar. 28, 2016); Jersey Mike’s Franchise Systems, Inc. Franchise Agreement § 16.9, at 25 (Apr. 1, 2016); Jimmy John’s Franchise, LLC Franchise Agreement § 4A(1), at 17 (Apr. 20, 2016); Krispy Kreme Doughnut Corporation 2016 Form of Franchise Agreement § 4.4, at 13 (2016); Panera, LLC Franchise Agreement §§ 8.03, 8.06, at 12–13 (Mar. 2016); Papa John’s Franchise Agreement Single Location Franchise § 11(b), at 26; Papa Murphy’s International LLC Franchise Agreement § 8.1(d)(iii), at 36 (Mar. 2016); Wendy’s Unit Franchise Agreement § 6.7, at 7 (Mar. 30, 2016); Tim Hortons Franchise Agreement (USA) § 13.02(b), at 90 (2016); Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant § 6(a)(3)(i), at 5–6 (2016).

94. Baskin-Robbins Franchise Agreement § 7.0.6, at 7 (Mar. 2016) (Franchisee must “[h]ire and maintain a sufficient number of properly trained managers . . . to render quick, competent and courteous service to Restaurant customers . . .”); Bojangles’ International, LLC Franchise Agreement § VII.G (June 14, 2016); Dunkin’ Donuts Franchise Agreement § 7.0.6, at 7 (Mar. 30, 2016); Jack in the Box Inc. Franchise Agreement § 5.J, at 9 (Mar. 20, 2016); Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 1.5(C), at 7–9, § 1.6(A), at 8.

determinations.⁹⁵ The *Cordova* court, for example, noted the relevancy of franchisor power to “supervise and set the hours of the employees.”⁹⁶

5. *Franchisor’s Influence over Training of Managers*

The review of contracts suggests that franchisors exert power over franchisee managers through franchisor-required trainings and ongoing advising. As Table 1 demonstrates, all but six of the forty-four contracts analyzed contained a contractual term involving franchisor influence over the training of franchisees’ managers. Thus, franchisor involvement in the training and ongoing advising of managers is an area that merits further inquiry moving forward when making employment determinations.⁹⁷

95. See *Orozco v. Plackis*, 757 F.3d 445, 450 (5th Cir. 2014) (“Orozco testified that Plackis [owner] did not set [plaintiff’s] work schedule”); *Marshall v. Shan-An-Dan, Inc.*, 747 F.2d 1084, 1087 (6th Cir. 1984) (“The franchisee, while subject to certain agreed minimum specified hours of operation, was free to control . . . hours”); *Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2013 U.S. Dist. LEXIS 51941, at *63 (D. Or. Dec. 13, 2016) (“[S]upervised and controlled employee work schedules or conditions of employment.”); *Brunner v. Liautaud*, No. 14-C-5509, 2015 U.S. Dist. LEXIS 46018, at *15 (N.D. Ill. Apr. 8, 2015) (“Plaintiffs have not specifically pled distinct facts that firmly establish [‘owners’] control over employees’ work schedules.”); *Benitez v. Demco of Riverdale, LLC*, No. 14 Civ. 7074(CM), 2015 U.S. Dist. LEXIS 20325, at *4 (S.D.N.Y. Feb. 19, 2015) (“[W]hether the purported employer supervised and controlled employee work schedules or conditions of employment.”); *Cordova v. SCCF, Inc.*, No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *21–22 (S.D.N.Y. July 16, 2014) (“[S. Luna has the power to] supervise and set the hours of the employees.”); *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014) (referring to “schedules of the employees”); *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 258 (S.D.N.Y. 2012) (“[S]upervised and controlled employee work schedules or conditions of employment.”); *Reese v. Coastal Restoration & Cleaning Servs.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *8 (S.D. Miss. Dec. 15, 2010) (“[I]t does not supervise or control [plaintiff’s] work schedule or conditions of employment.”); *Singh v. 7-Eleven, Inc.*, No. C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677, at *13 (N.D. Cal. Mar. 8, 2007) (“[P]laintiffs and Duong’s deposition testimony support the conclusion that Duong exclusively arranged plaintiffs’ workshifts”); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at *10 (N.D. Fla. Nov. 1, 1993) (acknowledging control over work schedules as important).

96. *Cordova*, 2014 U.S. Dist. LEXIS 97388, at *21–22.

97. See *Orozco*, 757 F.3d at 450–51 (“It is reasonable to assume that a franchisor would provide training”); *Cordova*, 2014 U.S. Dist. LEXIS 97388, at *17 (“Plaintiffs allege that SCCF created management and operation policies and practices by providing materials for use in training store managers and employees”); *Cano*, 287 F.R.D. at 260 (“Proposed Defendants created management and operation policies and practices that were implemented at the defendants’ store by providing materials for use in training store managers and employees.”); *Singh*, 2007 U.S. Dist. LEXIS 16677, at *11 (referring to plaintiffs’ assertion that “employees were subject to the terms and conditions of the training, on-going training, and satisfaction of 7-Eleven service standards”); *Howell*, 1993 U.S. Dist. LEXIS 19030, at *10 (“[Franchisee] was completely responsible for recruiting, interviewing, hiring, training, and terminating employees.”).

Thirty-eight out of forty-four contracts from 2016 explicitly required franchisor training of franchisees' managers.⁹⁸ The Culver's franchisor-franchisee contract mandates that "any new Restaurant managers" attend "all required training programs offered by us."⁹⁹ The Panera contract requires that the restaurant is always under the supervision of a manager or supervisor "who has completed and graduated from a certified-training program."¹⁰⁰ During the life of the contract, Popeyes requires its franchisees to have a minimum of three or more shift managers who have completed the franchisor's training program and "reserves the right to test" franchisees' managers on an annual basis.¹⁰¹ The wording of these provisions strongly suggests that the franchisor may exert a good deal of influence on the orientation and actions of the franchisees' managers.

The contractual content is not limited to initial startup trainings for managers. Some contracts explicitly reference franchisors' ongoing advisory role in training of franchisees' managers. The Baskin-Robbins 2016 contract, for instance, communicates that "[w]e will advise on the

98. Bojangles' International, LLC Franchise Agreement § VI.E(2), at 8 (June 14, 2016); Captain D's Franchise Agreement § 11, at 10 (May 1, 2016); Checkers Drive-In Restaurants, Inc. Franchise Agreement § 4.01, at 13–14 (Mar. 2016); Jason's Deli Management, Inc. Franchise Agreement § 9(d), at 11 (Apr. 1, 2016); Jersey Mike's Franchise Systems, Inc. Franchise Agreement §§ 5.1, 5.6, at 6–7 (Apr. 1, 2016); Jimmy John's Franchise, LLC Franchise Agreement § 4A(1), at 15–21 (Apr. 20, 2016); Long John Silver's Franchise Agreement § 5.03, at 13–14; Moe's Southwest Grill Franchise Agreement § 11.1B, at 20 (Apr. 1, 2016); Papa John's Franchise Agreement Single Location Franchise § 16(d), at 37; Papa Murphy's International LLC Franchise Agreement §§ 2.3(i), 2.4, at 5 (Mar. 2016); Qdoba Mexican Grill Franchise Agreement § 8.2, at 11 (Mar. 2017); Wendy's Unit Franchise Agreement § 6.3, at 7 (Mar. 30, 2016); Steak N Shake Enterprises, Inc. Unit Franchise Agreement § 1.6(B), at 8–9; Sonic Franchising LLC Number 7.1 Licensing Agreement § 6.04(c), at 10 (2016); Taco Bell Corp. Franchise Agreement § 4.2, at 3 (Mar. 25, 2016); Zaxby's Franchising, LLC License Agreement §§ III.A.6, V.E., at 18 (Apr. 2016).

99. Citadel Panda Express, Inc. License Agreement §§ 5.1A, 5.1I, at 4, 5–6 (Apr. 2016); Culver Franchising System, Inc. Franchise Agreement § 10.D, at B-13 (Mar. 29, 2016); Del Taco Franchise Agreement § D(7), at 9–11 (2016); Firehouse of America, LLC Franchise Agreement § 4.5b, at 10, § 6.1, at 12, § 16.2, at 30 (Mar. 28, 2016); Jamba Juice Franchising Agreement § 6, at 15 (Apr. 22, 2016) (similar); Pizza Hut, Inc. Location Franchise Agreement §§ 4.1A, B, at 6 (Apr. 1, 2016).

100. Panera, LLC Franchise Agreement § 9.07, at 16 (Mar. 2016); *see also* Arby's Franchisor, LLC License Agreement § 6:2, at 8 (2016) ("Licensee must, at all times, employ three managers per Restaurant in the Licensed Business who have become certified in the Management Training Program."); McDonald's USA, LLC Franchise Agreement (Traditional) § 6, at 4 (May 1, 2016) ("Franchisee . . . agrees to enroll Franchisee and Franchisee's managers, present and future, at Hamburger University or at such other training center as may be designated by McDonalds from time to time."). For similar provisions, see Carl's Jr Restaurant Franchise Agreement § 8.A, at 12 (May 2016).

101. Popeyes Louisiana Kitchen Franchise Agreement § 8.02–05, at 23–24 (Mar. 2016) ("[F]ive (5) designated management employees . . . must complete, to Franchisor's satisfaction, the Popeye's Training Program."); *id.* § 8.03, at 23 ("Throughout the term of the Franchise Agreement, Franchisee shall employ at the restaurant at least one Restaurant manager and three (3) or more shift managers who have satisfactorily completed all modules of the PTP . . ."); *id.* § 8.05, at 24 ("Franchisor reserves the right to test any and all Popeyes Certified Managers on an annual basis . . .").

training of your managers.”¹⁰² Some of the franchisors’ training requirements appear targeted at top-level franchisee management, leaving open the possibility that sometimes supervisory managers do not have to fulfill the same training requirements.¹⁰³ Nonetheless, the majority of contracts are directed to assistant managers, or managers more generally.¹⁰⁴

Observing the situation from the contractual language alone, the franchisor’s advisory relationship with managers is extensive in many cases. This is well illustrated by the Jimmy John’s franchisor-franchisee contract. At one point, the contract recognizes the “substantial costs for the [franchisee] associated with recruiting, hiring, and training new management employees (including, where applicable, sending an employee to complete [franchisor certified training programs]).”¹⁰⁵

Contract findings suggest that the franchisor has some degree of power over managerial training at the franchise level. Influence over training is widely acknowledged as a key determinant of whether an employment relationship exists between parties. In *Singh v. 7-Eleven, Inc.*,¹⁰⁶ for instance, a federal district court dismissed a FLSA claim against a franchisor, in part because “no evidence indicate[d] that 7-Eleven exercised any control over any terms of the employment, including training of employees.”¹⁰⁷ In *Cordova*, the court declined to dismiss a complaint against a franchisor, in part because the plaintiffs in that case alleged that the franchisor “created management and operation policies and practices by providing materials for use in training store managers and employees.”¹⁰⁸ Essential to the ultimate determination of whether a

102. Baskin-Robbins Franchise Agreement § 4.0, at 5 (Mar. 2016) (“You agree to timely and successfully complete, and to require your management and your other Restaurant employees to timely and successfully complete, all training regarding Standards.”); *see also id.* § 2.5, at 4 (“We will maintain a continuing advisory relationship We will advise on the training of managers . . .”).

103. *See* Auntie Anne’s Franchise Agreement § 11.1, at 18 (Apr. 1, 2016); Burger King Franchise Agreement (Corporate) § 8A, at 9–10 (Apr. 2016); Five Guys Enterprises, LLC Franchise Agreement VI.E(1), at 11 (Apr. 29, 2016); Jack in the Box Inc. Franchise Agreement § 7, at 13 (Mar. 15, 2017); Kentucky Fried Chicken Franchise Agreement § 5.3(a), at 5; Subway Franchise Agreement, § V(a)(ii), at 4 (2016); Taco Bell Corp. Franchise Agreement § 4.1, at 3 (Mar. 25, 2016); Tim Hortons Franchise Agreement (USA) § 13.02, at 90; Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant § 6(a)(3), at 5 (2016).

104. *See* Krispy Kreme Doughnut Corp. 2016 Form of Franchise Agreement § 11.1, at 22 (2016); Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant § 6(a)(3), at 5–6.

105. Jimmy John’s Franchise, LLC Franchise Agreement § 7(d), at 27–28 (Apr. 20, 2016).

106. No. C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677 (N.D. Cal. Mar. 8, 2007).

107. *Id.* at *11.

108. *Cordova v. SCCF, Inc.*, No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *17 (S.D.N.Y. July 16, 2014); *see also id.* at *6 (franchisor involved in “developing and implementing

franchisee manager is an employee of the franchisor, of course, will depend on the specific nature of the training/advisory relationship.

6. *Franchisor's Influence over Managers: The Questions Raised*

The contractual analysis opens up a number of areas of inquiry moving forward. What is the franchisor's specific involvement in the hiring, firing, and job qualifications of franchisees' managers? To what extent does the franchisor affect the staffing levels and scheduling of franchisees' managers? What is the nature and extent of training and ongoing advising that the franchisor engages in with the franchisees' managers? The answers to these questions will be relevant in determining whether a franchisor exhibits sufficient influence to give rise to employment liabilities and obligations.

It could be that the franchisor's influence over supervisory managers is extensive enough to make the franchisor a joint employer of the franchisee's supervisory managers. If the franchisor is an employer of the manager, then it is also an employer of the manager's employees. Even if a franchisee manager is not an employee of the franchisor, however, the franchisor may be influencing the manager in ways that affect the wages and working conditions of front-line employees. In other words, the franchisor may be controlling the franchisee managers' control over front-line workers, such that it could be considered a joint employer of those front-line workers.

While the contracts open up these areas of inquiry, they are formal legal instruments that reveal little about the specific content and nature of the relationship. An example from the evidence presented during the NLRB's recent joint employer trial against McDonald's (franchisor) begins to provide additional insight. The testimony and exhibits suggested considerable franchisor involvement in the training and ongoing advising

hiring and management practices"); *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014) (“[G]uided franchisees on ‘how to hire and train employees.’”).

of the franchisees' managers.¹⁰⁹ The nature of this advising relationship at times related to the work experiences of front-line workers.¹¹⁰

For example, with respect to staffing and scheduling, the franchisor trained managers on "how to manage [the] crew."¹¹¹ The franchisor provided trainings to managers on how "to work with the software to create the schedule" for front-line workers.¹¹² Moreover, franchisees' managers regularly used a franchisor-provided checklist document to "ensure that the shift was set up for success with the right people in the right places."¹¹³ The franchisor's "shift management critique" would "help" franchisees, and their managers, "work with and train" new shift managers.¹¹⁴

It is beyond the scope of this Article to elaborate upon all of the ways in which managerial intermediaries can channel franchisor influence, but

109. *See, e.g.*, Transcript of Record at 4063, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Apr. 27, 2016) (franchisor offered mid-managers at California's franchised stores an opportunity to come to an "employment practices seminar"); Transcript of Record at 20700, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Nov. 7, 2017) (referring to franchisor trainings for franchisees' managers); Transcript of Record at 10968, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Nov. 10, 2016) (same); Transcript of Record at 9676, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Oct. 13, 2016) (same); Transcript of Record at 8886–87, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 28, 2016) (same); Transcript of Record at 4055, 4150 McDonald's USA, LLC, No. 02-CA-093893 (NLRB Apr. 27, 2016) (same); Transcript of Record at 3504, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Apr. 18, 2016) (same).

110. *See, e.g.*, Transcript of Record at 3799, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Apr. 20, 2016) (referring to trainings for franchisees' managers "on how to optimize the employment experience").

111. *See* Transcript of Record at 8670–71, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 27, 2016); Transcript of Record at 9726–28, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Oct. 13, 2016) (describing how manager should staff a shift); Transcript of Record at 9011, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 29, 2016) (describing how "shift manager should manage a shift"); GC Exhibit BC-496 at 18, McDonald's USA, LLC, No. 02-CA-093893 (NLRB 2017) (Franchisor representative gave shift managers and franchisee specific instructions including that they should "make sure the grill is staffed properly."); Transcript of Record at 9011, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 29, 2016) (franchisor training which advised on how a "shift manager should manage a shift through following key success factors" including "focusing on service").

112. *See* Transcript of Record at 11496, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 29, 2016).

113. *See* Transcript of Record at 4805, McDonald's USA, LLC, No. 02-CA-093893 (NLRB May 31, 2016) (referring to franchisor-provided "dynamic shift positioning guide" which managers were encouraged to complete); GC Exhibit D-237 at 1–2, McDonald's USA, LLC, No. 02-CA-093893 (NLRB 2017) ("[C]rew schedule should be reviewed by the Restaurant Manager and Mid-Manager before it is posted. . . . When creating a manager schedule, copy the previous month's schedule. . . . When entering managers' shifts on ISP, edit one person for the whole month . . .").

114. Transcript of Record at 9665, McDonald's USA, LLC, No. 02-CA-093893 (NLRB Sept. 29, 2016) (Franchisees could utilize this to "evaluate a manager that was in training before they moved onto being a certified manager" as "part of their training process.").

the contractual analysis undoubtedly invites new areas of inquiry in cases involving fast-food worker claims against franchisors. The next subsection draws a jurisprudential analogy from a separate industry to further flesh out the proposed intermediary theory of joint employment.

B. Agricultural Analogy: Grower's Influence over Contractor Intermediaries

While the relationship between the franchisor, franchisee manager, and franchisee crewmember has yet to be unraveled by courts and administrative agencies in the franchising context, this mechanism of influence shares similarities with the FLSA's joint employer law in the agricultural context. Indeed, the intermediary role of direct supervisors has long played a part in joint employer law cases involving the agricultural industry.¹¹⁵ Thus, this section draws jurisprudential analogies from agricultural joint employer law to further flesh out the intermediary theory of joint employment depicted in Figure 1.

Many agricultural companies, commonly referred to as "growers" or "farmers," use intermediaries to recruit, hire, and directly supervise front-line agricultural workers in food harvesting and animal farming.¹¹⁶ Courts sometimes refer to these intermediaries as "farm labor contractors," "supervisors," "crew leaders," or "middle men."¹¹⁷

Franchisee managerial intermediaries are similar to agricultural intermediaries, in the sense that they are the individuals who interact with front-line workers on a day-to-day basis. The growers are similar to franchisors in the sense that they engage intermediaries but are the ultimate beneficiaries of the labor of the front-line workers. Unlike growers, however, franchisors have two intermediaries between them and

115. See Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 208 (1999) (discussing this dynamic of agricultural jurisprudence); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 330 (2003) (discussing relevant case law); Thomas J. Power, *Fast Food Sweatshops: Franchisors as Employers Under the Fair Labor Standards Act*, 19 CUNY L. REV. 337, 370 (2016) (analogizing to the garment and agricultural contexts to argue that franchisor control over franchisees constitutes an employment relationship).

116. See generally Annie Smith & Patricia Kakalec, *Joint Employment in the Agricultural Sector*, in N.Y.U. 68TH ANN. CONFERENCE LAB., WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?, *supra* note 19, at 379; Goldstein, Linder, Norton & Ruckelshaus, *supra* note 17, at 988.

117. *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 236 (5th Cir. 1973) (referring to crew leaders); *id.* at 237 (referring to supervisors); *Izaguirre v. Tankersley*, 516 F. Supp. 755, 759 (D. Or. 1981) (referring to middle man); Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 423 (2008) (referring to farm labor contractors).

front-line workers: franchisees and franchisees' managers. In this section, the Article focuses on the latter, but Part IV discusses the role of franchisees as intermediaries.

In some of these agricultural cases, courts concluded that the growers/farmers were in fact the "employers" of the intermediaries (farm labor contractors). Because growers were employers of the intermediaries, they were also employers of everyone the intermediaries hired to do front-line work on their behalf.¹¹⁸ Consistent with this theory, in *Beliz v. W.H. McLeod & Sons Packing Co.*,¹¹⁹ the Fifth Circuit asserted that if the farm labor contractor was an employee of the grower, "it would necessarily follow" that the farm labor contractor's workers were also employees of the grower.¹²⁰ Under the facts of *Beliz*, the farm labor contractor had little discretion over the activities of the workforce and the grower directed primary aspects of the work (such as where to pick and how to pick the vegetables).¹²¹ The *Beliz* court detailed all of the ways the grower influenced the contractor's conduct.¹²² It likened the contractor's role to "the kind" of "routine supervision" that is "commonly given by foremen" to communicate the lead company's "instructions to the workers."¹²³

Applying this reasoning to the franchising context, when a franchisee manager is essentially a "foreman" for the franchisor, there could be an employment relationship. Unlike franchisees and some farm labor contractors, franchisee managers do not have any opportunity for profit or loss. They are definitely employees of the franchisee, but, as the contracts suggest and the agricultural cases support, they might also be employees of the franchisor in certain circumstances.

In other FLSA agricultural cases, courts did not view the contractor as an employee of the grower. In these cases, we see a way that intermediaries can serve as a "pass through" for franchisor influence. These courts concluded that there were two joint employers of the farmworkers, the grower and the farm labor contractor. Nonetheless, in

118. *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1238 (10th Cir. 2018) (concluding that farmer oversaw farm labor contractor to such an extent that the contractor, as well as the children the contractor illegally hired, were employees of the farmer); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985) (stating that supervisory contractor was an employee of the grower and thus the grower was an employer of the farmworkers); *Castillo v. Givens*, 704 F.2d 181, 192, 195 (5th Cir. 1983) (same).

119. 765 F.2d 1317 (5th Cir. 1985).

120. *Id.* at 1327; see also *Acosta*, 884 F.3d at 1238; *Castillo*, 704 F.2d at 188 ("If [the contractor] was an employee of defendant, the plaintiff field workers were also defendant's employees.").

121. *Beliz*, 765 F.2d at 1322.

122. *Id.*

123. *Id.* at 1327.

these cases the contractor sometimes used its own independent judgment, and other times served as a conduit of the grower's directions. At times, the level of grower power over the front-line workers via this pass-through method reached such an extent that the grower was an "employer" with FLSA responsibilities, even though the contractor also independently employed the front-line workforce.¹²⁴

For example, in *Antenor v. D & S Farms*,¹²⁵ the Eleventh Circuit concluded that the grower influenced the farmworkers via the contractor by doing such things as instructing the contractor about how many farmworkers to bring each day and by relaying complaints (via the contractor) about workers "not going fast enough."¹²⁶ In some cases applying the intermediary theory, courts have refused to find joint employer status because the contractor was not sufficiently playing an intermediary role. For example, in a separate case out of the Eleventh Circuit, *Aimable v. Long & Scott Farms*,¹²⁷ the court acknowledged that when growers communicate orders "indirectly through the contractor" it shows the grower's supervision.¹²⁸ Based on the facts of that case, however, the Eleventh Circuit found that the defendant grower did not make such orders.¹²⁹

While it is very common in agricultural cases and unheard of in franchising cases to date, courts have examined intermediaries in other contexts, including those involving temporary agencies. In *Baystate Alternative Staffing, Inc. v. Herman*,¹³⁰ the First Circuit found the temporary agency to be an employer of the temp worker, even though the agency did no on-the-job supervision.¹³¹ The court found that the temporary agency "supervised" these workers via an intermediary: the temporary agency's client company.¹³² The court stated that the temporary

124. See, e.g., *Torres-Lopez v. May*, 111 F.3d 633, 645 (9th Cir. 1997) (concluding that grower and contractor were joint employers); *Antenor v. D & S Farms*, 88 F.3d 925, 938 (11th Cir. 1996) (same); *Hodgson v. Okada*, 472 F.2d 965, 968-69 (10th Cir. 1973) (concluding that grower was employer of farmworkers, but declining to make a determination of whether the contractor was an employee or an independent contractor of the grower because it was "irrelevant in determining whether the [growers were] responsible under the Act").

125. 88 F.3d 925 (11th Cir. 1996).

126. *Id.* at 934-35; see also *Torres-Lopez*, 111 F.3d at 642 (referring to "Ag-Labor" intermediary as receiving information about when work should happen).

127. 20 F.3d 434 (11th Cir. 1994).

128. *Id.* at 441.

129. *Id.*

130. 163 F.3d 668 (1st Cir. 1998).

131. *Id.* at 675.

132. *Id.* at 676.

agency “exercised indirect supervisory oversight of the workers through its communications with client companies regarding unsatisfactory performance.”¹³³

In sum, as Figure 1 illustrates, franchisor power over a franchisee’s front-line workers could be a byproduct of the franchisor’s influence over these workers’ supervisory managers (intermediaries). It may be that the franchisor’s power over the manager is so extensive that the manager is an employee of the franchisor. Or, it may be that the franchisor’s influence over the managers’ working conditions is minimal, but the franchisor uses the managers as a portal to direct front-line workers to such an extent that the front-line workers are employees of the franchisor.

Regardless of which of these two types of intermediary scenarios are at play, courts, scholars, advocates and administrative agencies should be interrogating franchisor-franchisee manager relations in the joint employer context.

IV. JOINT EMPLOYMENT MOVING FORWARD

The implications of this study call for enhanced probing of managers’ intermediary role, application of the theory to dependent franchisees, and an analytical and policy shift away from trying to separate direct from indirect forms of influence.

A. Probe Managers’ Intermediary Role

A systematic analysis of forty-four franchisor-franchisee contracts from leading brands in the fast-food industry exposes an underexplored avenue of influence—franchisor influence via franchisees’ supervisory managers. Namely, the contractual analysis shows that some franchisors have more power over franchisees’ managers than they have over the franchisees’ front-line employees. It suggests that the nature of this power may sometimes relate to aspects of a true employment relationship such as hiring/firing, job qualifications, work schedules, and ongoing training.

Once this new avenue of inquiry is considered in FLSA and NLRA cases, it may be that a franchisor’s influence over the managers of its franchisees is substantial enough to form an employment relationship between the franchisor and the managers in some cases. Even in cases where no such employment relationship exists between the franchisor and the manager, however, franchisors may affect front-line workers in relevant ways through the instructions they provide to franchisees’

133. *Id.*

managers. To date, no one has thoroughly explored this potential theory of joint employment.

The existing analytical concentration on franchisor relationships with franchisees' front-line employees, and franchisor relationships with the franchisees themselves, has overlooked the role of franchisees' supervisory managers. These individuals oversee the wages and working conditions of franchisees' front-line employees on a daily basis. They merit more intentional focus moving forward.

Do franchisors sufficiently influence franchisees' managers, such that they influence the front-line employees of franchisees? As with all good legal questions, of course, the final joint employer determination will depend on the decision-maker's consideration of the full set of facts. It will also depend on the relevance of franchisor influence over workers necessary to maintain "brand control." The goal of this Article is simply to introduce this new, important area of inquiry moving forward.

There are compelling policy reasons for why the Goliaths of the fast-food industry should be responsible for violations of the FLSA and the NLRA. A determination of joint employment based on influence via an intermediary is consistent with the FLSA and the NLRA's broad purposes to protect employees from injustices that result from inequalities of bargaining power between employers and employees,¹³⁴ but also with basic tort principles. Consistent with tort law fundamentals, holding franchisors responsible in such cases would effectively give the party in the best position to remedy a given situation the incentive to do so.¹³⁵

If the franchisor's trainings of the franchisee's managers include content leading to violations of wage-and-hour law, the franchisor (not the franchisee's manager) is in the best position to remedy the situation and determine what care is appropriate moving forward. If the franchisor's recommendations to a manager about how to handle worker organizing in

134. Fair Labor Standards Act § 2(a)–(b), 29 U.S.C. § 202(a)–(b) (2018) (Courts should "correct and as rapidly as practicable [] eliminate" the "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers"); National Labor Relations Act § 1, 29 U.S.C. § 151 (2018) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . encourag[es] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.").

135. *See, e.g.,* Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) ("This is a branch of tort law, designed to identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries). . . . Imposing liability on the person who does not control the execution of the work might induce pointless monitoring. All the details of the common law independent contractor doctrine having to do with the right to control the work are addressed to identifying the best monitor and precaution-taker.").

or around the restaurant are, in actuality, requirements that lead to unfair labor practices under the NLRA, then the franchisor is in the best position to ensure compliance moving forward. In these scenarios, the franchisor should be, in tort parlance, “answerable for the wrong.”¹³⁶

B. Apply the Intermediary Theory to Franchisees Too

The intermediary theory of joint employment could apply not only to franchisees’ managers, but also to franchisees themselves. Even if franchisees are in business for themselves, and are true independent contractors, they still may serve as critical intermediaries for franchisor influence over front-line workers at times. This is similar to the agricultural joint employer cases referenced above, where courts found that even when farm labor contractors were separate joint employers of the farmworkers, they sometimes served as intermediaries for grower directives.¹³⁷ It is also consistent with the courts described in Section I.C that have focused their joint employer inquiries primarily on the franchisor-franchisee relationship.

Some aspects of the forty-four contracts, along with the scholarly literature on franchisor-franchisee relations, suggest that courts, legislators, scholars, and executive branch agencies should probe further to consider the extent to which the franchisee is an intermediary for franchisor influence. If the franchisor is controlling wages and working conditions of front-line workers, it should not matter that it is doing so through a franchisee. Moreover, if a franchisor directs a franchisee to instruct workers about how fast to complete their tasks, or how to track their work time, the franchisor is exerting considerable influence over the working conditions of front-line workers.

Table 2 provides additional findings from the contractual analysis that support the application of the intermediary theory of joint employment to franchisees too. It suggests several ways that franchisors may transmit their influence over front-line workers via the contractual controls they put on franchisees. There are four contractual areas that relate to the working conditions of front-line employees: workers’ compensation, employment liability insurance, unemployment insurance, and labor and employment law compliance.

136. This phrase is very common in the tort context. *See* *Evansville & T.H.R. Co. v. McKee*, 99 Ind. 519, 522 (Ind. 1885).

137. *See* *Torres-Lopez v. May*, 111 F.3d 633, 642 (9th Cir. 1997); *Antenor v. D & S Farms*, 88 F.3d 925, 935–36 (11th Cir. 1996) (“[I]t is well settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor.” (citations omitted)); *supra* Section III.B.

Thirty-eight out of forty-four franchisors required that franchisees carry workers' compensation insurance for front-line workers. Seventeen required franchisees to sign up for general employment liability insurance, eleven required unemployment insurance, and fourteen required franchisees to comply with all applicable labor and employment laws.¹³⁸ These contractual terms notwithstanding, it is important to keep in mind that no contract included requirements related to fundamental employment conditions such as franchisor required wage levels or day-to-day supervision of work.

Nonetheless, while franchisor mandates with respect to these insurances and compliance measures cannot tell the whole story, they do touch upon front-line workers' experiences. This is especially the case if there is an injury, a termination, or some other workplace-based legal claim involving labor and employment law protections. Moreover, as the Fourth Circuit put forth in *Salinas v. Commercial Interiors, Inc.*,¹³⁹ contractual allocation of workers' compensation responsibility and the like is relevant because it shows "codetermination or allocation of responsibility over functions ordinarily carried out by employers."¹⁴⁰

Table 2:
Franchisor Required Labor Terms
Relating to Front-Line Workers in 2016 Contracts (n=44)

Contract Terms	Number of Contracts with Term
Franchisor Required Unemployment Insurance	11
Franchisor Required Workers' Compensation	38
Franchisor Required Insurance for Employment Liability	17
Franchisor Required Labor & Employment Law Compliance	14

138. The labor and employment law provisions require the franchisee to follow relevant laws providing front-line workers with a variety of protections. These provisions are straightforward and require little elaboration: Wingstop's contract pronounces, for instance, that Wingstop franchisees "will comply strictly with all . . . laws . . . including those relating to . . . employment and promotion practices, employee wages, child and immigrant labor, disabled persons, workers' compensation . . . [and] occupational safety." Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant § 7(C)(20), at 12 (2016).

139. 848 F.3d 125 (4th Cir. 2017).

140. *Id.* at 147; *see also id.* at 141–42 (specifically referencing workers' compensation).

Furthermore, other aspects of the contracts illustrate franchisees' high level of dependence on franchisors, which may give franchisors the power to control many aspects of the relationship between the parties. Franchisees invest their own capital up front and franchisors require them to pay ongoing royalties to the franchisor. Contractual power may translate into power over franchisee's human resource management and labor practices. Contracts typically give franchisors (not franchisees) broad power to terminate the contracts,¹⁴¹ to decline to renew the contract, or to require indemnification from the franchisee for liabilities.¹⁴²

These contractual terms, along with scholarly work showing high levels of franchisee dependence,¹⁴³ suggest that franchisors may directly control independent contractor franchisees in some circumstances. Many franchisees may be "independent contractors," rather than employees of franchisors, given their capital investments, profit-making, and the risk they take on. But, they are often "dependent independent contractors,"¹⁴⁴ and thus may serve as intermediaries for franchisor directives.

Courts often overlook this dependency relationship between the franchisee and franchisor, sometimes using the franchisor's self-serving formal characterizations from the contract as evidence of a lack of "control."¹⁴⁵ When dismissing a FLSA claim against a franchisor, a

141. For cases that considered whether the power to terminate the contract was relevant to questions of control, see *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014) ("[Franchisor defendants had the right] to terminate the franchise agreement and the operations of any restaurant that violated the FLSA or NYLL."); *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 257 (S.D.N.Y. 2012) ("Proposed Defendants had the power to stop these alleged employment violations by terminating, or threatening to terminate, the franchise agreements.").

142. See *Baskin Robbins Franchise Agreement* § 14.9, at 18 (Mar. 2016); *Culver Franchising System, Inc. Franchise Agreement* § 13(A), at B-17 (Mar. 30, 2016); *Dairy Queen Third Party Participation Agreement* § 10, at 5–6 (2014); *Dunkin' Donuts Franchise Agreement* § 14.9, at 18 (Mar. 30, 2016); *Five Guys Enterprises, LLC Franchise Agreement* § XV, at 33–34 (2016); *McDonald's Franchise Agreement (Traditional)* § 24, at 13 (Mar. 25, 2016); *Pizza Hut, Inc. Location Franchise Agreement* § 16.4, at 20 (2016); *Wendy's Unit Franchise Agreement* § 19.4, at 34 (Mar. 30, 2016); *Taco Bell Corp. Franchise Agreement* § 10.1, at 6 (Mar. 25, 2016); *Zaxby's Franchising, LLC License Agreement* § 18(B), at 50 (May 2, 2016); Bryan Arbeit, *A Franchisor's FLSA Liability for Its Franchisee's Workers: Why Operational Control Over Employment Conditions Should Make a Franchisor a Joint Employer*, 32 HOFSTRA LAB. & EMP. L.J. 253, 276–77 (2015) ("A franchisor can require franchisees to indemnify litigation and liability costs resulting from FLSA violations committed by the franchisee.").

143. See *supra* Section I.C and Part II.

144. Katherine Van Wezel Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 279 (2006) (defining "dependent independent contractors" as "those who have little independence or autonomy and depend on another business for their livelihood").

145. See, e.g., *Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061, at *62 (D. Or. Dec. 13, 2016) (referring to contractual terms when dismissing complaint

district court in Northern California quoted, as relevant, the contractual language between the franchisor and franchisee.¹⁴⁶ The language stated that, “[y]ou and we agree that this Agreement creates an arm’s-length business relationship and does not create any fiduciary, special or other similar relationship.”¹⁴⁷

Similarly, courts are too quickly accepting that franchisor directions to franchisees are mere recommendations because they are formally characterized as such. For instance, in *Pope v. Espeseth*,¹⁴⁸ when dismissing the FLSA claim, a Wisconsin district court concluded that even though the franchisee followed franchisor instructions, the franchisee “did not have to follow the manual.”¹⁴⁹ It concluded that the franchisor did not require that the franchisee adopt the “commission-based method of employee compensation” that was at issue in the FLSA litigation.¹⁵⁰ In *Gessele v. Jack in the Box*,¹⁵¹ an Oregon district court similarly characterized franchisor’s “Hiring the Right People” process and its “Consistent Hiring Process Guidelines” as mere “tools to which” franchisees “could refer” if they so choose.¹⁵² When dismissing the claim, the court highlighted that the franchisor-provided handbook “does not indicate such guidelines are mandatory.”¹⁵³

Given the contractual terms bestowing franchisors ultimate power to determine the fate of franchisees’ investments, and the scholarly literature questioning whether franchisor-franchisee contracts are truly “arms-length” transactions, courts should further scrutinize formal proclamations involving front-line workers as “recommendations.” Moreover, in light of the fact that franchisors often evaluate their franchisees based on their adoption of franchisor recommendations related to staffing, training, or other issues relating to front-line

against franchisor); *Reese v. Coastal Restoration & Cleaning Servs.*, No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *14 (S.D. Miss. Dec. 15, 2010) (“Reese’s position that his employment ‘extended through’ Coastal Restoration to SERVPRO by virtue of the franchise license agreement between the latter, is unsupported by the record evidence.”).

146. *Singh v. 7-Eleven, Inc.*, No. C-05-04534 RMW, 2007 U.S. Dist. LEXIS 16677, at *9–10 (N.D. Cal. Mar. 8, 2007).

147. *Id.*

148. 228 F. Supp. 3d 884 (W.D. Wis. 2017).

149. *Id.* at 890–91.

150. *Id.* at 891.

151. No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061 (D. Or. Dec. 13, 2016).

152. *Id.* at *21.

153. *Id.* at *25–26.

employees,¹⁵⁴ franchisees may interpret recommendations as requirements.

Hadfield's illuminating work, referenced above, reveals that franchisors and franchisees are engaged in a "reliance relationship" between "unequals."¹⁵⁵ According to Hadfield and others, a franchisee's weak position is due to its sunk costs, the franchisor's decision-making authority over most aspects of the franchisee's operations, and the franchisor's ability to terminate the relationship at any time.¹⁵⁶ The franchising business model is distinct from common trademark licenses. The franchisor instructs franchisees about how to operate the business almost as much it would instruct a manager at a franchisor-owned outlet. But, unlike a traditional "employee," the franchisee is an owner and investor taking on independent risks (which looks more like an independent contracting relationship).¹⁵⁷ As Hadfield notes, franchisees are "expected to act as if they are employed managers strictly following franchisor direction . . . [and] at the same time they are clearly operating 'their own' businesses in the sense that, despite franchisor advice, they run the ultimate risk of bankruptcy or poor performance."¹⁵⁸

When courts look to franchisor-franchisee relations, they should consider the franchisee's dependence and potential role as a pass through for franchisor influence over front-line workers. While it was not a franchising case, the Fourth Circuit's decision in *Salinas* takes an analytical step in this direction.¹⁵⁹ It directed lower courts to consider, among other things, the extent to which the two companies at issue (for

154. See, e.g., Transcript of Record at 4764, 4776 McDonald's USA, LLC, No. 02-CA-093893 (NLRB May 31, 2016) (referring to consideration of the number of shifts run by "a certified manager" who is a graduate of franchisor's "Hamburger University"); GC Exhibit BC-1257, McDonald's USA, LLC, No. 02-CA-093893 (NLRB 2017) (referring to franchisor evaluation mandating that "[a]ll department managers . . . complete their curriculum/functional training"); GC Exhibit BC-0997, at 12, McDonald's USA, LLC, No. 02-CA-093893 (NLRB 2017) (BSV Critical Questions include "Has management considered the positioning guide recommendations . . . ?," and "Does the shift manager observe and proactively identify potential Danger Zones . . . ?").

155. Hadfield, *supra* note 32, at 960–63. In contractual disputes, she argues for the use of a "good faith" standard that asks courts to look beyond the written agreement to "examine the relationship in which that contract is embedded." *Id.* at 984–85.

156. See *id.* at 928, 932, 951, 966, 968; Elmore, *Franchise Regulation*, *supra* note 58, at 917–18.

157. Kaufmann, Soler, Permesly & Cohen, *supra* note 9, at 441–42.

158. Hadfield, *supra* note 32, at 960.

159. See *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 129–30 (4th Cir. 2017) ("[J]oint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two or more persons' or entities' combined influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.").

the purposes of this Article, a franchisor and franchisee) jointly determine or share power over working conditions.¹⁶⁰

The agricultural joint employer cases cited above also support this notion. In some of those cases, the intermediary's economic dependence aided the court's conclusion that the grower was an "employer" of the farmworkers. In *Castillo v. Givens*,¹⁶¹ for example, the court affirmed that while the contractor "did exercise some control over the field workers, there was 'no economic substance' behind his power."¹⁶² In *Beliz*, the court referred to the contractor's role as "merely to communicate [the grower's] instructions to workers."¹⁶³ Many franchisees, similar to farm labor contractors and franchisee managers, are economically dependent and have little power to challenge franchisor recommendations.¹⁶⁴ Therefore, they have little choice but to accept franchisor directives regarding their own employees' job qualifications and working conditions.

In sum, when considering whether a franchisor is, or should be considered, an employer, courts, legislators, and administrative agencies should keep in mind the dependency relationship between franchisors and franchisees. Only with full consideration of these dynamics can courts decide who "possesse[s] the power to control the workers in question."¹⁶⁵

C. *Move Away from Direct Versus Indirect Dichotomy*

The intermediary theory of joint employment calls for a move away from the direct versus indirect dichotomy that currently frames joint employer debate. The statutory language of the FLSA and the NLRA do not disaggregate the concepts of direct and indirect forms of influence. The FLSA refers to an employer as a person "acting directly or indirectly in the interest of an employer."¹⁶⁶ The NLRA contemplates that an

160. *Id.* at 142. This standard is similar to the NLRA standard before 2002. See *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1201 (D.C. Cir. 2018) (quoting relevant case law as stating "separate business entities are joint employers if they each 'exert significant control over the same employees' in that they 'share or co-determine those matters governing the essential terms and conditions of employment'").

161. 704 F.2d 181 (5th Cir. 1983).

162. *Id.* at 192.

163. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985).

164. See generally *Elmore, Franchise Regulation*, *supra* note 58 (arguing throughout that the franchisee is dependent on the franchisor); *Hadfield*, *supra* note 32 (same).

165. *Benitez v. Demco of Riverdale, LLC*, No. 14 Civ. 7074(CM), 2015 U.S. Dist. LEXIS 20325, at *3 (S.D.N.Y. Feb. 19, 2015).

166. Fair Labor Standards Act § 3(d), 29 U.S.C. § 203(d) (2018).

employer “includes any person acting as an agent of an employer, directly or indirectly.”¹⁶⁷ Influence over wages and working conditions, be it direct or indirect, should be relevant to the inquiry. Instead of the direct versus indirect frame, we should consider the extent and nature of influence that the franchisor has over front-line workers.

As highlighted in the Introduction, the direct versus indirect dichotomy pervades recent judicial, administrative, and legislative consideration of the employment relationship. The NLRB’s proposed rule would require “direct and immediate” control over workers¹⁶⁸—as opposed to a broader standard that would find an employment relationship if a company “shares or codetermines” terms and conditions of employment along with another business.¹⁶⁹ The fate of the rule is unclear, however, because the D.C. Circuit in December 2018 concluded that both direct and indirect forms of control are relevant in the NLRA context, as long as the control “bears on workers’ essential terms and conditions.”¹⁷⁰ In the FLSA arena, courts use different terms but frame the distinction as between “functional”¹⁷¹ versus “formal” modes of influence.¹⁷² Moreover, the proposed Save

167. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2); *see also* 29 U.S.C. § 152(13) (“In determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”).

168. *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002).

169. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 186, at 7 (2015). *But see* *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1223 (D.C. Cir. 2018) (reversing in part, affirming in part, and remanding the NLRB decision); *TLI, Inc.*, 271 N.L.R.B. 798, 803 (1984) (citing *NLRB v. Browning Ferris Indus. of Pa.*, 691 F.2d 1117, 1123–24 (3d Cir. 1982)).

170. *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1216.

171. *See* *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003). The full set of functional control factors, as stated in *Zheng*, are:

(1) [W]hether [the putative ER’s] premises and equipment were used for the plaintiffs’ work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the putative employer’s] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for [the putative employer].

Id.; *see also* *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (stating that a joint employer “co-determine[s]—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment”).

172. *See In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012). The specific factors are (1) authority to hire and fire; (2) authority to set work rules and conditions of employment; (3) daily supervision; and (4) control over records. *Id.*; *see also* *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Elmore, Future of Fast Food*, *supra* note 58 (collecting case law in this area and stating, “[i]n contrast to this line of subcontractor cases, courts considering FLSA claims against franchisors often reject indirect supervision and nonsupervisory dependence as grounds for a joint-employer determination”).

Local Business Act referenced in the Introduction engages the direct versus indirect distinction. It calls for a new legislative standard that limits employment relationships to situations when a business has direct and immediate control over wages and working conditions.¹⁷³

This Article challenges the implied assumption embedded in the direct and indirect framing—that courts and administrative agencies can consistently disaggregate direct from indirect forms of influence, and that limiting employment to situations where direct control is present will lead to clearer and more predictable legal doctrine in this area.¹⁷⁴ Admittedly, it is sometimes possible to distinguish between direct and indirect forms of influence. Typically, what is meant by indirect forms of influence are situations where it is harder to “see” the influence through formal instruments, even though the party is influencing actors and working conditions in practice. In one FLSA case involving a franchisor, for example, the plaintiffs alleged indirect control by contending that the franchisor influenced their working conditions through such things as “providing programs to track employees’ performance.”¹⁷⁵ Clear examples of direct control include a business’s issuance of a weekly paystub, or a business’s engagement with a worker through other more formal types of paperwork, like hiring documents and employee records.¹⁷⁶ Other forms of direct influence would include a franchisor

173. Save Local Business Act, H.R. 3441, 115th Cong. § 2(a)(B) (2017) (stating that a joint employer is a person who “directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment”).

174. Many have noted that the current jurisprudence is variable and unpredictable. *See* Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 136 (2014) (referring to “open-ended balancing tests” as “yield[ing] unpredictable and at times arbitrary results”); Harper, *supra* note 19, at 46 (describing the unpredictability of multi-factored balancing tests that lack a clearly articulated ultimate touchstone).

175. Cordova v. SCCF, No. 13-CIV-5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *6–7 (S.D.N.Y. 2014).

176. Courts that use the formal control framework consider whether the alleged joint employer hired and fired, directly supervised, determined the rate and method of payment, and maintained records for the workers. *See* Bonnette, 704 F.2d 1465; *In re Enter. Rent-A-Car*, 683 F.3d 462; *Patterson v. Domino’s Pizza, LLC*, 333 P.3d 723, 726 (Cal. 2014) (“It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior.”).

directing orders to front-line workers during inspections¹⁷⁷ or other visits to the restaurant.¹⁷⁸

However, the intermediary theory of joint employment advanced here shows the limits of the direct versus indirect framing. Whether this new intermediary avenue represents direct or indirect influence is a difficult determination to make, even if only “direct” forms of control are relevant.¹⁷⁹ It is undisputable that franchisees’ managers have direct control over front-line workers. If the franchisor directly controls the franchisees’ supervisory managers and those managers directly control the franchisees’ front-line employees, does it not follow that the franchisor controls franchisees’ front-line employees? Some may see this as a direct chain of control, others may see it as an indirect form of control.

Regardless of the direct or indirect distinction, this avenue would constitute substantial franchisor influence over front-line workers. For instance, if a franchisor directs a franchisee manager to direct workers about how fast to complete their tasks, or how to track their work time, the franchisor is directing the working conditions of front-line workers. Why should it matter if *X* controls *Z* through direct supervision, or through *X*’s control of *Y* who controls *Z*? If *X* controls *Z*, it should not matter that

177. See *Cordova*, 2014 U.S. Dist. LEXIS 97388 at *6, *12 (showing potential relevance of franchisor supervision during inspections); *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 206–07 (S.D.N.Y. 2014) (same); *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 (S.D.N.Y. 2014) (same); *Singh v. 7-Eleven, Inc.*, No C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677, at *15 (N.D. Cal. Mar. 8, 2007) (same); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188-RV, 1993 U.S. Dist. LEXIS 19030, at *9 (N.D. Fla. Nov. 1, 1993) (“Approximately once or twice per year, Chick-Fil-A conducts a site visit to inspect the Cordova Mall restaurant and insure that it is, in fact, selling only regulation Chick-Fil-A products.”).

178. These contractual provisions often allow the franchisor to “photograph” and “interview” franchisees’ employees. See, e.g., *Culver Franchising System, Inc. Franchise Agreement* § 10.O, at B-15 (Mar. 29, 2016) (“This inspection right includes our right to photograph the Restaurant premises and Restaurant employees at all reasonable times and to interview your employees and independent contractors.”); *Panera, LLC Franchise Agreement* § 12.01, at 22 (Mar. 2016) (stating that franchisor can observe or tape the operations and “interview personnel and customers”); *Wingstop Restaurants Inc. Franchise Agreement for a Wingstop Restaurant* § 7(C)(18), at 12 (2016) (“Franchisee will permit Company representatives to conduct unannounced QSC inspections of the Restaurant at any time during normal business hours . . . and to interview the Restaurant’s employees and customers.”). *Papa Murphy’s contract* states that any inspection the franchisor conducts “is not intended to exercise, and does not constitute, control . . . over your employees.” *Papa Murphy’s Int’l LLC Franchise Agreement* § 5.66.5, at 19 (Mar. 2016).

179. Challenging the dichotomy along similar lines, scholars have begun to unveil the ways that franchisor-provided scheduling and tracking technology affects wages and working conditions. The work of these authors raises difficult questions about whether franchisor-required technology constitutes direct or indirect control over workers that is sufficient to extend liability obligations to the franchisor. See Charlotte Alexander & Elizabeth Tippet, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 974–77, 1021 (2017).

the control mechanism occurs via an intermediary (the franchisee manager).

In sum, this Article calls for a move away from disaggregating direct from indirect control.¹⁸⁰ The distinction is hard to administer and apply, even though sometimes it is possible to differentiate direct from indirect forms of control. There is a lot of analytical fuzziness in the middle. The manager as intermediary theory developed here serves as an example of the fuzziness. Sometimes the labels of direct versus indirect can get in the way of the ultimate employment question. Thus, any proposed “fix” to make a simple distinction between direct and indirect control is not a silver bullet that will lead to jurisprudential and administrative clarity in this area.

CONCLUSION

The “Fight for Fifteen and a Union” movement among fast-food workers and their allies has also become a “fight for joint employer liability.” The movement has spurred heightened activity in both the NLRA and the FLSA arenas and has raised questions about how broadly to interpret the concept of employment. Using a rare dataset of contracts between top fast-food brands and their franchisees, this Article addresses whether, or to what extent, fast-food brands may be legally responsible as joint employers. Namely, the empirical analysis of forty-four contracts revealed a new theory of joint employment via franchisor influence over franchisees’ managers. Unlike prior foci on franchisor-franchisee relations, and franchisor-crew member relations, this Article brings a new party to light: franchisees’ supervisory managers. Jurisprudential analogy to the agricultural context, and the case law regarding farm labor contractors as grower intermediaries, supports this proposed analytical lens.

The Article’s findings suggest that any fixes to the current problematic state of joint employer law in the fast-food industry must embrace this intermediary theory. Perhaps, instead of rewording statutes to narrow

180. Cases relating to Title VII of the Civil Rights Act, like the FLSA and the NLRA, also illustrate the direct versus indirect control framing. *Compare* *Evans v. McDonald’s Corp.*, 936 F.2d 1087, 1090 (10th Cir. 1991) (dismissing Title VII claim because “McDonald’s did not have control over [franchisee’s] labor relations with his franchise employees”), *and* *Baetzel v. Home Instead Senior Care*, 370 F. Supp. 2d 631, 641 (N.D. Ohio 2005) (dismissing Title VII claim because franchisee, not franchisor, was conducting daily supervision of workers), *with* *Mays v. BNSF Ry. Co.*, 974 F. Supp. 2d 1166, 1177 (N.D. Ill. 2013) (referencing direct and indirect theories of control). *See also* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112 (1984).

control to situations of direct control, new legislative and administrative initiatives could provide an identifiable analytical touchstone that could ground multi-factored tests and make their outcomes more predictable.¹⁸¹ Drawing from Professor Michael Harper's characterization, presented in *The Restatement of Employment Law*, perhaps joint employer decision-makers could focus on the touchstone inquiry of whether a brand has power over important labor decisions with respect to franchisees' employees.¹⁸² While the *Restatement's* formulation, which Harper calls the "independent business person-entrepreneurial control test," distinguishes between independent contractors and employees, it could serve similarly as a touchstone in the joint employer context.¹⁸³

It is beyond the scope of this Article to propose and evaluate all potential fixes. Whether it is Harper's formulation, or some other, the Article advises that courts, executive branch agencies, and legislative efforts should be mindful of franchisor influence through intermediaries, as well as the multi-tiered and diverse relationships embedded in the franchise system that make disaggregating direct from indirect forms of influence difficult to impossible.

181. See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) ("Fifty years after the Act's passage is too late to say that we still do not have a legal rule to govern these cases. My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why.").

182. See RESTATEMENT OF THE LAW, EMPLOYMENT LAW § 1.01 (AM. LAW INST. 2015).

183. See Harper, *supra* note 19.