

Franchisor Power as Employment Control

Andrew Elmore* & Kati L. Griffith**

Labor and employment laws are systematically underenforced in low-wage, franchised workplaces. Union contracts, and the benefits and protections they provide, are nonexistent. The Fight for Fifteen movement has brought attention to the low wages, systemic violations of workers' rights, and lack of collective representation in fast-food franchises. Given that franchisees can be judgment-proof and cannot set industry standards, the deterrence, remedial, and collective bargaining goals of labor and employment laws can depend on holding the franchisor (the brand) responsible under the joint employer doctrine. In a series of cases, however, a dominant approach has emerged that essentially foreclosed the possibility that franchisors and their subordinate companies (franchisees) are joint employers. Recent political developments mirror this foreclosure and pose a historic narrowing of the scope of joint employer liability. This Article challenges courts, administrative agencies, and legislators to take more seriously franchisors' power over their franchisees and the working conditions of low-wage fast-food workers. To advance this argument, we rely on insights from an original empirical data set of (1) forty-four contracts between leading fast-food franchisors and franchisees in 2016 and (2) comprehensive documentation provided in joint employer legal proceedings against two major fast-food franchisors in the United States: McDonald's and Domino's Pizza. Our proposed "power as employment control" construct considers, within the confines of existing doctrines, the cumulative effects of lead franchisor firms' reserved (unexercised) and exercised influence over the working conditions in their subordinate businesses. By giving power more consideration in analyses of joint employer liability, courts, administrative agencies, and policy-makers can bring more justice and consistency to this hotly contested area.

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INTRODUCTION

Four million people in the United States work in fast-food franchise stores.¹ Fast-food employees are disproportionately people of color and women, and they are among the lowest-paid workers in the United States.² They have joined the

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1. FRANDATA, FRANCHISE BUSINESS ECONOMIC OUTLOOK 2020, at 19 (2019), <https://franchiseeconomy.com/assets/32304.pdf> [<https://perma.cc/ZUD9-TH93>]. Nearly half of all employees who work for a franchise in the United States work in the fast-food sector. *Id.*

2. 21.4 percent of fast-food employees are African American, and 26.2 percent are Latinx—far higher than the 13.4 percent of the general U.S. population that is African American and the 18.5

Fight for Fifteen, a movement of fast-food and low-wage workers led by unions and affiliated community organizations. In addition to its demands for a \$15 minimum wage and a union, the Fight for Fifteen challenges the problems of low wages, systemic violations of workplace laws, and lack of collective representation in franchised fast-food stores.³

Often catalyzed by the Fight for Fifteen, employees and enforcement agencies have brought a flurry of claims alleging violations of wage and hour and labor laws in franchise stores.⁴ They have made claims not only against franchisees but also, more broadly, against the franchisors that effectively set the terms of employment in their franchised stores.⁵ For example, the Fight for Fifteen movement backed a series of complaints to the National Labor Relations Board (NLRB or Board) that named both McDonald's and its franchisees as joint employers responsible for retaliation against workers' collective fight to improve wages.⁶ During the Obama administration, this initiative led the Board to announce that it would consider whether both franchisors and franchisees are joint employers liable for violations of labor law.⁷ Fight for Fifteen has also catalyzed significant state-level government enforcement actions. In one such case, Fight for Fifteen complaints led the New York Attorney General (NYAG) to file suit, claiming that Domino's Pizza is a joint employer co-liable for wage

percent that is Latinx. IRENE TUNG, YANNET LATHROP & PAUL SONN, NAT'L EMP. L. PROJECT, THE GROWING MOVEMENT FOR \$15 1, 11 (2015), <https://www.nelp.org/wp-content/uploads/Growing-Movement-for-15-Dollars.pdf> [<https://perma.cc/S2ZE-3DKV>]; *Quick Facts: United States*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/NN46-ELHT>]. Although women make up only 50.8 percent of the U.S. population, 71.1 percent of fast-food employees are women. TUNG ET AL., *supra*, at 11. The National Employment Law Project reports from Current Population Survey data that the median wage of fast-food workers is \$8.25 per hour. *Id.*

3. STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 232–52 (2019); William Finnegan, *Dignity: Fast-Food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 8, 2014), <https://www.newyorker.com/magazine/2014/09/15/dignity-4> [<https://perma.cc/52A2-GZC3>]. Labor law scholars have written extensively about the strategies and goals of the Fight for Fifteen movement. Kate Andrias, for example, focused on the movement's novel use of the New York State wage board as a form of tripartite, social bargaining. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 63–68 (2016). Michael Oswald highlighted its embrace of impactful one-day strikes, short-term walkouts, and boycotts. See generally Michael M. Oswald, *Improvisational Unionism*, 104 CALIF. L. REV. 597 (2016).

4. The Fight for Fifteen both catalyzed litigation seeking to hold fast-food franchisors responsible for labor and employment law violations and provoked “a backlash among powerful interest groups who aim to narrow the scope of joint employer law.” Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHI.-KENT L. REV. 245, 249 (2020).

5. Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 939–40 (2018).

6. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES MAG. (Feb. 19, 2020), <https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html> [<https://perma.cc/B9XJ-FG75>]. Fight for Fifteen has more recently supported the claims of McDonald's employees who have filed a class-action Title VII sexual harassment claim against McDonald's as a joint employer of franchise store employees. Dee-Ann Durbin, *McDonald's Workers Say Anti-Harassment Efforts Fall Short*, ASSOCIATED PRESS (Nov. 12, 2019), <https://apnews.com/article/59500624d8d649508aac902aba037513> [<https://perma.cc/VPL7-MA6V>].

7. Elmore, *supra* note 5, at 939 n.147.

and hour law violations by its franchisees.⁸ The success of this movement turns on holding franchisors legally accountable for wages, working conditions, and collective bargaining responsibilities.⁹ Incentivizing franchisors to improve working conditions in these stores, however, is contingent upon a plausible theory of joint employer liability.

Joint employer doctrine extends liability to a lead firm at the top of a production chain for labor and employment law violations that take place in a subordinate company's workplace.¹⁰ Joint employer liability extends to the lead firm (here, a franchisor) when it influences working conditions in the subordinate business's operation (here, a franchisee).¹¹

Even where franchisee liability is clear, fulfilling the purposes of labor and employment laws often depends on a finding that the lead entity, or franchisor, is jointly responsible along with the franchisee for wages and working conditions. While recognizing that the joint employer question affects all workplace laws, we focus on the National Labor Relations Act of 1935 (NLRA) and Fair Labor Standards Act of 1938 (FLSA) because they are both Depression-era laws that constitute a major source of joint employer litigation involving fast-food franchisors.¹² The NLRA and FLSA predate modern franchising but allow courts and administrative agencies to interpret their scope and adapt their enforcement to changes in workplaces and economic relationships.

In order to address inequality in bargaining power between individual employees and employers, the NLRA affords employees the right to join unions and to act collectively to improve their wages and working conditions.¹³ Meeting this statutory goal, however, relies on joint employer liability. Because

8. See Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 104-05 (2018). Elmore was a Section Chief in the New York Office of the Attorney General's Labor Bureau until June 2015. The views expressed in this Article are solely those of the authors and do not necessarily reflect the views of the Bureau or the Office.

9. Andrew Elmore & Kati Griffith, Opinion, *A Bad Rule Lets Fast-Food Chains Off the Hook for Workers' Rights*, L.A. TIMES (Mar. 9, 2020), <https://www.latimes.com/opinion/story/2020-03-09/labor-law-fast-food-franchises> [<https://perma.cc/39PN-LW9P>].

10. See *infra* Part I.

11. *Id.* Franchising is only one of many types of contracting arrangements that implicate the joint employer doctrine. Some typical subcontracting arrangements are not plausible joint employer relationships. We focus on franchising because of the extensive forms of control often found in franchise agreements and in public agencies' investigation findings, which are not yet accounted for in joint employer case law.

12. We also reference employment discrimination litigation, in which courts consider whether franchisors are joint employers in ways that mirror the joint employer standard under the NLRA and FLSA. See *infra* Parts I.A and I.IV.

13. 29 U.S.C.A. § 151 (West 2021) (declaring that labor law is necessary to address "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association," which depresses the wages of employees). As Hiba Hafiz explained, while the New Deal architects of the NLRA saw its equal bargaining goal as furthered by industry-wide bargaining, fierce resistance by employers led to legislative amendments and judicial opinions that narrowed the Act's "scope to decentralized, single-enterprise bargaining with weak union protections." Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 673 (2021).

franchisors, not franchisees, are the parties with meaningful profit margins that could be redistributed to the workforce during bargaining, they are also the linchpin to effective collective bargaining and contractual outcomes for labor unions. Moreover, franchisors can alter franchisee behavior when confronted with worker organizing, given their significant influence over franchisees through myriad means, such as franchise agreements, trainings, manuals, and evaluation tools.¹⁴ In these ways, the NLRA can only substantively address inequality of bargaining power in the fast-food industry if franchisors are considered joint employers (along with the franchisees).

The FLSA offsets inequality of bargaining power and safeguards workers from poverty with a minimum wage and overtime standard that takes substandard wages out of competition. The FLSA broadly includes companies that “suffer or permit” the work in its definition of employers and requires employers to compensate workers for unpaid wages.¹⁵ Here, too, the joint employer doctrine is necessary to further the FLSA’s remedial and deterrence goals. Franchisees are often unsophisticated business owners with just one or two establishments and can be judgment-proof.¹⁶ Franchisors, in contrast, are often sophisticated companies that train franchisees to operate a store, impose detailed requirements on franchisees’ business practices, and have access to franchisee business records and employees.¹⁷ Franchisor standards set most revenue and cost variables for a franchise store except for labor costs, and they often impose cost requirements that cut deep into franchisee profit. Franchisees, as a result, have an incentive to violate underenforced workplace laws to increase

14. See *infra* Part II.

15. 29 U.S.C. § 203(g). The FLSA takes this standard from the child labor laws of the Progressive Era, extending coverage of the Act to companies that “allow work to be done on their behalf and are in a position to prevent wage and hour abuses, regardless of indirect business relationships and business formalities.” Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 571 (2019).

16. See Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 205–07, 213 (2013) (summarizing empirical studies showing that most franchisees are first-time business owners with no experience in the industry and that franchisees often do not read the franchise disclosure documents and rarely examine other franchise chains before making their investment); Mark D. Easton, Andrea M. Noack & Leah F. Vosko, *Are Franchisees More Prone to Employment Standards Violations than Other Businesses? Evidence from Ontario, Canada*, 32 ECON. & LAB. REL. REV. 39, 52–54, 56 (2021). The majority of franchise owners only own one or two units, and the median income for franchise owners is approximately \$50,000–\$75,000. Brandon Gaille, *21 Demographic Statistics of Franchises and Franchisees*, BRANDON GAILLE: SMALL BUS. & MKTG. ADVICE (May 30, 2017), <https://brandongaille.com/19-demographic-statistics-franchises-and-franchisees/> [<https://perma.cc/K9Z4-8EAS>] (analyzing franchising across industries). Accordingly, employment law litigation against franchisees can result in liability that far exceeds their capacity to pay. See, e.g., Steven Greenhouse, *Domino’s Delivery Workers Settle Suit for \$1.3 Million*, N.Y. TIMES (Jan. 31, 2014), <https://www.nytimes.com/2014/02/01/nyregion/dominos-franchise-settles-delivery-workers-lawsuit-for-1-28-million.html> [<https://perma.cc/4LY3-R7L3>] (describing wage and hour suit by sixty-one employees of a Domino’s Pizza franchisee that settled for about \$1.3 million, resulting in the franchisee filing for bankruptcy).

17. See *infra* Part II.

their profits.¹⁸ Franchisors that effectively set business practices in franchise stores and select and train franchisees in them are often the only private stakeholder that can consistently deter workplace violations, compensate victims, and make meaningful changes to wages and benefits.¹⁹

Despite the importance of holding franchisors jointly responsible for NLRA and FLSA obligations in franchise stores, joint employer claims against franchisors usually fail, even if the franchisor is substantially involved in franchise store operations and substantially influences the nature of fast-food workers' experiences.²⁰ The Ninth Circuit's 2019 decision, *Salazar v. McDonald's Corp.*,²¹ is a paradigmatic example. The Ninth Circuit held that McDonald's (as franchisor) did not jointly employ franchise store employees along with one of its franchisees.²² As set out in *Salazar*, McDonald's required its franchisee to use a payroll system that only recorded owed overtime if the employee worked over fifty hours per week.²³ This franchisor-required system caused the franchisee to systematically underpay employees under California's wage laws.²⁴ Even though the McDonald's system caused the violation, the Ninth Circuit minimized the company's responsibility. The court characterized the franchisor's role as giving "bad tools or bad advice" to the franchisee rather than acting as a joint employer.²⁵ The Ninth Circuit maintained that McDonald's was not liable as a joint employer, so long as the franchisor did not directly hire, fire, or supervise employees.²⁶ It affirmed the dismissal of the plaintiffs' joint employer claim against McDonald's as franchisor.²⁷

Salazar is notable both for its breathtaking implications and its unsurprising outcome. While a franchisor's participation in a legal violation would seem to require a finding of joint employment, *Salazar* holds the opposite. And *Salazar* is representative of a dominant thread of case law that exhibits extreme judicial resistance in the face of franchisor joint employer claims.²⁸ There are also federal legislative proposals and state legislation that aim to restrict joint employer

18. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 131 (2014); Easton et al., *supra* note 16, at 42–44, 50–52, 55; see also MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchising on Labor Standards Compliance* 3 (Bos. Univ. Sch. of Mgmt., Working Paper No. 2010-21, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623387 [<https://perma.cc/Z4UB-637R>] (“[T]here are high rates of non-compliance in [the fast food] sector . . .”).

19. See Elmore, *supra* note 5, at 931–32 (discussing the reputational interests and expertise that make franchisors well placed to ensure that franchisees comply with employment laws).

20. See *infra* Part I.A.

21. 944 F.3d 1024 (9th Cir. 2019).

22. *Id.* at 1027.

23. *Id.* at 1028.

24. *Id.*

25. *Id.* at 1030.

26. *Id.* at 1030–32.

27. *Id.* at 1027, 1030.

28. Regulatory developments under the Trump administration mirrored this resistance. See *infra* Part I.A.

liability.²⁹ This would codify the narrow joint employer standard sought by the Department of Labor (DOL) and the NLRB during the Trump administration.

This extreme resistance to joint employer claims has enormous implications for low-wage workers in franchised sectors. Workers in these sectors are often paid less than the minimum wage, and franchisees often operate cash-starved businesses with small profit margins.³⁰ Franchisors, especially after *Salazar*, have little incentive to deter future violations of workplace law or even to ensure that their own policies do not cause them. And franchisee employees cannot rely on collective bargaining with the franchisee alone to improve workplace conditions because franchisors effectively set the terms of employment.

To disrupt the current context, we draw from our own original empirical analyses as well as literature and doctrine to argue that power, and power relations between franchisors and franchisees, should be *central* to the inquiry of whether the franchisor jointly controls the working conditions of franchisees' employees.³¹ Our empirical work confirms that franchisors' economic power gives them the capacity to change franchisee behavior—including by reserving control in franchise agreements, which is known as “reserved control.” Franchisors also can exert “actual control” over working conditions through relational mechanisms such as manuals, trainings, and monitoring and evaluation tools. We draw our original empirical evidence from forty-four fast-food franchise agreements involving leading brands and from a comprehensive review of documents presented in recent joint employer cases against McDonald's and Domino's by the NLRB and the New York Attorney General, respectively.³² These analyses show the ways franchisor power is baked into contracts between franchisors and franchisees and how that power operates through ongoing relations between franchisors and franchisees (and by extension franchisees' employees). Because of franchisors' contractual power over franchisees' economic future, franchisees are incentivized to interpret

29. See *infra* Part I.B for discussion of legislative initiatives to narrow the joint employment standard. The Save Local Business Act sought to limit joint employer liability to people and companies that exercise direct control over employees. H.R. 3441, 115th Cong. § 2(a)(2) (2017) (defining a joint employer as one that “directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment”).

30. See WEIL, *supra* note 18, at 129–31 (noting most fast-food workers experience wage and hour law violations, which occur more frequently in franchisee-owned stores); Tiffany Hsu & Rachel Abrams, *Subway Got Too Big. Franchisees Paid a Price.*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/business/subway-franchisees.html> [<https://perma.cc/34H4-AJES>] (describing cash-starved franchisees unable to bring stores into compliance with franchisor standards).

31. Our power-as-control construct is consistent with political scientists who view power as a capacity to change behavior. See, e.g., Marissa Brookes, *Power Resources in Theory and Practice: Where to Go from Here*, 9 GLOB. LAB. J. 254, 255 (2018) (“Conceiving of power as a capacity is also compatible with the notion . . . that power is the product of actors' relationships of interdependence, conditioned by their embeddedness in the economic, institutional and social structures comprising their external environment.”).

32. For a more detailed description of our methodology, see notes *infra* Part III.

franchisors' many "recommendations" regarding wage practices and working conditions as franchisor requirements.

The empirical evidence we present, and the theoretical and doctrinal underpinnings that support our approach, are significant contributions to the burgeoning joint employer literature.³³ Moreover, while other scholarship has proposed alternative liability regimes to address shortcomings in the joint employer doctrine,³⁴ our proposal would address these shortcomings without requiring a significant expansion of existing doctrine or abandoning the central role of control in the analysis of whether a company has joint employer liability.

The Article proceeds as follows. In Part I, we describe the problem the Article seeks to address. We discuss trends that essentially foreclose joint employer liability, notwithstanding significant evidence of control. This Section also illustrates that this foreclosure, in part, is due to "the tortification,"³⁵ or judicial importation of a restrictive causal nexus requirement, of joint employer doctrine. We will show that this trend has led courts to discount significant forms of reserved and exercised control through an intermediary (the franchisee)—often called "indirect" control.

Part II presents empirical evidence from an analysis of fast-food contracts and a systematic review of all publicly available documentation in the McDonald's and Domino's litigation. It illustrates the reserved control that emanates from the limits franchisors put on the economic opportunities of their franchisees. It also spells out the mechanisms of power as control, such as manuals, trainings, monitoring, and evaluations. In this way, franchisors

33. Most joint employer scholarship discusses the history of the doctrine and its modern applications, but that literature does not attempt an empirical examination of contracts by organizational forms often involved in joint employment disputes. *See, e.g.*, Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1700–03 (2016); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 341 (2003); Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 *passim* (1999). The last systematic empirical examination of franchise contracts in the law literature was by Gillian Hadfield in 1990. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990). That article sought to show the opportunism in relational contracts but did not apply this analysis to the joint employment doctrine.

34. *See, e.g.*, Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 42–46 (2010) (proposing a negligence standard for the joint employment doctrine); Guy Davidov, *Indirect Employment: Should Lead Companies Be Liable?*, 37 COMPAR. LAB. L. & POL'Y J. 5, 35 (2015) (proposing a limited form of enterprise liability "based on implicit brand representations").

35. The term "tortification" came about as a critique of the Supreme Court's use of causation standards to limit the reach of federal employment discrimination law, particularly after *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). *See* Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375 (2014). This article is the first to identify a similar pattern in joint employer claims, in which courts require evidence of control beyond what employment and labor laws seem to require. The tort label is not intended to suggest that the joint employer doctrine adopts common law causation standards. As explained *infra* Part II.A, the causal standards in tort law are more flexible than the causation requirements often imported into the joint employer doctrine.

indirectly control frontline workers via their directives to their franchisees. A comprehensive consideration of the contractual relations, and the relations in practice, shows that franchisees act upon the franchisors' recommendations as though they were requirements, even if the franchisors formally refer to them as "recommendations."

Part III provides a theoretical and doctrinal grounding for our proposed *power as control* approach. It explores scholarship on franchising that finds that franchisors hold expansive power in their relationship with franchisees and exert their power to extract one-sided contract terms. Finally, this Section illustrates that, in contrast to cases that constrict the scope of joint employment in the franchising context, there is existing case law in other contexts that supports our claim that considerations of power should be key to determining who controls working conditions in joint employer cases.

Part IV operationalizes the power as control approach and shows how it would further the deterrence, remedial, and collective bargaining goals of labor and employment law. Lowering the steep hurdles that currently foreclose joint employer claims would permit low-wage workers and their advocates to vindicate their rights and pursue collective action. Courts adopting a power as control approach would find that findings of substantial indirect control can suffice to demonstrate joint employment. Adoption of our approach should also encourage the NLRB and other administrative agencies to interrogate franchisor-franchisee relationships in investigating alleged violations of labor and employment law in the fast-food sector. This Article concludes that this proposed approach can help courts, administrative agencies, and policy-makers to bring more justice and consistency to this hotly contested area.

I.

THE PROBLEM: FORECLOSING JOINT EMPLOYMENT IN FRANCHISING

This Section will explain the judicial narrowing of the joint employer doctrine in cases involving franchisors and show how some legislatures and agencies have mirrored this trend, which can foreclose joint employment liability in the franchise relationship. It will demonstrate that the current judicial approach to joint employer cases involving franchisors is to presume no joint employment. This has effectively created a safe harbor, precluding franchisor liability for labor and employment law violations in franchise stores where there is no evidence of the franchisor's direct hiring, firing, or supervision of employees. But before we describe what we view as problematic resistance to joint employer determinations, a few conceptual definitions are necessary.

The lead entities in a vertically integrated production chain can be classified as joint employers with their subordinate companies if they have sufficient control over wages and working conditions.³⁶ We use the word "control" while

36. Temporary staffing and staffing firms and their clients are one example of "typical" joint employers. See *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 145 (2d Cir. 2008) (finding

fully acknowledging that some statutes, like the FLSA, do not speak of control and are meant to extend coverage beyond common law conceptions of control.³⁷ Nonetheless, control is the dominant paradigm in discussions of joint employment, and we adopt the word here for ease so that our approach speaks broadly to joint employer debates across various labor and employment laws. The concept of control emanates from common law notions of master-servant relations and agency theory.³⁸ For all practical purposes, it means that an entity is influencing, or could influence, the behavior of another, whether directly or indirectly.³⁹

Differentiating between direct control and indirect control is an analytically slippery endeavor. Generally, direct control requires formal directions, or explicit instructions to employees that shape wages and working conditions, often provided through day-to-day, on-site interactions with employees.⁴⁰ By indirect control, we mean two things. First, we mean a franchisor's reserved power to control wages and working conditions—whether or not it is actually exercised. This is often referred to as the power to, or the ability to, control.⁴¹ Second, we mean exercised control that does not fit into the obvious buckets of direct controls used by direct supervisors of frontline workers. This would

that a nurse paid by referral agencies was jointly employed by hospital); EEOC Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 3, 1997), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary> [<https://perma.cc/P8MQ-54AM>] (“If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as ‘joint employers.’”); *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 218–19 (3d Cir. 2015) (finding and collecting cases in other circuits finding a staffing company to be a joint employer under Title VII).

37. See Griffith, *supra* note 15, at 593 (arguing that comprehensive review of the FLSA’s legislative history “dictates forcefully that the statute must reach even those entities that benefit from the labor and have indirect power over the payment of minimum wage and overtime premiums, regardless of formalities”).

38. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) (defining an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”).

39. See *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (stating that “control” in the employment context speaks to the fundamental question of whether “persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment”).

40. See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70 (2d Cir. 2003) (distinguishing between an employer that exercises direct control and a putative joint employer that “does not hire and fire its joint employees, directly dictate their hours, or pay them”); *Torres-Lopez v. May*, 111 F.3d 633, 639–43 (9th Cir. 1997) (discussing distinction between direct and indirect control over employees as hinging on the extent to which the putative employer has direct contact with employees in hiring, firing, supervising, and paying them); *DiMucci Constr. Co. v. NLRB*, 24 F.3d 949, 952 (7th Cir. 1994) (“Factors to consider in determining joint employer status are (1) supervision of employees’ day-to-day activities; (2) authority to hire or fire employees; (3) promulgation of work rules and conditions of employment; (4) issuance of work assignments; and (5) issuance of operating instructions.”).

41. For example, the Sixth Circuit has adopted a version of the common law test that considers “an entity’s *ability to* hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.” *Equal Emp. Opportunity Comm’n v. Skanska USA Bldg., Inc.*, 550 F. App’x 253, 256 (6th Cir. 2013) (emphasis added).

include, for instance, franchisor instructions that filter through an intermediary, e.g., a franchisee or franchisee manager, to ultimately affect working conditions on the front lines.⁴² It would also include operational requirements—and recommendations that are effectively requirements for franchisees to continue to do business—that shape working conditions.⁴³

Our definition of “control” narrowly construes direct control and considers most forms of franchisor control over franchisee store operations to be indirect. In offering these definitions of direct and indirect control, we do not suggest that direct control is more powerful than indirect control in all instances or that these are the only, or the correct, definitions. Neither form of control is necessarily stronger. Franchisor field representatives’ presence in training franchisee employees about store operations can be a fairly weak form of direct control, while franchisor threats of franchise termination for failing to comply with those policies can be a strong form of indirect control. While we characterize the former as direct control and the latter as indirect control, this distinction can be porous. Some forms of control, such as supervision through an intermediary, could be characterized as either.⁴⁴

We, nonetheless, distinguish between direct and indirect control in this Article for two reasons. First, this distinction can be dispositive in determining whether a company at the top of a vertically integrated production chain, such as a franchisor, is a joint employer.⁴⁵ Liability often fundamentally hinges on how courts construe indirect control.⁴⁶ All courts will find a joint employment

42. For example, a putative joint employer, that is, a franchisor, might exert indirect control by providing operational instructions to franchise store managers. See Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New “Intermediary” Theory of Joint Employment*, 94 WASH. L. REV. 171, 173–74 (2019) (“[S]ome 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 franchisor and front-line workers such that, in some cases, franchisors are joint employers (along with the franchisee) of front-line workers.”).

43. See, e.g., *Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc.*, No. 11-cv-8557, 2014 WL 183956, at *6 (C.D. Cal. Jan. 14, 2014) (finding that Walmart’s “suggestions” to its subcontractor about how to improve productivity was evidence of indirect control because of Walmart’s expectation that the subcontractor “would follow these suggestions”).

44. For example, the NLRB has recently characterized contractor direction of an intermediary, such as managers of the subcontractor, as a form of direct control. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184, 11209 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).

45. See, e.g., *In re Enterprise Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 468–69 (3d Cir. 2012) (distinguishing between “ultimate,” or “direct,” control over employees and “indirect” control in determining whether a parent corporation jointly employs its subsidiary’s employees, and cautioning that “the FLSA designates those entities with sufficient *indirect* control,” in addition to entities with direct control, as joint employers).

46. Appellate courts have reversed trial courts for failure to consider indirect control in a joint employer analysis. See, e.g., *Talarico v. Pub. P’ships, LLC*, No. 20-1413, 2020 WL 7137072, at *3–4 (3d Cir. Dec. 7, 2020) (reversing trial court grant of summary judgment for defendant and finding evidence of indirect control, including required work rules, orientation and training, review of time sheets, and retention of personnel records, was sufficient to create a genuine dispute about joint employer status); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003) (vacating judgment in favor of defendants because district court failed to consider indirect control); *Torres-Lopez v. May*, 111 F.3d

relationship if there is substantial evidence of direct control.⁴⁷ While joint exercise of direct control is routine in some joint employer relationships, such as between staffing agencies and their clients,⁴⁸ it is uncommon in most vertically integrated settings.⁴⁹ Whether labor and employment laws hold liable entities at the top of a vertically integrated production chain depends on whether and how courts consider indirect forms of control.

Indirect control is important for all forms of contracting out for end-services, but it is of central importance for franchising because of the extensive forms of franchisor control over franchisees in franchise agreements, the extensive operations manuals, the agreements annex, and the means by which franchisors monitor and enforce their terms. Close examination of indirect controls is necessary to evaluate the true nature of the relationship. Cumulatively, indirect control can allow a lead company to effectively control operations and working conditions at a subsidiary.

A. *Court Resistance to Joint Employment*

Even though courts have recognized indirect control in joint employer analysis,⁵⁰ courts often discount indirect control and require evidence of direct, day-to-day supervision of franchise store employees to support a determination of joint employment.

633, 639–41 (9th Cir. 1997) (criticizing the district court for only considering direct control and for failing to consider defendant's indirect control over farmworkers, which showed that the grower was a joint employer). Trial courts often, nonetheless, dismiss joint employer claims because of the lack of direct control.

47. *See, e.g.*, *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999) (finding that individual was a joint employer based on evidence that he hired manager-level employees, “supervised and controlled employee work schedules and the conditions of employment,” and stopped the misclassification of employees as independent contractors); *Scalia v. Liberty Gas Station & Convenience Store, LLC*, 444 F. Supp. 3d 390, 401–02 (N.D.N.Y. 2020) (finding that two distinct companies that shared employees in a single workplace were joint employers); *Farmer v. Shake Shack Enters., LLC*, No. 19 Civ. 9425, 2020 WL 4194860, at *5 (S.D.N.Y. July 21, 2020) (denying motion to dismiss joint employer claim based on evidence of direct control).

48. *See, e.g.*, *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 680–81 (1st Cir. 1998) (holding that application of direct control factors showed that temporary employment agencies were joint employers); *Jackson v. Fed. Nat'l Mortg. Ass'n*, 181 F. Supp. 3d 1044, 1062 (N.D. Ga. 2016) (granting conditional collective action certification in FLSA claim against staffing agencies and Fannie Mae as joint employers).

49. *See, e.g.*, *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 689–94 (D. Md. 2010) (holding that Comcast did not jointly employ cable technicians because it did not exercise direct control over hiring and firing, supervision, or pay); *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1160–61 (C.D. Cal. 2003) (finding that garment manufacturer was not a joint employer of garment employees, despite presence of manufacturer quality control personnel in worksite, because only the contractor directly controlled employees).

50. *See, e.g.*, *Graves v. Lowery*, 117 F.3d 723, 727–29 (3d Cir. 1997) (finding that a county jointly employed judicial clerks, even though the court disciplined, fired, and supervised them, because the employees were covered by the county's personnel policies and were hired and funded by the county).

The Fifth Circuit in *Orozco v. Plackis* is emblematic of this trend.⁵¹ It considered a minimum wage and overtime claim under the FLSA, which expressly defines employment more broadly than the common law.⁵² But the court focused exclusively on the lack of day-to-day supervision by the franchisor.⁵³ It dismissed evidence of franchisor meetings with the franchisee, in which the franchisor recommended staffing and other operational changes that the franchisee later adopted, as mere “advice” and “suggested improvements” rather than as evidence of control.⁵⁴ The court held that a franchisor’s recommended employee compensation policy did not indicate control, even if the franchisor reserved the power to require it.⁵⁵ It found that the franchisor’s training, policies, and personnel recommendations could not, as a matter of law, create a joint employment relationship.⁵⁶ This was the case because of terms in the franchise agreement disclaiming franchisor authority over franchisee store employees.⁵⁷

Recently, some courts have offered a different, more expansive approach to considering the joint employer status of franchisors. The court in *Cano v. DPNY, Inc.* granted a motion to add Domino’s Pizza, a franchisor, as a defendant based on evidence of indirect control.⁵⁸ As evidence of joint employment, the plaintiffs alleged that the franchisor’s employee compensation policies and access to the franchisee’s pay records showing wage and hour violations indicated indirect control over the franchisee.⁵⁹ Some courts have since adopted this reasoning in denying motions to dismiss claims against franchisors.⁶⁰ They find that evidence of the franchisor’s training, payroll systems, and employment policies, along with intensive monitoring and inspections, can be sufficient to defeat a franchisor’s motion to dismiss the joint employer claim.⁶¹

But these trial court decisions permitting claims to survive if they allege substantial indirect control are the minority approach in franchising. Like in

51. 757 F.3d 445 (5th Cir. 2014); *see also* Pope v. Espeseth, Inc., 228 F. Supp. 3d 884, 890–91 (W.D. Wis. 2017), *appeal dismissed*, No. 17-3082, 2018 WL 1738817 (7th Cir. Mar. 21, 2018).

52. The FLSA uses the broader “suffer or permit” standard. 29 U.S.C. § 203(g).

53. *Orozco*, 757 F.3d at 451.

54. *Id.* at 450.

55. *Id.* at 451.

56. *Id.* at 452.

57. *Id.* at 451–52.

58. *Cano v. DPNY, Inc.*, 287 F.R.D. 251 (S.D.N.Y. 2012).

59. *Id.* at 257.

60. *See, e.g.*, Parrott v. Marriott Int’l, Inc., No. 17-10359, 2017 WL 3891806, at *10 (E.D. Mich. Sept. 6, 2017); Lora v. Ledo Pizza Sys., Inc., No. DKC 16-4002, 2017 WL 3189406, at *6 (D. Md. July 27, 2017); Shupe v. DBJ Enters., LLC, No. 14CV308, 2015 WL 790451, at *4 (M.D.N.C. Feb. 25, 2015).

61. *See* Ocampo v. 455 Hosp. LLC, No. 14-CV-9614, 2016 WL 4926204, at *7–9 (S.D.N.Y. Sept. 15, 2016); Cordova v. SCCF, Inc., No. 13CIV5665-LTS-HP, 2014 WL 3512838, at *5 (S.D.N.Y. July 16, 2014); Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014); Bonaventura v. Gear Fitness One NY Plaza LLC, No. 17 Civ. 2168, 2018 WL 1605078, at *3–5 (S.D.N.Y. Mar. 29, 2018); Benitez v. Demco of Riverdale, LLC, No. 14 Civ. 7074, 2015 WL 803069, at *3–4 (S.D.N.Y. Feb. 19, 2015).

Orozco and *Salazar*, most trial courts minimize indirect control and adopt narrow control tests that only credit the exercise of direct, day-to-day supervision of franchise store employees.⁶²

The rejection of indirect control as evidence of a joint employer relationship in *In re Jimmy John's Overtime Litigation* is an instructive example.⁶³ *Jimmy John's* involved a FLSA claim for unpaid wages brought by franchise store employees against the franchisee and franchisor as joint employers.⁶⁴ According to the *Jimmy John's* plaintiffs, the fast-food franchisor provided guidance to franchisees about the hiring process, including advice about staffing volume, and instructed franchisees to discipline and terminate employees for violations of franchisor-required personnel standards.⁶⁵ But the court held that evidence that Jimmy John's representatives directed franchisee staffing levels and schedules did not show the franchisor's role in the interview process or in the selection of who to hire, "which is the heart of the test."⁶⁶ And evidence that Jimmy John's representatives wanted franchise store employees removed and gave low evaluation scores for franchisees whose personnel failed to follow rules was not evidence of control because the franchisor did not play a role in specific discipline or firing of personnel.⁶⁷ In rejecting the joint employer claim, the court held that the franchisor's pervasive control over franchisee business records and "the systems, operations, and dress code at franchise stores" was insufficient to establish a joint employment relationship because the "purpose of these requirements [wa]s not to control franchise employees but to protect the Jimmy John's Brand Standards that make it a successful business."⁶⁸

Many trial courts have followed this familiar pattern. For example, courts have referred to mandatory employee schedules in franchisor operations manuals as insufficient to show that the franchisor "control[ed] . . . employee work schedules" because the franchisor did not "enforce the requirements exactly as listed in the manual," and the franchisee did not follow the manual "in every instance."⁶⁹ Likewise, a commission-based system of compensation that is dictated in a franchisor's operations manual and that violates wage and hour law

62. See, e.g., *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 889–91 (W.D. Wisc. 2017) (granting franchisor's motion for summary judgment), *appeal dismissed*, *Pope v. Espeseth, Inc.*, No. 17-3082, 2018 WL 1738817 (7th Cir. Mar. 21, 2018); *Gessele v. Jack in the Box, Inc.*, No. 14-CV-1092-BR, 2016 WL 7223324, at *21 (D. Or. Dec. 13, 2016) (granting the same); *Abdelkhaleq v. Precision Door*, No. 07 CV 03585, 2008 WL 3980339, at *16 (N.D. Ohio Aug. 21, 2008) (granting franchisor's Rule 12(b)(6) motion to dismiss worker's claim); *Howell v. Chick-Fil-A, Inc.*, No. 92-30188, 1993 WL 603296, at *6 (N.D. Fla. Nov. 1, 1993) (granting franchisor's motion for summary judgment).

63. *In re Jimmy John's Overtime Litig.*, No. 14 C 5509, 2018 WL 3231273 (N.D. Ill. June 14, 2018).

64. See *id.* at *2.

65. *Id.* at *15–18.

66. *Id.* at *15.

67. *Id.* at *16.

68. *Id.* at *20.

69. *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 890 (W.D. Wis. 2017), *appeal dismissed*, No. 17-3082, 2018 WL 1738817 (7th Cir. Mar. 21, 2018).

is insufficient to show control because “a recommendation regarding the method of employee compensation does not, on its own, amount to control over employees’ working conditions.”⁷⁰ Courts have also held that a required employee background check is a “quality control standard” but does not indicate power to control.⁷¹ One court described a franchisor’s payroll services as “merely a convenience” to franchisees and not evidence of joint employment in a suit where franchise store employees claimed that their paychecks did not include owed overtime and meal break compensation.⁷² Evidence that a franchisor required franchise store employees to pass the franchisor’s approved background checks did not show “power to hire” because “the decision as to which qualified applicants to hire” was ultimately the franchisee’s.⁷³

The day-to-day direct control requirement makes it virtually impossible to find joint employment in franchising given the vertical organization of franchisor-franchisee relations. Franchisees mediate the relationship between the franchisor and the fast-food workforce. One court, reviewing this line of cases, concluded that “the type of standard setting and oversight exercised by a franchisor does not rise to the requisite level of control to constitute joint employer status.”⁷⁴ The purpose of franchising is to contract out for day-to-day supervision while maintaining extensive operational control. So requiring day-to-day supervision and ignoring indirect control means the joint employer doctrine does not apply to franchisors in practice. Applied rigidly, it is difficult to imagine a franchising—or any secondary business—relationship that could meet this direct supervision requirement.⁷⁵

Courts are not always clear in their reasons for why they ignore or minimize evidence of indirect control in franchising. But as the California Supreme Court in *Patterson v. Domino’s Pizza, LLC* explained, while the “terminology” for disregarding indirect control “varies . . . courts have focused on the franchisor’s lack of control over the ‘instrumentality’ . . . that caused the alleged injury.”⁷⁶

70. *Id.* at 891.

71. *See, e.g.*, *Reese v. Coastal Restoration & Cleaning Servs.*, No. 10cv36, 2010 WL 5184841, at *4 (S.D. Miss. Dec. 15, 2010) (rejecting as evidence of control the provisions in an employee training program form that authorized franchisor to have access to the results of employee background checks).

72. *Singh v. 7-Eleven, Inc.*, No. C-05-04534, 2007 WL 715488, at *6 (N.D. Cal. Mar. 8, 2007); *see also* *Perez v. DNC Parks & Resorts at Sequoia*, No. 19-cv-00484, 2020 WL 4344911, at *4 (E.D. Cal. July 29, 2020) (“[M]erely providing payroll services and meal and rest break policies—let alone sharing or distributing them—does not create a joint employer relationship.”).

73. *In re Domino’s Pizza Inc.*, No. 16-CV-2492, 2018 WL 4757944, at *5 (S.D.N.Y. Sept. 30, 2018).

74. *Id.* at *4.

75. As the majority opinion in *Salazar* observed, the joint employer analysis applies to temporary and staffing agencies that place employees in an employer’s workplace and in which the employer exercises the same day-to-day control for the temporary employees as for regular employees. *Salazar v. McDonald’s Corp.*, 944 F.3d 1024, 1031 (9th Cir. 2019). The *Salazar* court suggested, however, that this analysis would not apply to temporary and staffing agencies that do not retain power over hiring and day-to-day control. *Id.*

76. *Patterson v. Domino’s Pizza, LLC*, 333 P.3d 723, 739 (Cal. 2014); *see also*, *Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83, 87 (E.D.N.Y. 2000), *aff’d*, 4 F. App’x 82 (2d Cir. 2001) (“In deciding

This causal nexus requirement demands a showing that the defendant controls “the daily conduct or operation of the particular ‘instrumentality’ or aspect of the franchisee’s business” alleged to have caused the harm.⁷⁷ An instrumentality requirement, to be sure, is typical for claims seeking to hold franchisors vicariously liable for common law claims against franchisees⁷⁸ and for claims of franchisor liability for coemployee sexual harassment, like the one in *Patterson*.⁷⁹ As in *Patterson*, a court analogizing to the common law doctrine of respondeat superior may impose a causal nexus standard to limit harassment liability where the principal “could not have prevented the misconduct and corrected its effects.”⁸⁰

Scholars have criticized this “tortification” of employment discrimination law for “up[ping] the ante” of what plaintiffs must prove in harassment claims, beyond what statutes require.⁸¹ As Sandra Sperino explained, the tort label is misleading because courts that import causal requirements into employment statutes apply the causal nexus standard less flexibly than tort law would allow.⁸² In *Patterson*, the causal nexus requirement seemed aimed at rejecting the relevance of the franchisor’s “standards and controls” as a means of controlling employees.⁸³ The court held that a narrow control test is necessary in franchising not because tort law requires it, but because “[a]ny other guiding principle would disrupt the franchise relationship.”⁸⁴ At bottom, judicial resistance to crediting indirect control in joint employer claims against franchisors seems driven by a

whether a franchisor may be held vicariously liable for acts of its franchisees, courts determine whether the franchisor controls the day-to-day operations of the franchisee, and more specifically *whether the franchisor exercises a considerable degree of control over the instrumentality at issue in a given case.*”) (emphasis added).

77. *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶ 39, 682 N.W.2d 328, 340.

78. *See* Courtland v. GCEP-Surprise, LLC, No. CV-12-00349-PHX, 2013 WL 3894981, at *5 (D. Ariz. July 29, 2013) (adopting the instrumentality requirement from *Kerl* as the “‘predominant test’ for holding a franchisor vicariously liable”).

79. In Title VII claims, a principal in a vertically integrated production chain is only liable “if the defendant employer knew or should have known about the other employer’s conduct and ‘failed to undertake prompt corrective measures within its control.’” U.S. Equal Emp. Opportunity Comm’n v. Glob. Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019) (quoting EEOC Notice No. 915.002, *supra* note 36).

80. *Patterson*, 333 P.3d at 739.

81. Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1091 (2017).

82. *See* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1086–87 (2014). Res ipsa loquitur, for example, is a commonly accepted doctrinal tool courts rely on to relax the factual causation requirement when negligence is clear, but it is difficult to prove that the untaken precaution caused the loss. *See* Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 916–20 (1994) (identifying a class of “nondurable negligence” cases in which specific negligence cannot be shown, and which is therefore “obliged to rely on res ipsa loquitur”). Likewise, the loss of chance doctrine permits claims in which a patient with a less than 50 percent chance of recovery may nonetheless satisfy causation for clear medical malpractice that made survival less likely. *See* David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 627–35 (2001) (explaining deterrence justification of loss of chance doctrine, and its criticisms).

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

84. *Id.* at 739.

fear of imposing “virtually unlimited liability” on franchisors that institute uniform brand standards.⁸⁵

We will return to the judicial concern about unbounded liability for franchisors in Part IV. For now, our purpose is to show how this exclusion of franchise standards and controls from evidence of joint employment has implications for any joint employer claim in a franchise relationship. Courts have applied the reasoning of *Patterson* to claims, such as wage and hour claims, in which the franchisor has constructive knowledge of the violations.⁸⁶ Even where a causal nexus is established, like the McDonald’s required payroll program that underreported owed wages in *Salazar*, courts routinely reject the claim.⁸⁷ In these instances, the direct control requirement that disregards even “a franchisor’s expansive control over a franchisee”⁸⁸ means that joint employer theories in franchising cases are essentially foreclosed. This defeats the purpose of labor and employment law by permitting franchisors to effectively control operations while ignoring legal violations that they have notice of and have the ability to cure.

B. Agency/Legislative Resistance to Joint Employment

Agency interpretation under the Trump administration and some state-level legislation has tracked the judiciary’s narrowing of the joint employer test for franchisors in labor and wage and hour law. While there has been no federal statutory change, attempts to account for the power that franchisors have over franchisees have met intense opposition in many state legislatures and administratively. While the Biden administration will likely, as we propose, seek to restore a broader interpretation of joint employment similar to that held by agencies during the Obama administration, it is unclear how durable any future agency action will be. Meanwhile, courts will likely continue their foreclosure of joint employer claims.

85. *Chavez v. McDonald’s Corp.*, No. 19-cv-00164-PAB-SKC, 2020 WL 1322864, at *5 (D. Colo. Mar. 20, 2020) (quoting *McKinnon v. YUM! Brands, Inc.*, No. 15-cv-00286, 2017 WL 3659166, at *9 (D. Idaho Aug. 24, 2017)) (dismissing Section 1981 claim by customer against McDonald’s for alleged discriminatory conduct by franchisee).

86. *See In re Domino’s Pizza Inc.*, No. 16-CV-2492, 2018 WL 4757944, at *5 (S.D.N.Y. Sept. 30, 2018) (citing *Patterson*, 333 P.3d at 728 in an FLSA joint employer claim against franchisor for the proposition that “evidence of corporate guidance in the hiring process is insufficient to demonstrate that a franchisor has power to hire a franchisee’s employees”); *In re Jimmy John’s Overtime Litig.*, No. 14 C 5509, 2018 WL 3231273, at *15 (N.D. Ill. June 14, 2018) (citing *Patterson*, 333 P.3d at 728 for the proposition that “a showing of corporate guidance in the hiring process, without any personal involvement in the hiring decisions of individuals seeking employment at a [franchise store], is insufficient to demonstrate that [a franchisor] controls the selection of franchise employees”).

87. *See, e.g., Perez v. DNC Parks & Resorts at Sequoia*, No. 19-cv-000484, 2020 WL 4344911, at *4 (E.D. Cal. July 29, 2020) (relying on *Patterson*, 333 P.3d at 739 to dismiss wage and hour law claim against franchisor because “merely providing payroll services and meal and rest break policies . . . does not create a joint employer relationship”).

88. *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].”).

Under the Obama administration, the two executive agencies in charge of enforcing labor and employment law—the DOL and the NLRB⁸⁹—broadly interpreted the joint employer standard. Obama’s Wage and Hour Administrator at the DOL, David Weil, acknowledged the need to examine supply chain realities and the “fissured” nature of business relationships among multiple businesses in his enforcement strategies.⁹⁰ In 2014, the General Counsel of the NLRB sued McDonald’s and its franchisees alleging that these joint employers violated employees’ rights to engage in collective activities to support the Fight for Fifteen movement.⁹¹ Then, in *Browning-Ferris Industries of California, Inc.*, the NLRB ruled that reserved control in contractual arrangements and indirect control over workplace standards could show joint employment status.⁹² It found that the “right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.”⁹³

Joint employer developments during the Obama administration led to administrative and legislative backlash, with a high-profile push by the business community to narrow the scope of joint employer law.⁹⁴ Government agencies

89. Unique among agencies regulating the workplace, the NLRB shapes labor law by determining whether a complaint proceeds and by announcing its new interpretations of labor law in the administrative appeal process. The NLRB Office of General Counsel decides which cases the Board hears, and the Board rules on substantive labor law questions through its case determinations. See 29 U.S.C. §§ 153(d), 160. While subject to judicial review, these rules shift in predictable ways from liberal to conservative administrations. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 1013, 1015 (2009).

90. David Weil, *Strategic Enforcement in the Fissured Workplace*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR 19, 19 (Kati L. Griffith & Samuel Estreicher eds., 2015).

91. Hassan A. Kanu, *McDonald’s Gets Win in Labor Case Backed by Fight for \$15(2)*, Daily Lab. Rep. (BL) (Dec. 12, 2019), <https://bna.com/employee-benefits/mcdonalds-gets-win-in-major-labor-case-backed-by-fight-for-15/> [<https://perma.cc/NU4U-XG9G>]; Michael Rose, *NLRB Announces Six More Complaints Issued Against McDonald’s on Joint Employer Issue*, Daily Lab. Rep. (BL) (February 13, 2015), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/> (search in the search bar for “Michael Rose” “McDonald’s”; then click “Go”; then scroll down to the fifth result) [<https://perma.cc/5F85-RLBD>] (“In July 2014, NLRB General Counsel Richard F. Griffin said he had authorized regional directors to issue complaints in 43 ULP cases involving McDonald’s. He then issued 13 complaints in December 2014.”); Steven Greenhouse, *McDonald’s Ruling Could Open Door for Unions*, N.Y. TIMES (July 29, 2014), <https://www.nytimes.com/2014/07/30/business/nlrbs-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html> [<https://perma.cc/V9M2-GJ4W>].

92. 362 N.L.R.B. 1599, 1614 (2015), *aff’d*, 911 F.3d 1195 (D.C. Cir. 2018).

93. *Id.*

94. See Justin Miller, *Can Big Business Dismantle the Joint Employer Standard?*, AM. PROSPECT (June 21, 2016), <https://prospect.org/labor/can-big-business-dismantle-joint-employer-standard/> [<https://perma.cc/SPM8-WSXG>] (reporting employer legal mobilization against the *Browning-Ferris* standard); Opinion, *NLRB’s Joint Employer Attack*, WALL ST. J. (Aug. 28, 2015), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826> [<https://perma.cc/6K5C-WZCV>] (arguing that *Browning-Ferris* is an example of agency overreach); Erin Conway & Caroline Fichter, *Surviving the Tempest: Franchisees in the Brave New World of Joint Employers and \$15 Now*, 35 FRANCHISE L.J. 509, 515 (2016) (“[The] change in the NLRB employer test is vehemently opposed by the International Franchise Association (IFA) and bemoaned as the end of franchising altogether by some.”); David J. Kaufmann, Felicia N. Soler, Breton H. Permesly & Dale A. Cohen, *A Franchisor Is*

under the Trump administration flatly rejected this broader view of joint employer liability. The DOL and NLRB repudiated those positions and restricted the scope of joint employer liability.⁹⁵ In December 2019, the NLRB approved a franchisor-friendly settlement of its General Counsel’s joint employer case against McDonald’s, and its General Counsel then declined to pursue charges against McDonald’s for violations in stores owned by its closely held subsidiary.⁹⁶ In 2018, the D.C. Circuit Court of Appeals affirmed the reasoning of *Browning-Ferris*,⁹⁷ even as the NLRB overturned it through the issuance of a rule, returning to a narrow scope of joint employment.⁹⁸ The NLRB’s Trump-era rule defined the “‘share or codetermine’ standard” to require a showing of “‘possession and exercise of substantial direct and immediate control over one or more essential terms and conditions of employment.’”⁹⁹

Meanwhile, the Trump-era DOL in 2020 promulgated a rule similar to that of the NLRB’s, narrowing the scope of the FLSA.¹⁰⁰ The DOL refrained from concluding that indirect control can never be sufficient to establish a joint employer relationship. Its rule contemplated that a putative joint employer that “determine[s] how employees’ schedules, routes, or other working conditions will be altered or changed” to meet its own needs weighs in favor of a joint employer finding.¹⁰¹ But, like the NLRB, the DOL opined that there is nothing about the franchise relationship that makes “joint employer status more likely.”¹⁰² In September 2020, a district court invalidated the DOL’s new,

Not the Employer of Its Franchisees or Their Employees, 34 FRANCHISE L.J. 439 *passim* (2015) (arguing franchisors’ position that franchisors should not be considered joint employers).

95. See Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820, 2823 (proposed Jan. 16, 2020) (to be codified at 29 C.F.R. pt. 791) (DOL rule narrowly interpreting joint employer rule for FLSA and clarifying that franchising as a form of contracting does “not make joint employer status more . . . likely”); Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184, 11187, 11198 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103) (NLRB overruling *Browning-Ferris* and finding that joint employment is established “only if the two entities share or codetermine the employees’ essential terms and conditions of employment,” which does not include the “brand standards” of a franchising relationship); see also *Recission of Joint Employer Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 14038 (Mar. 12, 2021) (to be codified at 29 C.F.R. pt. 791).

96. See Hassan A. Kanu, *McDonald’s Labor Board Ruling Attacked on Ethics Grounds*, Daily Lab. Rep. (BL) (January 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-case-should-be-reopened-on-ethics-grounds-lawyers> [<https://perma.cc/28EM-KFBW>]; Ian Kullgren, *Joint-Employer Questions Raised in New NLRB McDonald’s Case*, Daily Lab. Rep. (BL) (Sept. 23, 2020), <https://news.bloomberglaw.com/daily-labor-report/joint-employer-questions-raised-in-new-nlr-mcdonalds-case> [<https://perma.cc/9R7J-Z48G>].

97. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1200, 1217–21 (D.C. Cir. 2018) (affirming that indirect control is relevant when related to “essential terms and conditions of employment”).

98. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. at 11184.

99. *Id.* at 11186, 11198.

100. Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. at 2820. This rule superseded informal guidance by the DOL in January 2016, which more broadly interpreted the FLSA joint employer standard. See U.S. Dep’t of Labor, Wage & Hour Div., Administrator Interpretations Letter on Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act (Jan. 20, 2016).

101. Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. at 2841.

102. *Id.*

narrower interpretation as inconsistent with the FLSA's broad definitions of the employment relationship.¹⁰³

Franchisors, through the International Franchise Association (IFA), have sought to extend and codify Trump-era administrative rules narrowing joint employment standards for franchisors.¹⁰⁴ While this has had limited effect in advancing federal legislation,¹⁰⁵ eighteen states have amended their employment laws to exclude franchisors from joint employer liability altogether.¹⁰⁶

Despite the Biden administration's move to return to Obama-era rules regarding joint employment,¹⁰⁷ and despite the Democratic majority in the Senate, courts are likely to continue to foreclose joint employer claims. Even if federal agencies start to pursue joint employer claims in franchising cases aggressively, they are likely to face resistance in the courts. The joint employer status of franchisors under federal law is likely to remain in judges' and agencies' discretion, and a good number of states are likely to continue their efforts to narrow the scope of joint employment liability. With that reality in mind, we join other scholars in rejecting the need to show direct, day-to-day control in a joint employer relationship.¹⁰⁸ This direct control requirement is contrary to established law and would defeat the legislative purpose of labor and employment statutes.¹⁰⁹

We agree with Brishen Rogers and Guy Davidov's critiques of narrow constructions of the scope of joint employer responsibility. Drawing from tort principles, Rogers argued in favor of replacing the right-to-control test with a negligence standard for the joint employer doctrine.¹¹⁰ A negligence standard would hold principals co-liable for the employment law violations of

103. *New York v. Scalia*, 20-cv-01689, 2020 WL 5370871, at *34 (S.D.N.Y. Sept. 8, 2020).

104. Megan R. Wilson, *Franchisors Blitz Congress in Search of Liability Shield*, HILL (Mar. 14, 2018), <https://thehill.com/business-a-lobbying/business-a-lobbying/378447-franchisors-blitz-congress-in-search-of-liability> [<https://perma.cc/9WJ4-8DJG>]; Allison R. Grow & Adrienne L. Saltz, *Effectiveness of the Legislative Response to Joint Employer Liability*, 37 FRANCHISE L.J. 349 (2018).

105. Shortly after the *Browning-Ferris* decision, which revived the broad joint employer standard, the U.S. House of Representatives introduced a bill, called the "Save Local Business Act," which was not taken up by the Senate. It purported to effectively write joint employers like franchisors out of the scope of the NLRA and the FLSA. Save Local Business Act, H.R. 3441, 115th Cong. (2017).

106. Mami von Wilpert, *States with Joint-Employer Shield Laws Are Protecting Wealthy Corporate Franchisors at the Expense of Franchisees and Workers*, ECON. POL'Y INST. (Feb. 13, 2018), <http://epi.org/142015> [<https://perma.cc/C4GV-AC5B>]. Texas, for example, "exclud[es] a franchisor as an employer of a franchisee or a franchisee's employees." S. 652, 84th Leg., Reg. Sess. (Tex. 2015).

107. *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939 (July 30, 2021) (to be codified at 29 C.F.R. pt. 791); Ben Penn, *DOL Proposes Ditching Trump's Narrowed Joint Employer Rule*, Daily Lab. Rep. (BL) (March 11, 2021), <https://news.bloomberglaw.com/daily-labor-report/biden-dol-proposes-ditching-trumps-narrowed-joint-employer-rule> [<https://perma.cc/YPD7-3JKE>].

108. *See, e.g.*, Cunningham-Parmeter, *supra* note 33, at 1705–07; Goldstein et al., *supra* note 33, at 1011–13.

109. *See, e.g.*, Griffith, *supra* note 15, at 588 (uncovering in the legislative history of the FLSA a "concerted effort to reduce incentives for businesses to splinter, or 'fissure,' in an effort to avoid the FLSA's grasp").

110. Rogers, *supra* note 34, at 42–46.

subcontractors if the “violations are often both foreseeable and preventable.”¹¹¹ Davidov proposed a different standard that would operate as a limited form of enterprise liability, “based on implicit brand representations.”¹¹² But proposals to extend joint employer liability must contend with the considerable political obstacles to broadening the standard of liability in franchising.

Recognizing the judicially entrenched nature of foreclosing joint employer claims against franchisors and the administrative volatility of the issue, we will argue in the next Section that advancing the goals of the NLRA and FLSA and securing the rights of franchise workers will require a new approach.

II.

POWER AS CONTROL IN PRACTICE

Our empirical work reveals the power imbalance between franchisors and franchisees and how that power translates into franchisor control over the working conditions of franchisee employees. It exposes forms of control commonly reserved (unexercised) as well as forms of control commonly exercised by franchisors. Armed with the power to end the franchisees’ business and often to restrict franchisees’ business opportunities, franchisors have substantial unexercised control—they can change wages and working conditions if they choose to do so.¹¹³ Franchisors also exercise their power over franchisees through sunk costs, including substantial fees and other mandated expenses for such things as remodeling and advertising that “can range into the hundreds of thousands of dollars.”¹¹⁴ Franchisors exert exercised control through a variety of means including their “recommendations” to franchisees and franchisee managers. These recommendations are communicated through mechanisms such as manuals, training, monitoring, and evaluation.¹¹⁵ The economic dependence on franchisors and extensive monitoring raise at least suspicions that franchisees will understand and follow franchisor recommendations with respect to the working conditions of their staff as if they were requirements. This is the case

111. *Id.* at 6, 46. Aditi Bagchi made a similar proposal comparing the tort liability regime of manufacturers for defective products to employment law violations in a production chain. *See* Aditi Bagchi, *Production Liability*, 87 *FORDHAM L. REV.* 2501, 2519 (2019) (arguing that “a retailer is responsible for the accidents, working conditions, or employment terms under which its goods are produced if those consequences of its supplier contracts are foreseeable and could be avoided by different contractual terms”).

112. Davidov, *supra* note 34, at 35. Elmore has also previously argued in favor of liability outside of the joint employer doctrine entirely, grounded in the tort doctrines of apparent agency and misrepresentation. *See* Elmore, *supra* note 5, at 947–49.

113. Elmore, *supra* note 5, at 919–22 (arguing that franchisees’ inexperience, lack of sophistication, and sunk costs in operating a franchise store, coupled with franchisors’ intensive inspections and monitoring of stores and power to unilaterally terminate the franchise agreement, “collectively permit the franchisor to ensure that franchisees adopt its required and recommended policies without exerting direct control”).

114. *Id.* at 920; *see also* Hadfield, *supra* note 33, at 951–52 (explaining that “the risk that franchisors will extract sunk costs makes opportunism a central concern for franchisees”).

115. *See* discussion *infra* Part II.B.

even when contracts explicitly state that the franchisee, not the franchisor, is solely responsible for wages and working conditions of employees. In other words, the power imbalance between the franchisor and franchisee influences how a franchisee interprets a franchisor “recommendation.”

Franchisors’ power to control is embedded into the very structure of the franchising business model. Franchisors have a strong incentive to provide comprehensive “recommendations” that relate to how workers perform their work because franchisees’ interests in reducing costs are not in line with franchisors’ broader interest in a reliable view of the brand. Economists have long shown how franchisor efforts to promote the brand through franchise stores can result in misaligned interests of franchisors and franchisees, particularly over time.¹¹⁶ Franchisees have a free-rider interest in maximizing profit by attracting customers with the franchisor’s brand name while cutting costs by shirking on franchisor standards that reduce profit.¹¹⁷ But free riding by franchisees may associate the franchisor with an inferior product or service.¹¹⁸ Franchisors, in contrast, have an incentive to maximize store revenue and build customer loyalty.¹¹⁹ Franchisors may seek to impose requirements on franchisees opportunistically, even if they run counter to the reasonable expectations of franchisees and cut deep into franchisees’ profits.¹²⁰ Franchisors also may enact extensive, uniform operational requirements, which they incorporate in franchise agreements as “operations manual[s],”¹²¹ to remove the discretion from franchisees to pursue their own interests.¹²²

The power that franchisors wield over franchisees through limits on economic opportunities and through recommendations that are interpreted as requirements can harm workers. Franchisors can steer franchisees to focus on

116. Economists have historically examined the franchise relationship from an “agency costs” perspective. This perspective suggests that entities choose franchising to coordinate their production process to deter “shirking” by delegating monitoring to franchisees, who, in return for reducing employee shirking, may claim the residual profit. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 782–83, 790 n.15 (1972); June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 995 (2017); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 310 (1993).

117. See Francine Lafontaine & Emmanuel Raynaud, *Residual Claims and Self-Enforcement as Incentive Mechanisms in Franchise Contracts: Substitutes or Complements?*, in *THE ECONOMICS OF CONTRACTS: THEORIES AND APPLICATIONS* 315, 324 (Eric Brousseau & Jean-Michel Glachant eds., 2002); see also Steven C. Michael, *The Effect of Organizational Form on Quality: The Case of Franchising*, 43 J. ECON. BEHAV. & ORG. 295, 298–99 (2000) (arguing that free riding prevents franchise store from providing the same quality as other corporate forms).

118. See JEFFREY L. BRADACH, *FRANCHISE ORGANIZATIONS* 10–11 (1998); see also MinWoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 INDUS. & LAB. RELS. REV. 977, 979 (2015) (noting that reputational factors cause franchisees to be more willing to violate hygiene codes than company-owned restaurants); Hadfield, *supra* note 33, at 948–55 (arguing that the franchising relationship is an obstacle to quality control for the franchisor).

119. See Lafontaine & Raynaud, *supra* note 117, at 317–19.

120. Hadfield, *supra* note 33, at 952 (explaining that a franchisor may opportunistically raise the prices it charges franchisees for goods or require unnecessary renovations to boost store revenue).

121. *Id.* at 943.

122. See WEIL, *supra* note 18, at 66–71.

intensively monitoring workers' speed and quantity of work instead of pursuing more equitable productivity strategies, such as raising wages or improving employee skills.¹²³ Franchisees can respond to intensive franchisor monitoring and tight profit margins by unlawfully chiseling wages as the only cost variable that the franchisor does not directly monitor.¹²⁴ Franchisor pressure can sometimes lead franchisees to violate employment law,¹²⁵ and franchisor anti-poaching restrictions and similar restraints can drive wage stagnation.¹²⁶

A. Limits on Franchisees' Economic Opportunities

Most franchisees begin the franchise relationship in a state of dependency on the franchisor, as they tend to own only one or two franchise stores and have little previous business experience.¹²⁷ Franchisors leverage this dependency to limit the ongoing and future economic opportunities of their franchisees, which further sets the stage for franchisor power over franchisees and their store's working conditions. To illustrate the role of franchisors' *ex ante* restrictions on franchisees, we draw both from our contractual analyses of leading franchisor-franchisee contracts in fast-food¹²⁸ and our deep dive into the recent McDonald's

123. Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. POL. ECON. 397, 398–99 (2021).

124. David Weil similarly argued that franchising “can create incentives that simultaneously demand adherence to product quality and create incentives for franchisees to violate laws.” WEIL, *supra* note 18, at 9.

125. See Elmore, *supra* note 5, at 927–32.

126. Alan Krueger and Orley Ashenfelter found that most major franchisors required franchisees to agree to no-poaching terms, effectively restraining franchise store employees from transferring from one franchisee to another. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Nat'l Bureau of Econ. Rsch., Working Paper Paper No. 24831, 2018), https://www.nber.org/system/files/working_papers/w24831/w24831.pdf [<https://perma.cc/W3DG-UG64>]. Brian Callaci argued that “vertical restraints,” such as supplier restrictions and mandatory hours of operation, reduce the bargaining power of franchisees and their employees and take “virtually everything but labor costs and labor discipline out of the franchisee’s profit maximizing choice set,” encouraging franchisees “to adopt a labor management strategy of minimizing the wage bill and extracting high levels of labor effort . . . over possible alternative strategies.” Callaci, *supra* note 123, at 398–99. Antitrust scholars have theorized that these types of vertical restraints that restrict franchise store employees can contribute to wage stagnation. Generally, franchisors, by restraining franchise store employment, exercise classic monopsony power, which is associated with lower employee wages. Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law* (Jan. 13, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365374 [<https://perma.cc/T42X-QF9U>]; Samuel Muehleman, Paul Ryan & Stefan C. Wolter, *Monopsony Power, Pay Structure and Training* (Mar. 2011) (unpublished manuscript), <http://ftp.iza.org/dp5587.pdf> [<https://perma.cc/7M56-VDZK>].

127. Elmore, *supra* note 5, at 922 n.61.

128. Researchers retrieved forty-four contracts from the two government sources that have contracts publicly available: *Commerce Actions and Regulatory Documents Search*, MINN. COM. DEP’T, <https://www.cards.commerce.state.mn.us/CARDS/> [<https://perma.cc/CBS8-LUEQ>] and *Franchise Search*, WISC. DEP’T OF FIN. INSTS., <https://www.wdfr.org/apps/FranchiseSearch/MainSearch.aspx> [<https://perma.cc/D246-V4T7>]. We searched for contracts for the top fifty brands listed in a leading trade publication. *The QSR 50*, QSR MAG., <https://www.qsrmagazine.com/content/qsr50-2017-top-50-chart> [<https://perma.cc/MMX8-HGR7>]. We located forty-four, rather than fifty contracts, because some brands do not franchise (for example, Starbucks, Chipotle, White Castle, Boston Market, and In-n-Out Burger) and some did not

and Domino's litigation documentation.¹²⁹ A franchisee's costs spent operating stores in the franchisor's brand, coupled with a franchisor's ability to terminate or refuse to renew the contract and to restrict a franchisee's outside business ventures, puts a franchisee in a position of economic dependence.

1. Termination and Renewal

Franchisors reserve expansive rights to terminate the franchise contract and to refuse renewal of the contract in the future. Both of these powers, if exercised, vanquish franchisees' investments in the business and often years of their effort.

As Table 1 illuminates, thirty-four of the contracts we surveyed give the franchisor, not the franchisee, broad power to terminate the contract. Most of these contracts provide franchisees with some assurance that they will get a chance to "cure" the problem but leave the ultimate authority to terminate the business relationship in the franchisors' hands.¹³⁰ The remaining ten contracts give franchisees some, but very limited, rights to terminate the contract. Seven of these ten more franchisee friendly provisions allow a franchisee to terminate only if the franchisor fails to cure a material breach.¹³¹ Nonetheless, even these ten hardly reflect an equally portioned right. The franchisee, but not the franchisor, is subject to a vast array of rules, which, if violated, could trigger a termination.¹³² Since the franchisor has very few contractual obligations, there

have files available in Minnesota or Wisconsin. At the time the research was conducted, 2016 was the most recent year available through these publicly available sources. The top fifty brands account for nearly the entire market. Jeff Feingold, *Krispy Kreme Rebounds in UNH Franchise Index*, N.H. BUS. REV. (June 8, 2006), <http://www.nhbr.com/May-26-2006/Krispy-Kreme-rebounds-in-UNH-franchise-index/> [<https://perma.cc/CDW6-K7LH>].

129. Researchers located all of the documentation available in both cases. Once the documentation was aggregated, researchers developed a spreadsheet with a variety of categories of interest, including wages, trainings, staffing, evaluations, inspections, and others. Researchers then systematically reviewed all of the documentation and filled in the spreadsheet with all relevant information available on each theme.

130. Our findings are consistent with Hadfield's study. See Hadfield, *supra* note 33, at 944 (characterizing termination as in franchisor hands, with some room for the franchisee to cure).

131. Jersey Mike's Franchise Sys., Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 17.1, at 25 (Apr. 1, 2016), https://www.franchimp.com/?page=pdf&f=107143_2016.pdf [<https://perma.cc/CPV3-NV32>]; Jimmy John's Franchise, LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 14(A), at 53–54 (Apr. 20, 2016) (on file with authors); Papa Murphy's Int'l LLC, Form of Franchise Agreement (Franchise Disclosure Document, Exhibit D) § 7.2, at 28 (Mar. 2016) (on file with authors); Steak 'N Shake Enters., Inc., Unit Franchise Agreement (Franchise Disclosure Document, Exhibit J) § 11.1(C), at 59 (2016) (on file with authors); Culver Franchising Sys., Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 18, at B-23 (Mar. 29 2016), https://www.franchimp.com/?page=pdf&f=106989_2016.pdf [<https://perma.cc/GS3J-BWXT>]; Am. Dairy Queen Corp., DQ Treat Operating Agreement (Franchise Disclosure Document, Exhibit B) § 13.3, at 32 (Dec. 20, 2016) (on file with authors); Domino's Pizza Franchising LLC, Standard Franchise Agreement (Franchise Disclosure Document, Exhibit E) § 18.1, at 26 (Jan. 2013) (on file with authors).

132. Hadfield, *supra* note 33, at 943 ("[C]onsider the great weighting of the clauses towards the obligations of the franchisee. Nearly all of the clauses pertain to commitments made by the franchisee On the other hand, the franchisor's contractual obligations extend only to training, to advertising, and to the provision of an exclusive territory. Ongoing management support, promised in

are narrow circumstances whereby a franchisor could materially breach the contract. One of the only contractual promises that some franchisors provide is that they will not grant a license to another franchisee within a particular geographical boundary around the franchisee's store.¹³³ What the contractual analysis of this term communicates is that the franchisor, not the franchisee, holds most of the power of termination.

Table 1: Termination and Renewal Contractual Provisions*

Type of Provision	Number of Contracts
Termination: Franchisor Exclusive Power	34
Termination: Franchisee Power If Franchisor Breaches	10
Renewal: Franchisor Exclusive Power	41
Renewal: Franchisee Power to Renew with Conditions	3

* Total number of contracts reviewed=44

The contracts tell a similar story of power imbalance with respect to contract renewal provisions. The majority of contracts (forty-one of forty-four) give franchisors the sole discretion to decide whether to renew a contract at the end of the existing contract term. Some contracts are quite explicit about the expansiveness of the franchisor's sole discretion over renewal decisions. For instance, Jack in the Box's agreement "makes no assurance of the granting of a new license at expiration,"¹³⁴ and Taco Bell's contract states that the franchisee "shall have no expectation or right to continue."¹³⁵ The three that provide franchisees with some discretion over their renewal right typically condition renewal on compliance with the contract, up-to-date payments, franchisor-approved renovations, and notice within a specified period of time.

The fate of the contract is of great importance to franchisees who have invested significant time and resources into their stores. The testimony in the

about half the contracts, is normally discretionary. Few franchisors undertake firm obligations with regard to the nature, extent, and quality of advertising.”)

133. *See, e.g.*, Checkers Drive-In Restaurants, Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 2.02, at 6–7 (Apr. 1, 2016), https://www.franchimp.com/?page=pdf&f=106902_2016.pdf [<https://perma.cc/LVP2-A9DQ>] (“[W]e will not operate . . . or grant to a third party the right to operate, any “Checkers” or “Rally’s” branded restaurant located within a particular geographic area . . .”).

134. Jack in the Box Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit J-1) § 1, at 2 (Mar. 15, 2017), https://www.franchimp.com/?page=pdf&f=107134_2017.pdf [<https://perma.cc/H8YP-B3NW>].

135. Taco Bell Corp., Franchise Agreement (Franchise Disclosure Document, Exhibit B-1) § 2, at 2 (Mar. 25, 2016), https://www.franchimp.com/?page=pdf&f=107446_2016.pdf [<https://perma.cc/KGC5-59V3>]; *see also* Chick-fil-A, Inc., Franchise Agreement § 2.7, at 4 (Mar. 26, 2016) (on file with authors) (“In the event of [termination or expiration], Chick-fil-A shall have the right to designate one of such Additional Businesses as the Initial Business for purposes of either (i) continuing under this Agreement; or (ii) requiring the Operator to enter into a new Franchise Agreement.”).

NYAG-Domino's and NLRB-McDonald's litigation confirms the overwhelming power of franchisors over termination and renewal. The Domino's documentation illustrates that franchisees tend to interpret franchisor power over termination and renewal as more powerful than even the contractual language invites. For example, the Domino's termination provision sets out a list of scenarios that would justify the franchisor's termination of the contract.¹³⁶ Franchisees widely interpret this contractual provision, however, as broadly allowing the franchisor to terminate the contract "at its discretion."¹³⁷

The McDonald's contract is silent on renewal processes, but the trial documentation clarifies that McDonald's wields its expansive power over franchisees' future business opportunities. McDonald's, as franchisor, does extensive evaluations before deciding whether to allow a franchisee to renew its contract.¹³⁸ McDonald's regularly denies opportunities for growth to franchisees, even to the group of franchisees that have successfully complied with all franchisor-established benchmarks.¹³⁹

2. Noncompete Restrictions

Beyond termination and renewal, franchisors wield considerable contractual power to restrict franchisees' economic opportunities through noncompete restrictions. There has been a lot of press and scholarly focus on no-poach clauses and the ways that franchisors restrict franchisees from hiring the employees of other franchisees within the brand.¹⁴⁰ Here, we highlight franchisor

136. Domino's Pizza Franchising LLC, *supra* note 131, § 18, at 26–28.

137. See Exhibit 14 to Affirmation of Terry Gernstein at 131, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. May 24, 2016), NYSCEF No. 22 [hereinafter Denman Testimony] (quoting franchisee Matthew J. Denman as testifying on December 4, 2013 that if a franchisee fails to correct problems, "[y]ou can be in default, and they can terminate your contract"); Exhibit 22 to Affirmation of Terry Gernstein at 2, *Domino's*, No. 450627/16 (NYSCEF No. 30) [hereinafter Lee Affidavit] (quoting franchisee Michael Lee swearing in an April 6, 2015 affidavit that "Domino's may place me in default of the franchise agreement and/or terminate the franchise agreement at its discretion if I do not cure the violations to Domino's satisfaction"); Exhibit 51 to Affirmation of Terry Gernstein at 3, *Domino's*, No. 450627/16 (NYSCEF No. 59) [hereinafter Sharma Affidavit] (quoting franchisee Yash Sharma swearing in a February 27, 2014 affidavit that "[t]he agreement is non-negotiable and provides that if I do not follow Domino's required policies the agreement may be terminated at Domino's discretion"); Exhibit 23 to Affirmation of Terry Gernstein at 3, *Domino's*, No. 450627/16 (NYSCEF No. 31) [hereinafter Gaisser Affidavit] (providing franchisee Mark Gaisser's April 10, 2015 affidavit); Exhibit 21 to Affirmation of Terry Gernstein at 4–5, *Domino's*, No. 450627/16 (NYSCEF No. 29) [hereinafter Cookston Affidavit] (quoting franchisee Robert Cookston in an April 7, 2015 affidavit stating franchisor had all of the discretion).

138. See Transcript of Record at 5453, 10722, 12603, *McDonald's USA, LLC*, 368 N.L.R.B. No. 134 (Dec. 12, 2019) (No. 02-CA-093893) (on file with authors).

139. There are many points in the record supporting the view that McDonald's alone decided the prospects of franchisees' future growth within the system. See *id.* at 1260, 5142–43, 5447, 7014–15, 7386, 12560, 20603, 21037, 21115–16, 21146. McDonald's, in its discretion, can decide which of the eligible franchisees can expand their operations. See *id.* at 20369 ("Amongst those operators who are eligible, McDonald's makes the determination which amongst those eligible operators, will be permitted to purchase the additional restaurants[.]").

140. See, e.g., Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-franchise No-Poach Agreements*, 35 A.B.A. J. LAB. & EMP. L. 151, 153–55 (2020) (discussing thorny issues that

restrictions on the franchisees' ability to engage in business ventures outside of the brand.

Franchisors broadly restrict franchisees from engaging in business arrangements that are in competition with the franchisors' business. Through the contract, franchisors limit franchisees from engaging in a competitive business during the term of the contract and sometimes for a specified period after the contract ends. For example, pizza franchisors might restrict franchisees from opening a separate pizza business for a period of time. As Table 2 illustrates, these provisions (often referred to as "noncompetes" or "covenants not to compete") only restrict the independent activities of franchisees, not franchisors. We did not uncover any contractual restrictions on the franchisors' business opportunities. In other words, no contract limited the franchisor's right to compete with the franchisee beyond the restrictions on allowing another store to open within a specified geographical area around the franchisee. Sixteen out of forty-four contracts restrict franchisees' competitive behavior during the contract, and thirty-eight restrict it after the contract. These provisions sometimes make room for exceptions, but only if the franchisor allows them.

Table 2: Restrictions on Competitive Behavior*

Type of Provision	Number of Contracts with Provision
Restrictions on Franchisor Competitive Behavior	0 ¹⁴¹
Restrictions on Franchisee Competitive Behavior during Contract Term	16
Restrictions on Franchisee Competitive Behavior after Contract Term	38

* Total number of contracts reviewed=44

Dairy Queen's contractual language is an exemplar of the nature of noncompete provisions that apply during the term of the contract. It restricts franchisees from engaging in "any competitive business" during the term of the

franchising no-poach agreements raise for antitrust law and proposing reform); Griffith, *supra* note 42, at 191–93 (discussing anti-poach contractual provisions and the controversy surrounding them); Rachel Abrams, *8 Fast-Food Chains Will End 'No-Poach' Policies*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html> [<https://perma.cc/48K4-7NR2>].

141. Arby's as franchisor does not limit its ability to compete but does limit its ability to poach employees somewhat. See Arby's Franchisor, LLC, License Agreement (Franchise Disclosure Document, Exhibit D) § 13.1, at 15 (Mar. 31, 2016), https://www.franchimp.com/?page=pdf&f=106854_2016.pdf [<https://perma.cc/6R22-WHNM>] ("Arby's covenants that, during the term of this License Agreement, neither Arby's nor any affiliates controlled by Arby's will solicit or attempt to solicit any officer, employee or independent contractor of Licensee or its affiliates to terminate or reduce his or her employment or business relationship with Licensee or its affiliates and shall not assist any other person or entity in such a solicitation.").

contract unless it has the franchisor's "written consent."¹⁴² These provisions are often worded quite broadly in that they restrict franchisees not only from ownership interests in competitive firms but also from working in a competitive business as an employee.¹⁴³ Some contracts go even further in favoring franchisors, explicitly stating that the franchisor can compete with the franchisee if it so chooses during the term of the contract. Baskin-Robbins's contract, for example, states that the franchisor can conduct business, or license to other businesses, "in ways that compete" with the franchisee's location "and that draw customers from the same area as [the franchisee's] Restaurant."¹⁴⁴ All but six of the forty-four contracts contain a restriction on competitive behavior after contract termination. These provisions apply for a range of one to three years¹⁴⁵ and to activity within a three- to twenty-five-mile radius, depending on the brand.¹⁴⁶

While broadly worded noncompete clauses are sometimes unenforceable because of antitrust law and other restrictions,¹⁴⁷ they unambiguously send franchisees a message of franchisor power over their economic behavior. Testimony from Domino's franchisees in the NYAG case overwhelmingly confirms this view. Even though the Domino's franchise contract formally restricts franchisees from engaging in "carry-out or delivery pizza store business,"¹⁴⁸ franchisees often described their understanding of this restriction in much broader terms, reaching beyond the pizza business.¹⁴⁹ Several Domino's

142. Am. Dairy Queen Corp., *supra* note 131, § 10.5, at 23.

143. *See, e.g., id.* § 14.6, at 34.

144. Baskin-Robbins Franchising LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit B-1) § 2.4(a), at 2-3 (Mar. 30, 2016), https://www.franchimp.com/?page=pdf&f=108153_2016.pdf [<https://perma.cc/QBF4-RLDH>].

145. *See, e.g.,* Culver Franchising Sys., Inc., *supra* note 131, § 20(B), at B-24 to -25 (restricting competition for one year); Bojangles' Int'l, LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit B) § XVI(A)(2)(b), at 30-31 (Mar. 14, 2016), https://www.franchimp.com/?page=pdf&f=106881_2016.pdf [<https://perma.cc/SY93-Q8HJ>] (restricting competition for three years).

146. *See, e.g.,* Five Guys Enters., LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit C) § X(C)(2)(c), at 24 (Apr. 29, 2016), https://www.franchimp.com/?page=pdf&f=107040_2016.pdf [<https://perma.cc/C99J-3TQM>] (restricting to a twenty-five-mile radius); Jimmy John's Franchise, LLC, *supra* note 131, § 15(D)(3)(b), at 59 (restricting to a three-mile radius).

147. *See* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, ANTITRUST MAG., Summer 2012, at 73, 73 ("State law regulates the enforceability of post-employment restrictive covenants, and some states (notably California) severely limit the enforceability of non-compete and non-solicitation agreements."); *see also* *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (finding a "plausible claim" under the Sherman Act that a franchising arrangement violated antitrust law). Franchisor bad faith behavior may also be actionable under the implied covenant of good faith and fair dealing. *See* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 929-30 (1994).

148. Domino's Pizza Franchising LLC, *supra* note 131, § 20.1, at 32-33; *see also* Exhibit 18 to Affirmation of Terry Gernstein at 32-33, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. May 24, 2016), NYSCEF No. 26 (same document).

149. *See, e.g.,* Sharma Affidavit, *supra* note 137, at 3 ("The agreement prohibits me from having any other business interest other than real estate investments." (emphasis added)).

franchisees described the noncompete provision as prohibiting them “from owning any outside business other than Domino’s stores.”¹⁵⁰ Others described it as only allowing franchisees to engage in “real estate investments” but nothing beyond that.¹⁵¹ One franchisee aptly described the franchisor’s power over his other economic opportunities this way:

[the noncompete restriction] has the effect of essentially forcing [a franchisee] to have all your eggs in one basket. Like you asked what other businesses I have, I have nothing, because that is all I have. I could own real estate, I suppose, but I have nothing, because I can’t have anything else.¹⁵²

Another Domino’s franchisee described the franchisor’s power over his economic opportunities like this:

The franchise agreement . . . provides that if I do not follow Domino’s required policies, Domino’s may place me in default of the franchise agreement and/or terminate the franchise agreement at its discretion if I do not cure the violations to Domino’s satisfaction. It also prohibits me from owning any outside business other than Domino’s stores.¹⁵³

Franchisees’ misunderstandings of their franchise agreements illustrate how power translates into control. A franchisor that requires franchisees to submit to competition restrictions and the possibility of franchisor encroachment demonstrates the franchisor’s power to destroy the franchisee’s current business and potential future business ventures, whether or not those terms are actually enforceable. Smaller, less business-savvy franchisees are unlikely to be aware of legal defenses to these terms. Due to limitations on future economic opportunities and the franchisor’s essentially unilateral right to terminate or not renew the franchise agreement, the franchisee is likely to instead comply with the franchisor’s wishes in order to remain in its good graces. Effectively, franchisors’ power alters franchisee perceptions of restrictions in ways that amplify franchisor control.

In sum, termination, renewal, and noncompete restrictions give enormous power to the franchisor. These provisions, coupled with franchisees’ sunk costs in the initial investment and ongoing renovations, give the franchisor power over the franchisees’ economic prospects. And franchisees’ misinterpretation of the contract is another way power drives control. This power is an element of the ongoing relationship between the parties that should form part of the

150. Lee Affidavit, *supra* note 137, at 2; Gaisser Affidavit, *supra* note 137, at 3; *see also* Cookston Affidavit, *supra* note 137, at 4–5 (“The franchise agreement also prohibits me from owning an outside business other than Domino’s . . .”).

151. Sharma Affidavit, *supra* note 137, at 3; *see also* Denman Testimony, *supra* note 137, at 65 (indicating the franchise agreement permitted him to invest in only real estate or stocks and bonds).

152. Exhibit 7 to Reply Affirmation of Lawrence J. Reina at 116, *James v. Domino’s Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Feb. 1, 2017), NYSCEF No. 284 (excerpts from March 30, 2013 testimony of franchisee John Cilmi).

153. Gaisser Affidavit, *supra* note 137, at 3.

consideration of whether the franchisor is determining (or codetermining) wages and working conditions in the franchisee's business.

Now that we have illustrated franchisors' power over their franchisees' economic prospects, we home in on how that power translates into control over working conditions in practice.

B. Recommendations as Requirements

With power over franchisees assured through the franchise contract, franchisors control actual workplace conditions through requirements that masquerade as recommendations. We have established with our contractual analysis that franchisors have reserved control, which means they *could* control working conditions in their franchised stores if they so desired. While the contractual control is on reserve, it is exercisable at any time. Franchisors' reserved control sets the stage for franchisees to interpret franchisor instructions, which are formally billed as recommendations, as de facto requirements in practice. This dynamic constitutes a key form of indirect exercised control over franchisees.

Franchisors have overwhelming power in the relationship and can exert this power to control their franchised stores. Given the inferior position of franchisees,¹⁵⁴ they are strongly incentivized to follow a franchisor's policies, even those related to working conditions, as if they were requirements.

Under the current restrictive joint employment jurisprudence, a franchisor's recommendations about employee pay practices, grooming, and schedules for employees are insufficient evidence of employment control on their own.¹⁵⁵ However, these so-called "recommendations" would be strong evidence of control if considered alongside a franchisor's reserved power over a franchisee and how that power affects the franchisee's behavior in practice. These

154. Emerson & Benoiel, *supra* note 16, at 205–06 (“It is worth noting that new franchisees regularly lack prior business experience not only because of the *nature* of the franchise business format, but also due to the fact that franchisors tend to prefer to contract with franchisees with no prior business experience. Inexperienced franchisees, as opposed to those with experience, are relatively easy to control.”); *id.* at 207 (referring to a study that showed that “only 20 percent of the sample had actually been business owners before becoming franchisees” (quoting Kimberley A. Morrison, *An Empirical Test of a Model of Franchisee Job Satisfaction*, 34 J. SMALL BUS. MGMT. 27, 30 (1996))); *id.* (“Another empirical study conducted by Alden Peterson and Rajiv Dant shows even more strongly that most new franchisees lack prior business ownership experience According to the study, only 6.7% of the sample had owned an independent business prior to joining the franchise system.” (citing Alden Peterson & Rajiv P. Dant, *Perceived Advantages of the Franchise Option from the Franchisee Perspective: Empirical Insights from a Service Franchisee*, 28 SMALL BUS. MGMT. 46, 50 tbl. 1 (1990))); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 108 (2004) (“Some franchisees are large corporate entities, but many franchises are purchased by individuals with a limited business background. Franchisors speak of the sophistication of two parties to a commercial business contract, but the evidence belies this, as does the franchisors own marketing strategy.”).

155. See discussion *supra* Part I.A.

recommendations are communicated via franchisor-provided manuals and trainings, as well as monitoring and evaluations.

1. *Manuals and Training*

Key mechanisms of franchisor influence over frontline working conditions include franchisor-provided manuals and training. Franchisors typically require franchisees to comply with the requirements set forth in operations manuals as an express term of the franchise agreement. The main purpose of these operations manuals is to ensure that food preparation and “brand standards” are uniformly implemented in franchised restaurants.¹⁵⁶ Some manuals and trainings, however, also contain instructions that relate to working conditions.¹⁵⁷ They often cover aspects of working conditions such as staffing, scheduling, training, appearance, worker safety, speed of work, and the manner of carrying out the work.¹⁵⁸ Although the instructions relating to employees are “recommended,” they are highly detailed and cover almost every aspect of the day-to-day activities of frontline workers, leaving little discretion to the franchisee.¹⁵⁹

Both the content and nature of franchisors’ manuals and trainings should be central to joint employer inquiries, even if they are formally termed “recommendations.” Here, we provide just a few examples that suggest that manuals and trainings go beyond food preparation and enter into employees’ working conditions. McDonald’s provides instructions for how supervisors can improve employee efficiency.¹⁶⁰ Its “[U]nder the [A]rches” program helps employees with their “speaking skills [and] English skills.”¹⁶¹ Domino’s trains franchisees on how to staff their stores to reach the “ideal” level for labor costs.¹⁶² The Domino’s trainings and guide inform franchisees about how to use

156. 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, 197 (2016) (referring to “operations manual[s]” as synonymous with “brand standards manual[s]”).

157. *Alberter v. McDonald’s Corp.*, 70 F. Supp. 2d 1138, 1144–45 (D. Nev. 1999) (describing agreement language that stated that the licensee was required to “adhere to the policies set forth in the business manuals, including the personnel policies” but also stated “that licensees may choose to adopt the policies it sets out or may set their own policies with respect to personnel”).

158. See, e.g., *Steak N Shake Enters., Inc.*, *supra* note 131, § 1.6(A), at 8 (“At all times during the Term of this Agreement, Franchisee shall maintain a competent, conscientious, trained staff and management personnel in such number to comply with Franchisor’s minimum requirements and comply with Franchisor’s standards or metrics for guest satisfaction”); *Firehouse of Am., LLC*, Franchise Agreement (Franchise Disclosure Document, Exhibit C) § 10.1, at 16–17 (Mar. 28, 2016) (on file with authors) (“Operations Manual . . . may specify uniforms and appearance to meet brand standards.”).

159. See generally *McDonald’s, People Practices: U.S. Operations and Training Manual* (Sept. 2014) (on file with authors) (“Franchisees are independent employers who make their own decisions and policies regarding employment-related matters pertaining to their employees. Franchisees may choose to use part, all, or none of the contents in these materials that will be helpful to them in operating their own McDonald’s restaurant(s).”).

160. See, e.g., Transcript of Record, *supra* note 138, at 4805 (indicating that the McDonald’s manual is meant “[to] ensure that the shift is set up for success with the right people in the right places”).

161. *Id.* at 3634–35.

162. *Sharma Affidavit*, *supra* note 137, at 11.

the franchisor's "PULSE" system to determine the lowest number of staff necessary to meet typical customer demands at a particular time of day.¹⁶³

Courts often ignore aspects of operations manuals and trainings termed "recommendations" with the assumption that franchisees may safely disregard them.¹⁶⁴ But many franchisees interpret these recommended practices as *requirements* for them to sustain and grow their business (and recoup their sunk costs), enforced through the monitoring and evaluation relationship they have with their franchisors. From the franchisees' point of view, continuing and growing a business depends on compliance with the terms in the operations manual, regardless of whether the franchisor formally calls some of them recommendations. Franchisees who disregard recommendations run the risk of losing their current and future investments in the brand. One Domino's franchisee characterized the franchisor's monitoring and evaluations as "the way in which you learn about the rules . . . [b]ecause if you get points off for something, you realize that's a problem" because "it's going to hurt you . . ."¹⁶⁵

2. *Monitoring and Evaluating*

There is no doubt that the vast majority of franchisors have the power to monitor the activities of frontline workers. Many franchisors provide their franchisees with technologies (e.g., point of sale systems) that give them the power to review the schedules, productivity, and pay of franchisees' employees.¹⁶⁶ They communicate with franchisees' managers about operations. They inspect stores and talk to employees as part of their visits. They evaluate all aspects of the operation to ensure franchisees are following brand standards.

The contract gives franchisors legal power to monitor. Indeed, forty-three out of forty-four contracts surveyed in this study give franchisors the right to comprehensively inspect the franchisees' operations. Typically, the language in inspection provisions gives the franchisor "the right . . . to . . . inspect the STORE . . . observe . . . and videotape the operations . . . interview personnel . . . [and] interview customers," among other monitoring mechanisms.¹⁶⁷ Often the stated goals of these provisions are to ensure franchisee compliance with the franchisor's manuals and brand standards and the provisions of the contract.¹⁶⁸ Only one of these brands (Dunkin' Donuts)

163. *Id.*

164. See discussion *supra* Part I.A.

165. Exhibit 1 to Reply Affirmation of Lawrence J. Reina at 92, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Feb. 1, 2017), NYSCEF No. 278 (excerpts from November 25, 2013 testimony of franchisee Michael Lee).

166. See, e.g., *Steak N Shake Enters.*, *supra* note 131, §§ 3.6(C), (A), at 23–24 ("Franchisee shall purchase the Required Technology from Franchisor" including "point-of-sale systems (including but not limited to food cost management, supply management and labor management systems) . . .").

167. *Krispy Kreme Doughnut Corp.*, Franchise Agreement (Franchise Disclosure Document, Exhibit B-1) § 12.3, at 23 (2016) (on file with authors).

168. See, e.g., *McDonald's USA, LLC*, Franchise Agreement (Traditional) § 12, at 6 (Franchise Disclosure Document, Exhibit B) (May 1, 2016),

gives franchisees the explicit right to “reasonable notice” from the franchisor before an inspection can occur.¹⁶⁹ Twenty-two of the contracts go so far as to explicitly state that the franchisor can inspect its franchisees’ operations without prior notice.¹⁷⁰

Moreover, all forty-four contracts give the franchisor broad rights to audit the franchisees’ record keeping. The term “record” is used broadly to include

https://www.franchimp.com/?page=pdf&f=107211_2016.pdf [https://perma.cc/UX7H-B4L3] (“McDonald’s shall have the right to inspect the Restaurant at all reasonable times to ensure that Franchisee’s operation thereof is in compliance with the standards and policies of the McDonald’s System.”); Chick-fil-A, Inc., *supra* note 135, § 13.1 (“In order to protect the Marks, the public image of and all goodwill associated with the Marks and the System as a whole, the high quality and uniform consistency of the Products, the cleanliness and sanitation of the Businesses and other interests of Chick-fil-A: (a) Chick-fil-A, or its designee, shall have the right to inspect any Site at any time during normal Business hours, without notice to the Operator, to ensure that all aspects thereof are in compliance with all Minimum Standards, including, without limitation, quality, cleanliness, sanitation and operation, and that the Operator is otherwise in full compliance with the terms and conditions of this Agreement[.]”); Jamba Juice Co., Franchise Agreement (Franchise Disclosure Document, Exhibit A) § 10.2, at 29 (Apr. 22, 2016), https://www.franchimp.com/?page=pdf&f=108262_2016.pdf [https://perma.cc/DB8K-NSDN] (“Company’s authorized representatives shall have the right to enter upon the entire Premises of Franchisee’s Store during business hours, without disrupting Franchisee’s business operations, to examine same, conferring with Franchisee’s employees, inspecting and checking operations, food, beverages, furnishings, interior and exterior decor, supplies, fixtures, and equipment, and determining whether the business is being conducted in accordance with this Agreement, the System and the Manuals.”).

169. Dunkin’ Donuts Franchising LLC, Security Agreement (Franchise Disclosure Document, Exhibit C-2) § 4(E), at 5 (Mar. 30, 2016), https://www.franchimp.com/?page=pdf&f=108223_2016.pdf [https://perma.cc/3HNN-NTGU].

170. See Baskin-Robbins Franchising, LLC, *supra* note 144, § 7.2, at 8; Carl’s Jr. Restaurants LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit F) § 9(D), at 13 (May 2016) (on file with authors); Checkers Drive-In Restaurants, Inc., *supra* note 133, § 12.01, at 30; Chick-fil-A, Inc., *supra* note 135, § 13.1(a), at 8; Del Taco LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit E) § 10(h), at 14 (Mar. 14, 2016), https://www.franchimp.com/?page=pdf&f=106995_2016.pdf [https://perma.cc/G6XF-U89E]; Domino’s Pizza Franchising LLC, *supra* note 131, § 17, at 25; Firehouse of Am., LLC, *supra* note 158, § 13.1, at 23; Jack in the Box Inc., *supra* note 134, § 5(N), at 11; Jimmy John’s Franchise, LLC, *supra* note 131, § 11(A), at 41; Krispy Kreme Doughnut Corp., *supra* note 167, § 12.3, at 23; Little Caesar Enters., Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit A) § 4.6, at 6 (Mar. 31, 2016), https://www.franchimp.com/?page=pdf&f=107188_2016.pdf [https://perma.cc/38JZ-QHQQ]; Long John Silver’s, LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit C) § 5.04(b), at 14 (2016) (on file with authors); Citadel Panda Express, Inc., License Agreement (Franchise Disclosure Document, Exhibit A) § 13.1(A), at 22 (Apr. 21, 2016), https://www.franchimp.com/?page=pdf&f=107628_2016.pdf [https://perma.cc/8GRB-VKS2]; Panera, LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 12.01, at 22 (Mar. 25, 2016), https://www.franchimp.com/?page=pdf&f=107274_2016.pdf [https://perma.cc/EQ7U-6FCT]; Steak N Shake Enters., Inc., *supra* note 131, § 5.5, at 35; Taco Bell Corp., *supra* note 135, § 9, at 6; Tim Hortons USA Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit E) § 5.13(c), at 43 (2016) (on file with authors); Quality Is Our Recipe, LLC, Unit Franchise Agreement (Franchise Disclosure Document, Exhibit B) § 6.15, at 9 (Mar. 30, 2016), https://www.franchimp.com/?page=pdf&f=107514_2016.pdf [https://perma.cc/3JN3-ERLR]; Wingstop Restaurants Inc., Franchise Agreement for a Wingstop Restaurant (Franchise Disclosure Document, Exhibit C) § 7(c)(18), at 12 (2016) (on file with authors); Burger King Corp., Franchise Agreement (Corporate) (Franchise Disclosure Document, Exhibit F) § 4(K), at 8 (Apr. 2016) (on file with authors); Deli Mgmt., Inc., Franchise Agreement (Franchise Disclosure Document, Exhibit “B”), § 9(k), at 12 (Apr. 1, 2016) (on file with authors); Papa Murphy’s Int’l LLC, *supra* note 131, § 5.66.5, at 19.

electronic monitoring as well as reviews of paper records such as tax returns and payroll records. The contract for the Jason's Deli brand, for example, gives the franchisor "direct access" to all records, "licensed software and any records in electronic form, including, but not limited to, computer hard drives. . . ." ¹⁷¹ Only seven brands promised prior notice before conducting an audit of franchisees' records. ¹⁷² Ten brands go in the other direction, explicitly stating in their contracts that the franchisor has the right to audit the franchisee without any prior notice. ¹⁷³

Notable in the joint employer liability context, two brands included contractual language that was careful to mention that the franchisors' monitoring rights do not extend to matters related to the franchisees' employees. Wingstop's audit provision, for example, explicitly states that the franchisor can require the franchisee to provide business records except for "records which Company has no authority to control and/or remedy," such as employee records. ¹⁷⁴ The joint employer monitoring carve outs in these two contracts, however, are the exception. Usually, the contractual language provides franchisors with broad power to inspect all aspects of their franchisees' operations.

Franchisors, however, do not merely possess the contractual *power* to monitor (a reserved, unexercised power). Our review of the McDonald's and Domino's documentation reveals that, in practice, franchisors influence the employment relationship through *actual* monitoring and evaluating (exercised power).

a. McDonald's

The NLRB's case against McDonald's, which was filed under the Obama administration and settled under the Trump administration, alleged that McDonald's as a franchisor was jointly responsible for interfering with the

171. Deli Mgmt., Inc., *supra* note 170, § 9(bb), at 16.

172. See Baskin-Robbins Franchising, LLC, *supra* note 144, § 7.2, at 8; Dunkin' Donuts Franchising LLC, Franchise Agreement (Franchise Disclosure Document, Exhibit B-1) § 11.2, at 12 (Mar. 30, 2016) https://www.franchimp.com/?page=pdf&f=108223_2016.pdf [<https://perma.cc/3HNN-NTGU>]; Arby's Franchisor, LLC, *supra* note 141, § 9.2, at 9; Culver Franchising Sys., Inc., *supra* note 131, § 14(D), at B-19; Panera, LLC, *supra* note 170, § 12.02, at 22; Papa John's Int'l, Inc., Franchise Agreement Standard Restaurant (Franchise Disclosure Document, Exhibit B) § 13(e), at 30 (Feb. 29, 2016), https://www.franchimp.com/?page=pdf&f=107278_2016.pdf [<https://perma.cc/DBG2-J46A>]; Zaxby's Franchising LLC, License Agreement, § IV(B), at 15 (Apr. 26, 2016) (on file with authors).

173. See Checkers Drive-In Restaurants, Inc., *supra* note 133, § 12.02, at 30–31; Firehouse of Am., LLC, *supra* note 158, § 13.2, at 23; Jimmy John's Franchise, LLC, *supra* note 131, § 11(B), at 42; Krispy Kreme Doughnut Corp., *supra* note 167, § 20.7, at 37–38; Citadel Panda Express, Inc., *supra* note 170, § 13.2, at 22; Papa Murphy's Int'l LLC, *supra* note 131, § 4.84(6), at 14–15; Qdoba Restaurant Corp., Qdoba Mexican Grill Franchise Agreement (Franchise Disclosure Document, Exhibit F-1) § 14.4 at 21 (Mar. 15, 2017) (on file with authors); Subway Franchise Agreement, § 5.H, at 5 (2016); Tim Hortons USA, Inc., *supra* note 170, § 9.09, at 60; Jack in the Box Inc., *supra* note 134, § 9(D), at 18.

174. Wingstop Restaurants Inc., *supra* note 170, § 7(c)(24), at 13; see also Jimmy John's Franchise, LLC, *supra* note 131, § 11(B), at 42.

collective rights of fast-food employees supporting Fight for Fifteen efforts.¹⁷⁵ The testimony and accompanying exhibits in the McDonald's litigation illustrate a dizzying array of mechanisms that allows for franchisor monitoring of its franchised stores. These include, among other things, documentary reviews of franchisees' paper and electronic records, on-site evaluations, and ongoing communications through phone, e-mail, and other web-based platforms.¹⁷⁶ It is not possible to get a firm handle on the frequency of interactions, but the testimony suggests that McDonald's engaged in some form of monitoring of many of its franchisees at least monthly.¹⁷⁷

While much of the monitoring focused on food preparation and customer service, aspects of franchisees' operations that dealt with wages and working conditions were also part of the franchisor's ongoing monitoring. McDonald's, as a franchisor, is careful not to formally require franchisees to follow its suggestions with respect to wages and working conditions.¹⁷⁸ Nonetheless, McDonald's provides its franchisees with a complete set of tools related to these issues and presents them as the best way for the franchisee to reach the franchisor's metrics of success.

The employee staffing and scheduling area is one such example.¹⁷⁹ McDonald's representatives provide franchisees with a number of tools to gauge ideal staffing levels at different times of the day.¹⁸⁰ These tools and ongoing recommendations from McDonald's representatives suggest not only how many employees are needed for optimal efficiency but also where employees should position themselves to complete certain tasks most efficiently.¹⁸¹ As one

175. See *supra* Introduction.

176. Transcript of Record, *supra* note 138, at 8559–60, 8937–38, 10320, 10323–25; GC Exhibit BC-475.1, *McDonald's USA, LLC*, 368 N.L.R.B. No. 134 (Dec. 12, 2019) (No. 02-CA-093893) (on file with authors).

177. See Transcript of Record, *supra* note 138, at 12620–23 (referring to receipt of “SOAR reports,” “roll-up report[s],” “recap e-mail[s],” and “R2D2 staffing reports” from franchisee stores on a monthly basis).

178. See, e.g., *id.* at 10137 (referring to the franchisor provision of an optional “guide to help [the franchisee] understand how to effectively leverage staff and schedule and position”).

179. See *id.* at 3782 (franchisor recommendations for staffing during holidays); *id.* at 4984; GC Exhibit Q-48, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors); GC Exhibit Q-48.1, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (staffing recommendations).

180. Transcript of Record, *supra* note 138, at 10847–48 (referencing the Sales Opportunity Analysis Report tool); *id.* at 8997, (referring to McDonald's Labor Scheduling 2.7 tool); *id.* at 8011; GC Exhibit BC-210, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (referring to franchisor representative's email to franchisees in his area recommending that they adopt the “crew staffing calculator”).

181. See Transcript of Record, *supra* note 138, at 8832, 9765–66, GC Exhibit BC-517, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors); GC Exhibit BC.0105, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (talking about tools that recommend where to “position” employees); Transcript of Record, *supra* note 138, at 2538, 2541–42; GC Exhibit F.92, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (“French fry person stays in position according to the positioning guide.”); Transcript of Record, *supra* note 138, at 4402–03, 4429–30; see also *id.* at 10024–25 (noting a “Hundred Days of Shopping

McDonald's representative testified to the NLRB, these staffing tools are meant "to put the right people in the right place at the right time."¹⁸² McDonald's representatives repeatedly offered specific guidelines around employee staffing in their interactions with franchisees.¹⁸³

Notably, McDonald's representatives included employee scheduling when they reviewed and evaluated franchisees' operations. One franchisor representative testified during the NLRB trial, for example, that he did "a lot of drop by visits" where he would evaluate and make suggestions about "staffing levels."¹⁸⁴ Franchisor representatives consistently made sure that franchisees "had a plan" with respect to staffing that could ensure that "labor [was] the right percentage."¹⁸⁵ Other franchisor representatives used the more formal reporting mechanisms "to identify staffing opportunities" for the franchisees they worked with in their areas.¹⁸⁶ These franchisor evaluation tools, some of which were referred to as "a scorecard," considered the "crew size" and the "staffing" of employees.¹⁸⁷

It is not entirely clear from the documentation we reviewed whether repeated scheduling problems alone could land a franchisee in default. Because

Readiness" document recommending to franchisees that they position their "best employees in the most critical areas of the restaurant").

182. Transcript of Record, *supra* note 138, at 6303–04; *see also id.* at 4805; GC Exhibit Q-007, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (referring to a scheduling checklist for managers to be completed to "ensure that the shift is set up for success with the right people in the right places").

183. *See* Transcript of Record, *supra* note 138, at 9059; GC Exhibit BC-0280, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (referring to consultant recommendation that the franchisee use the franchisor's "staffing tracking tool"); Transcript of Record, *supra* note 138, at 4784–85; GC Exhibit-149, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (describing franchisor's recommendation to franchisee to develop a staffing plan to ensure all shifts are properly staffed, which, as a result, would maximize capacity and optimize the service drivers in the restaurant); Transcript of Record, *supra* note 138, at 8546; GC Exhibit BC-462.1, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (describing franchisor statement to franchisee that planning a healthy schedule in order to have effective labor controls is the goal); Transcript of Record, *supra* note 138, at 8554–56; GC Exhibit BC-496, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (describing franchisor instruction to franchisee to make sure the grill is staffed properly); Transcript of Record, *supra* note 138, at 10137 (describing franchisor representative sending a franchisee an optional "guide to help [the franchisee] understand how to effectively leverage staff and schedule and position"); *id.* at 10154; GC Exhibit BC-1458, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (describing franchisor representative's work with franchisees to "identify trends and adjust staffing needs").

184. Transcript of Record, *supra* note 138, at 8838; GC Exhibit BC-518, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors); *see also* Transcript of Record, *supra* note 138, at 11199–200; GC Exhibit BC.1270, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (recalling "mentioning during a visit" that "schedules [were] not being posted with enough time in advance for the crew").

185. Transcript of Record, *supra* note 138, at 7848.

186. *Id.* at 10551–52; *see also id.* at 11154 (referring to a scorecard as a tool to evaluate scheduling); *id.* at 8557; GC Exhibit BC-495.1, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (describing franchisor representative who had a "labor schedule and verification sheet").

187. Transcript of Record, *supra* note 138, at 3299–3300; GC Exhibit HR-636, *McDonald's*, 368 N.L.R.B. No. 134 (No. 02-CA-093893) (on file with authors) (referring to "people scorecard").

McDonald's has sole discretion to impose a variety of adverse actions short of termination (from nonrenewal of an existing franchise agreement to non-referral of a new store purchase opportunity), it is difficult to discern the extent to which franchisors sanction franchisees for refusing to implement a recommended practice. Nonetheless, the franchisor message to franchisees is clearly that scheduling management problems will result in "lost . . . points" on their evaluations.¹⁸⁸ In sum, the McDonald's litigation reveals how franchisor monitoring and evaluation of franchisees' stores transform instructions labeled recommendations into instructions that are interpreted as requirements.

b. Domino's

Domino's, like McDonald's, influences its franchised stores through monitoring and evaluation mechanisms. In-person visits are one such way that Domino's communicates its recommendations regarding working conditions. One Domino's franchisee recounted a franchisor visit when the franchisor representative said to the employees, "I'm your boss," told them, "that he had the power to shut the stores down completely," and reminded them that if that happened, "they wouldn't have jobs."¹⁸⁹

Evaluation processes are a key mechanism of indirect control. Domino's franchisees described the evaluations process as a review of their compliance with all of the standards listed in the contract and associated manuals.¹⁹⁰ Following these evaluations, Domino's has threatened to issue defaults, sometimes related to evaluations of employees' working conditions.¹⁹¹ Thus, franchisees view failure to follow franchisor instructions around employee matters as putting their investment in the franchise (as well as future economic opportunities) at risk.

Indeed, franchisees reported their perception that the franchisor can terminate the contract when franchisees are "not following rules about personnel matters."¹⁹² One franchisee noted, for example, "that Domino's has a number of requirements that [franchisees] are expected to follow, including employee behavior. . . . And that if employees fail to meet those requirements, one

188. Transcript of Record, *supra* note 138, at 7264 (referring to "lost" points in the context of scheduling).

189. Lee Affidavit, *supra* note 137, at 7.

190. See Sharma Affidavit, *supra* note 137, at 14 ("Every three to four months, Domino's has conducted . . . unannounced inspections of my Domino's franchise stores . . . with points awarded for on time deliveries, employees with clean uniforms, and employee correct responses to role played customer complaints. Domino's inspectors have interviewed drivers and inside workers to evaluate whether they address customer complaints pursuant to Domino's protocol, reviewed whether employees meet appearance standards and drivers use seat belts, and checked whether drivers are carrying more than \$20 in cash. The Domino's inspectors prepare a report that same day that evaluates the store and notes whether I have a failing score and/or need to cure any aspect of my operation.").

191. See *infra* notes 195 and 198 and accompanying text.

192. Denman Testimony, *supra* note 137, at 132.

consequence could be termination of the franchise.”¹⁹³ Other Domino’s franchisees commented that the franchisor influenced employees’ working conditions because it evaluated the franchisee based on the speed and efficiency of franchisees’ employees.¹⁹⁴ Similarly, a franchisee recounted that the franchisor threatened him with a default because of issues that explicitly related to employees’ working conditions. The franchisor alleged he was in default for such things as “failing to pay employees properly,” not keeping “proper pay records,” neglecting to have enough staff available for the volume of orders, “and failing to keep I-9 and other personnel records.”¹⁹⁵ Another franchisee stated that Domino’s reduced the score of one of his stores because an employee with an ingrown hair condition “didn’t have a doctor’s note” to justify facial hair longer than an inch.¹⁹⁶ As another example, a franchisee mentioned that the franchisor ordered him to remove an employee tip jar after a franchisor inspection.¹⁹⁷ He noted the high stakes of these franchisor evaluations, saying that if one of his stores was in default, the franchisor could place “all of the stores I operate” into default.¹⁹⁸ As a result, he complied with the tip jar directive.¹⁹⁹ Yet another example is a Domino’s franchisee who reluctantly disciplined a longtime employee based on the franchisor’s demand.²⁰⁰ He said that he did this because the franchisor would subject him to default as a consequence of noncompliance.²⁰¹

193. Exhibit 4 to Affirmation of Christopher M. Colorado at 139, *James v. Domino’s Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Dec. 9, 2016), NYSCEF No. 206 (excerpts from November 25, 2013 testimony of franchisee Michael Lee).

194. Cookston Affidavit, *supra* note 137, at 17 (“15 of the 100 OER points are allocated to a store’s service, or the store’s ability to meet Domino’s delivery time requirements as reflected in the PULSE Service Time Reports. During an inspection, the OER inspector evaluates the past twenty-eight days of PULSE order records. Domino’s requires that all orders are taken within one minute, assembled and placed on the oven within three minutes, cooked within seven minutes, and delivered within thirty minutes. Franchisees who meet those time requirements at least 85% of the time receive all 15 points on this section, franchisees who only deliver 70% on time receive five of fifteen points, and franchisees whose PULSE records show slower times might receive no points.”).

195. Sharma Affidavit, *supra* note 137, at 14.

196. Exhibit 3 to Affirmation of Terry Gernstein at 240, *James v. Domino’s Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. May 24, 2016), NYSCEF No. 11 (excerpts from December 10, 2013 testimony of franchisee Anthony Maestri).

197. *See* Lee Affidavit, *supra* note 137, at 10 (“I am not able to opt out of either the OER or EOC visits, and I must make all changes that Domino’s requires after each such visit, including changes I would consider too insignificant for Domino’s to notice. For example, a few years ago, Mr. DuPont ordered me to remove the tip jar on the counter of the Pizza Wars store. He did not explain why, and I had to comply immediately.”).

198. *Id.*, at 9–10 (“It is my understanding that when Domino’s finds serious OER violations in one of my stores, it can place not only the violating store in default, but all of the stores I operate.”).

199. *Id.* at 10.

200. Exhibit 2 to Affirmation of Christopher M. Colorado at 226–27, *James v. Domino’s Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Dec. 9, 2016), NYSCEF No. 204 (excerpts from December 12, 2013 testimony of franchisee Robert Cookston).

201. *Id.*; *see also* Denman Testimony, *supra* note 137, at 46, 48 (“I felt pretty strongly about what I had stated to you, that he has been a good employee. They felt that the brand was too much risk, and they said you have to terminate this employee. I asked them to put it in writing. They would not. They straight out told me they would terminate my contract if I did not terminate this employee.”).

Adding to Domino's control over workplace behavior is the significant involvement of its field representatives in determining whether franchisees have violated general standards, such as customer satisfaction, and whether a franchisee has cured a default adequately. Franchisees have been placed in default for failing to provide adequate documentation of employee disciplinary action and training for an infraction and because field representatives have not been satisfied with the franchisees' response to customer complaints.²⁰² In one case, a field representative addressed a franchisee's low store scores by pressuring the franchisee to hire a manager and then instructing the manager of his specific job duties.²⁰³

Relatedly, franchisees have interpreted recommended practices as effectively required. While Domino's only provides "ideal" scheduling software to franchisees as a recommendation, as one franchisee explained, Domino's both "expects me to schedule an 'ideal' number of employees at any one time, as few as possible to meet the customer demand" and "has told me that I have received a notice of default for . . . failing to schedule enough personnel to handle customer orders."²⁰⁴

In sum, these data and findings show that franchisors have extensive reserved power in the franchise relationship and can exert this power to control working conditions in franchise stores. The vast array of rules and recommended policies franchisors disseminate to franchisees has greater force than courts and federal administrative agencies currently recognize. Given their inferior position and franchisors' power over them, franchisees are strongly incentivized to follow these rules and to interpret franchisors' extensive recommendations related to working conditions as requirements. None of the above analysis is meant to suggest that the McDonald's or Domino's cases have, in fact, satisfied a particular joint employer standard—the NLRB settled the McDonald's case without the franchisor, and the trial court in *Domino's* recently dismissed the suit, which NYAG has appealed.²⁰⁵ Instead, our point is that franchisors can, as these franchisors appear to do, use their extensive power in the franchise agreement in ways that reach deep into the employment relationship, raising a plausible claim of joint employer status. The evidence unearthed by these claims is a compelling justification for deeper joint employer inquiries by courts and administrative agencies.

202. See Exhibits 111, 112, 117 to Affirmation of Terry Gernstein, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. May 24, 2016), NYSCEF Nos. 119, 120, 125 (default notices).

203. Exhibit 78 to Affirmation of Terry Gernstein at 130–31, *Domino's*, No. 450627/16 (NYSCEF No. 86) (excerpts from December 17, 2013 testimony of franchisee Duane Webster).

204. Sharma Affidavit, *supra* note 137, at 11, 14.

205. At writing, the trial court has dismissed the claims in *Domino's* and the N.Y. Attorney General has filed a notice of appeal. Transcript of Proceedings, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Oct. 27, 2020), NYSCEF No. 480; Notice of Appeal, *James v. Domino's Pizza, Inc.*, No. 450627/16 (N.Y. Sup. Ct. Feb. 5, 2021), NYSCEF No. 480.

III.

POWER AS CONTROL IN THEORY AND DOCTRINE

Part III provides a theoretical and doctrinal grounding of our proposed approach, which, if embraced, would disrupt the trend of foreclosing joint employer claims in franchising. Put simply, we argue that power, and power relations between franchisors and franchisees, should be *central* to the inquiry of whether the franchisor “controls” the working conditions of franchisees’ employees.²⁰⁶ Franchisors have the capacity to change franchisee behavior indirectly with reserved control and through field staff, who use relational mechanisms such as manuals, trainings, monitoring, and evaluations to direct operations.

This Section will develop our power as control theory and then illustrate that the power as control construct is consistent with existing labor and employment law doctrine. In other words, it can be adopted without the need for law reform. While consideration of power relations in labor and employment law typically homes in on the relationship between the lead company and the frontline worker, there is some precedent for considering the power relations between the lead company and the subordinate business entity.

A franchisor’s power over its franchisees is relevant in weighing the extent to which franchisors reserve or exercise their power to alter franchisee behavior and treatment of their staff. Power is a key part of the equation when determining whether the franchisor and franchisee codetermine working conditions.

A. Theoretical Underpinnings of Power and Control

Our thesis is that assessing franchisor control in a joint employer analysis requires accounting for franchisors’ power over franchisees. Evidence of the power as control can be found in the franchise agreement terms, in the behavior of franchisors monitoring and enforcing franchise store compliance, and in franchisees interpreting their responsibilities. A joint employer analysis that disregards this power imbalance ignores the labor and employment law goal to offset bargaining power inequalities. It ignores the importance of collective bargaining between the workers who represent the brand to the consumer and the company that owns the brand and shapes the workplace standards of those workers. It disregards franchisor behavior that can suppress wages and shift wage and hour law liability to franchisees, harming workers and defeating the deterrence and remedial goals of wage and hour law.

206. This is consistent with Robert Dahl and others who have defined power as “the capacity of an actor to compel another actor to do something the latter otherwise would not do.” Brookes, *supra* note 31, at 254 (citing and describing ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961)); *see also id.* at 255 (“Conceiving of power as a capacity is also compatible with the notion . . . that power is the product of actors’ relationships of interdependence, conditioned by their embeddedness in the economic, institutional and social structures comprising their external environment.”).

While law scholars have identified power disparities as a pervasive feature of franchise relationships, until recently, this discussion has been confined to contract and antitrust law. As Albert Choi and George Triantis explained, contract law, as demonstrated by the doctrines of duress and unconscionability, is attentive to how power accrues to the party with greater access to information and bargaining sophistication.²⁰⁷ In contract law, legal controversies often erupt when extreme imbalances in bargaining power lead the stronger party to pursue value-claiming terms instead of value-producing ones.²⁰⁸

Contract law scholar Gillian Hadfield identified power disparities in the franchisor-franchisee relationship thirty years ago and explained how incomplete contracts can defeat the expectations of franchisees, making them vulnerable to franchisor opportunism.²⁰⁹ From a contract law perspective, the “unavoidable incompleteness” in franchise contracts is problematic because it threatens to “defeat[] the relationally reinforced expectations of franchisees as to what commitments they acquire from the franchisor in exchange for their own commitments.”²¹⁰ But, while contract law recognizes the problems created by inequalities in bargaining power,²¹¹ contract law doctrines typically approach disparities in bargaining power through gap-filling measures that reflect the parties’ expectations.²¹²

While considerations of power inform when and how a court in a contract law dispute should intervene,²¹³ contract law typically rejects power disparities as a basis to adjust contract terms.²¹⁴ Consistent with this view, Hadfield proposed the doctrinal tool of the covenant of good faith and fair dealing to account for the different expectations and interests of franchisors and franchisees in filling gaps in the franchise agreement.²¹⁵ Even though requiring good faith in franchise relations can reduce franchisor opportunism, it may not attend to other

207. See Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1676–77 (2012).

208. *Id.* at 1671–73 (“The problem of extreme allocations of bargaining power in either direction stems, in part, from the fact that one party has the power to dictate the terms of trade. The party with this power is willing, in many circumstances, to sacrifice some of the aggregate surplus in order to capture a larger share of the surplus.”).

209. Hadfield, *supra* note 33.

210. *Id.* at 929–30.

211. As Omri Ben-Shahar explained, in contract law there is “a substantial doctrinal tradition . . . founded on the belief that courts can identify bargaining power and determine legal consequences based on this identification.” Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 409 (2009).

212. *Id.* at 408.

213. Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 901–04 (2011).

214. *Id.* at 897–98 (arguing that contract law interventions to equalize terms in a contract beyond minimal repairs to a tolerable level because of a party’s greater bargaining power are “unhelpful,” because the power disparity will “continue to manifest itself elsewhere in the contract”).

215. Hadfield, *supra* note 33, at 985–86. A good-faith analysis, according to Hadfield, permits courts to ask, when identifying divergent interests in a franchise relationship, whether the franchisor’s control power has enabled the franchisor “to pursue its interest at the expense of the franchisee’s.” *Id.* at 989.

important values, such as fairness,²¹⁶ and can leave third parties in the economic relationship unprotected. In the case of franchising, contract law does not resolve the problem of franchisor opportunism that can harm franchise store employees.²¹⁷

Power disparities in franchise relationships have also been the subject of recent antitrust litigation and scholarship. While antitrust law applies equally to product and labor markets,²¹⁸ it has historically neglected the problem of anticompetitive behavior that harms workers.²¹⁹ Monopsony power, or the employer's buyer market power over employees,²²⁰ has received greater antitrust attention recently. Studies by economists have shown how franchisors can suppress wages through restraints like non-compete and no-poaching requirements in franchise agreements.²²¹ Actions by state attorneys general and private antitrust lawsuits over the past several years have challenged franchisor no-poaching agreements with some success.²²²

The antitrust law focus on buyer market power shares with our power analysis a concern that franchisors can exert their power in ways that suppress work standards. Antitrust doctrine, however, imposes considerable impediments to litigating power disparities in the franchise relationship that can harm workers.²²³ This is because of the intellectual shift ushered in by the Chicago

216. *Id.* at 953.

217. Elmore, *supra* note 5, at 944–46.

218. Section 1 of the Sherman Act broadly declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,” 15 U.S.C. § 1, and does not distinguish between product and labor markets.

219. Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1346–47 (2020).

220. As Ioana Marinescu and Eric Posner explained, “[a] labor monopsony exists when lack of competition in the labor market enables employers to suppress the wages of their workers.” *Id.* at 1345–46.

221. Krueger & Ashenfelter, *supra* note 126, at 2–4. Brian Callaci conducted an empirical study of vertical restraints in 530 franchise agreements, finding that, for example, virtually all of them required franchisees to sign covenants not to compete with the franchisor after the franchise relationship ends, and that sixty-nine percent of fast-food franchisors required no-poaching agreements. He argued that these and other vertical restraints allow “franchisors to impose a high-effort, low-wage labor management regime” on franchisees. Callaci, *supra* note 123, at 398, 408, 413.

222. See Marinescu & Posner, *supra* note 219, at 1369; see also, e.g., *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *6–8 (N.D. Ill. June 25, 2018) (finding that allegations of horizontal elements in a franchisor’s no-poaching agreement state a claim for a restraint that may violate antitrust law).

223. See Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. (forthcoming 2021) (manuscript at 30–47), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810250 [<https://perma.cc/3LDQ-NYTQ>] (explaining doctrinal impediments to antitrust challenges of employment restraints, such as noncompete agreements, including the difficulty of discerning antitrust violations in individual contracts, and enforcement of class waivers that preclude aggregation of claims). While some restraints are unreasonable per se and presumptively unlawful under antitrust law, antitrust law generally applies a deferential “rule of reason” standard for most vertical restraints imposed by lead firms on subordinate firms in a distribution chain. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2277, 2283–84 (2018); see also *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) (holding that nonprice vertical restraints are subject to the rule of reason); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (finding that

School, beginning in the 1960s, insisting that antitrust law should primarily be guided by efficiency.²²⁴ For the Chicago School, vertical restraints can benefit consumers by promoting interbrand competition.²²⁵ By 1977, the Supreme Court in *Continental Television v. GTE Sylvania* adopted this view, finding that vertical restraints “promote interbrand competition by allowing the manufacturer to achieve certain efficiencies,” in distribution.²²⁶ To be sure, continued antitrust enforcement of no-poaching agreements as illegal restraints is likely to deter those agreements given their horizontal elements and wage suppression effect.²²⁷ But, lacking horizontal elements and clear anticompetitive effects, most franchisor control over franchisees is permissible.²²⁸

The Chicago School efficiency framework has come under increasing criticism for failing to attend to the harmful effects of monopsony power²²⁹ while simultaneously forbidding coordination among workers who are independent

maximum price restraints are subject to the rule of reason); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (holding that rule of reason also applies to maximum price restraints). The rule of reason typically requires courts to engage in a fact-specific assessment of market power and structure to assess the restraint’s actual effect on competition and requires the plaintiffs to show that the restraint is in fact unreasonable and anticompetitive. *See Am. Express Co.*, 138 S. Ct. at 2284.

224. *See* ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 20–21 (1978); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 19–20 (1976); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *ANTITRUST L.J.* 135, 138–40 (1984). For a critical view of the Chicago School intervention into antitrust law, see TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 86–92 (2018).

225. POSNER, *supra* note 224, at 147–51; Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1, 13–14 (1984).

226. 433 U.S. at 54.

227. Some courts have found that allegations of no-poaching agreements between franchisors and franchisees are sufficient to state an antitrust claim because of their horizontal elements. *See Blanton v. Domino’s Pizza Franchising LLC*, No. 18-13207, 2019 WL 2247731, at *4 (E.D. Mich. May 24, 2019); *Deslandes*, 2018 WL 3105955, at *6–8.

228. *See, e.g., Ungar v. Dunkin’ Donuts of Am., Inc.*, 531 F.2d 1211, 1226 (3d Cir. 1976) (rejecting class certification of tying claim because there was not sufficient proof that each plaintiff was coerced into accepting arrangement); *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 922 F. Supp. 1055, 1062 (E.D. Pa. 1996), *aff’d*, 124 F.3d 430 (3d Cir. 1997) (rejecting post-contract market definition because “allegations of wrongdoing in the post-contractual setting implicate principles of contract, and are not the concern of the antitrust laws”); *Martino v. McDonald’s Sys., Inc.*, 625 F. Supp. 356, 363 (N.D. Ill. 1985) (“Designating menu selections and specifications, without more, does not implicate the antitrust laws.”). Some courts considering antitrust claims have also found that franchisors and their franchisees cannot conspire under antitrust law because they are single enterprises. *See Arrington v. Burger King Worldwide, Inc.*, 448 F. Supp. 3d, 1322, 1332 (S.D. Fla. 2020) (dismissing action because franchisor no-poaching agreement with franchisee qualified as single firm exception to Sherman Act Section 1 conspiracy claim); *see also Sanjukta Paul, Antitrust as Allocator of Coordination Rights*, 67 *UCLA L. REV.* 378, 408–09 (2020) (discussing court extension of antitrust firm exemption to the franchise relationship).

229. WU, *supra* note 224, at 91 (criticizing the Chicago School intervention as “*laissez-faire* reincarnated, without the Social Darwinist baggage, and with a slightly less overt worship of monopoly—but with much the same result”); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 *HARV. L. & POL’Y REV.* 235, 238–245 (2017). This echoes longstanding critiques of the Chicago School intervention in antitrust law for subordinating other values, such as fairness and deconcentration of markets. *See generally* Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 *CALIF. L. REV.* 917 (1987).

contractors to oppose monopsony power.²³⁰ Others have proposed increased scrutiny of franchisor-imposed restraints.²³¹ While our analysis of the power imbalance in the franchise relationship is aligned with these critiques and proposals, the doctrinal limitations in antitrust law will remain a significant impediment in addressing franchisor opportunism that can harm workers.

Instead, the statutory purposes of the NLRA and FLSA guide our project to uncover power as a form of control in labor and employment law. These laws address power disparities in economic relationships by safeguarding the rights of employees to collectively improve terms and conditions of employment and by mandating minimum workplace standards. Our theory of power as control builds upon the work of scholars who have similarly argued that labor and employment law doctrines must account for power disparities in the employment relationship. Our approach is consistent with Hiba Hafiz's work on the NLRA, which called for deeper consideration of inequality of bargaining power through social scientific inquiry.²³² Failure to "ensur[e] equal bargaining power between labor and capital," according to Hafiz, has "significantly eroded workers' ability . . . [to] strike," contrary to the NLRA's purpose.²³³ To advance the NLRA's goal of promoting collective action to equalize the bargaining power between employers and employees, she called for a "structural approach" that "takes into account workers' relative bargaining power as compared to their employers in determining the scope of substantive labor rights and in resolving disputes."²³⁴ While Hafiz's proposed approach primarily focused on economic analysis in labor law, especially the effect of labor market restraints such as no-poaching agreements, it supports our power as control thesis in that it calls for an explicit consideration of power as part of labor law analysis.²³⁵

In a similar vein, Noah Zatz criticized a control test focus on direct control for ignoring how more powerful parties can shift costs and risks to others in an employment relationship.²³⁶ Zatz advanced that imbalances of power between

230. Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 261 (2017) (critiquing antitrust law for permitting "the owners of a firm to benefit from a price premium from coordination when the providers of the service sold are barred from doing so").

231. Marinescu and Posner suggested that courts hold broad no-poaching agreements per se unlawful and relax the Sherman Act Section 1 labor market definition requirement to ease class certification. Marinescu & Posner, *supra* note 219, at 1387–88. They also proposed congressional action to prohibit employers from requiring employees to waive class-action participation in arbitration provisions in employment contracts. *Id.* at 1393–94.

232. Hafiz, *supra* note 13, at 661–62.

233. *Id.* at 682.

234. *Id.* at 661–62. This would empower the NLRB to consider in a joint employer analysis "labor-market restraints that limit workers' bargaining power, including use of no-poaching and non-compete provisions in franchising contracts." *Id.* at 717.

235. Hafiz shared our concern with the NLRB's failure to account for the franchisor's unequal bargaining power "over its franchisees' employees" as a metric for showing the franchisor's control. *Id.* at 657–58.

236. Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 294 (2011).

the company and those that labor on its behalf not only distort working conditions but also “equally well can distort the [company’s] very choice between employment and other work arrangements.”²³⁷ In other words, limiting joint employer consideration to specific types of direct control enables companies to wield their power to reconfigure business operations such that they are insulated from employment responsibilities. Zatz situated his argument in the context of independent contractor arrangements and whether the NLRB should consider the extent to which anti-union animus motivates the classification of a worker as an independent contractor instead of an employee.²³⁸ But his argument is broadly applicable to other workplace laws and to franchising.

Without considering the power to control workplaces, the exclusive judicial focus on the formal trappings of control indirectly invites an endless reconfiguring of the contractual relationship by the more powerful companies to avoid liability. Again, while Zatz spoke of a different context, a fairness principle guides his argument that the power to shift costs and risks is equivalent to direct control. Fairness requires accounting for franchisor power when evaluating control over wages and working conditions. A franchisor with superior bargaining power because of monopsony power, information asymmetries, sophistication, and expertise can engage in opportunistic behavior that drives down workplace standards notwithstanding the absence of the trappings of direct control. As Zatz argued, considerations of power and the ability of parties with superior power to indirectly control workplace conditions are essential.

B. Doctrinal Underpinnings of Power and Control in Labor and Employment Law

Even though economic power alone does not necessarily translate into franchisor control over franchisees and their employees, some labor and employment law cases do provide justification for considering the inequality of bargaining power between contracting parties.²³⁹ Here, we will show doctrinal support for our claim that a franchisor’s power over its franchisees is relevant in weighing the extent to which franchisors reserve or exercise this power to alter franchisee behavior in NLRA and FLSA claims. Despite the decisional law outlined in Part I, which found no joint employer relationship in franchising, there is significant doctrinal support for considering power in the joint employer doctrine.

Case law on lead entities and subsidiary actors has acknowledged the role of power in joint employer determinations, sometimes implying that a lead

237. *Id.*

238. Zatz’s specific argument was that an anti-union motive to adopt an independent contractor model should raise similar concerns as “a decision to subcontract work in order to avoid unionization,” which is recognized as an unfair labor practice under Sections 8(a)(3) and 8(a)(5) of the NLRA. *Id.* at 291; 29 U.S.C. § 158.

239. *See, e.g., Lopez v. Silverman*, 14 F. Supp. 2d 405, 423 (S.D.N.Y. 1998) (acknowledging relevance of “[lead company] Renaissance’s power and influence over [subordinate company] Woo”).

company's power can lead to "functional control" for employment purposes.²⁴⁰ The Fifth Circuit, in *Castillo v. Givens*, considered the power relations between a grower and his farm labor contractor in the joint employment context. The court concluded that, even though the contractor "did exercise some control over the field workers, there was 'no economic substance' behind his power."²⁴¹ It was the grower who had the power, and thus control, over the working conditions of the field workers.²⁴² The contractor only invested a "hoe" and the grower provided "all investment or risk capital" in the land, supplies, and equipment.²⁴³ In *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, a case involving Walmart and a subcontractor, a California district court acknowledged the lead company's power over its subcontractor, reasoning that the subcontractor understood recommendations as nondiscretionary.²⁴⁴ In other words, upon considering the realities of power relations, the court concluded that the recommendations could be understood as requirements or directives.²⁴⁵

In *Zheng v. Liberty Apparel Co.*, the Second Circuit acknowledged the importance of power relations between a garment manufacturer and its garment assembly contractors by articulating joint employer factors that could decipher who was calling the shots with respect to frontline assembly workers.²⁴⁶ Along

240. See, e.g., *Chen v. St. Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 279 (E.D.N.Y. 2005) (acknowledging that a lead company can have "functional control over workers even in the absence of [] formal control" (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003))).

241. *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983), *disapproved of on other grounds by* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). Agricultural workers who perform work on a single farm for a growing season are generally able to raise at least a genuine issue of fact about the joint employer status of growers. See *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997) (explaining that both regulatory and non-regulatory factors can be considered by courts in determining whether a worker is employed by more than one entity at the same time); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (stating that economic realities, not contractual labels, determine employment status); see also Griffith, *supra* note 42 at 200–03 (discussing case law finding joint employment in the agricultural context); Annie Smith & Patricia Kakalec, *Joint Employment in the Agricultural Sector, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR*, *supra* note 90, at 379, 379 (noting the prominence of joint employment concepts in agriculture).

242. *Castillo*, 704 F.2d at 192.

243. *Id.*

244. No. 11-cv-8557, 2014 WL 183956, at *16 (C.D. Cal. Jan. 14, 2014).

245. Scholars have challenged courts that ignore indirect control in other contexts as well. See, e.g., Lung, *supra* note 33, at 321 (describing a court that, in a farmworker case, "conjoined master-servant law and contract law to reproduce formalistic definitions of employer and employee"). Lung wrote that the court's "insistence on strict control and supervision comported with the master-servant model, in which the master wielded direct and tangible physical domination over the performance of workers who were part of his household. However, this formalism fail[ed] to account for the complex ways in which work in a modern economy has been reconfigured by subcontracting practices [and when] a work arrangement is based on multiple layers of relationships that are designed to attenuate the employment relationship." *Id.*

246. 355 F.3d 61, 74 (2d Cir. 2003) (discussing joint employer claim involving contractor that services a single putative joint employer, stating that "it is difficult *not* to draw the inference that a subterfuge arrangement exists"). Manufacturers are often considered joint employers of employees of garment contractors that primarily fill orders for one or a few manufacturers. See, e.g., *id.* at 75–76; *Lopez v. Silverman*, 14 F. Supp. 2d 405, 422–23 (S.D.N.Y. 1998).

similar lines, the Ninth Circuit recently concluded that a labor contractor and the fruit growers who contracted with them were joint employers of Thai workers who came to the United States as part of the H-2A guest worker program.²⁴⁷ Even though the contractor (Global Horizons) directly controlled employment conditions, the court found that the fruit growers were joint employers because they “possessed ultimate authority over [employment conditions].”²⁴⁸ As the court stated,

If the Growers were dissatisfied with the quality of Global Horizons’ services, they could have demanded changes, withheld payment, or ended the contract with Global Horizons altogether. The power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, even if never exercised, is sufficient to render the Growers joint employers²⁴⁹

Thus, the court found the power imbalance between the growers and the contractor central to its finding that reserved control was sufficient to establish a joint employment relationship.

The consideration of inequality of power between the franchisor and franchisee is not unlike the consideration of inequality of bargaining power between the employer and employee. In *NLRB v. Gissel Packing Co.*, a seminal labor law case, the Court concluded that the NLRB should account for power imbalances when considering whether an employer’s statements about job loss before a union election were an implicit threat of retaliation.²⁵⁰ In other words, rather than considering how an objective person would interpret seemingly benign predictions about the effects of unionization, the Court concluded that the NLRB should consider how an economically dependent individual would interpret the statements.²⁵¹ They might be more prone to “pick up intended implications” of the employer’s statement that might “be more readily dismissed by a more disinterested ear.”²⁵² Translating this to the franchising context, franchisees are more likely than arms-length, independent businesses to perceive and respond to franchisor “recommendations” as requirements in light of the franchisors’ immense power over the economic opportunities of franchisees. This is because a subcontractor dependent on a contractor’s business might hear the contractor’s suggestions to improve productivity as “an expectation that [the

247. U.S. Equal Emp. Opportunity Comm’n v. Glob. Horizons, Inc., 915 F.3d 631, 634 (9th Cir. 2019).

248. *Id.* at 641.

249. *Id.*

250. 395 U.S. 575, 579 (1969).

251. *Id.* at 617–18.

252. *Id.* at 617. Hafiz also pointed to *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984), in which the Supreme Court reasoned that Section 7 of the NLRA, which protects collective action among employees, is intended to equalize power between employers and employees, including in workplaces subject to a collective bargaining agreement, as an example of the Supreme Court considering unequal bargaining power in labor law. *See* Hafiz, *supra* note 13, at 681.

subcontractor] would follow these suggestions.”²⁵³ Translating this to power imbalances between franchisors and franchisees, decision-makers should consider how economic dependence affects whether franchisees interpret franchisors’ “recommendations” as requirements.

Courts that have moved toward a joint employer inquiry that analyzes whether parties co-determine workers’ terms and conditions of employment are also in line with our power as control approach. A Fourth Circuit case, *Salinas v. Commercial Interiors, Inc.*,²⁵⁴ is probably the most emblematic of this trend. In *Salinas*, the Fourth Circuit criticized joint employer tests that focus on “the relationship between a putative joint employer and a worker, rather than the relationship *between putative joint employers*.”²⁵⁵ It directed courts to consider, in particular, whether the lead company “codetermines the essential terms and conditions of a worker’s employment” along with the subordinate company “formally or informally, directly or indirectly.”²⁵⁶ Assessing a franchisor’s power over its franchisee through the contract and methods of monitoring and enforcing the contract in practice is essential in evaluating codetermination.²⁵⁷

Courts deciding a wide spectrum of labor and employment law issues often consider whether the lead entity has the right to,²⁵⁸ or the power to, control working conditions.²⁵⁹ Our approach is consistent with this view. We argue that franchisors’ economic power over franchisees, in combination with their expansive recommendations relating to working conditions, is the franchisor’s recipe for indirect control over fast-food workers in their franchised stores. Accounting for this method of indirect control will be necessary to end the widespread foreclosure of joint employer claims in franchising.

IV.

IMPLEMENTING THE POWER AS CONTROL APPROACH

Foreclosing joint employer liability for fast-food franchisors underestimates franchisor power and the extent to which a typical franchisor exerts unexercised and exercised control over franchisees and their low-wage

253. *Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc.*, No. 11-cv-8557, 2014 WL 183956, at *8 (C.D. Cal. Jan. 14, 2014).

254. 848 F.3d 125 (4th Cir. 2017).

255. *Id.* at 139 (emphasis added).

256. *Id.* at 141–42.

257. *See id.*

258. *See, e.g.*, *Bogosian v. All Am. Concessions*, No. 06-CV-1633, 2008 WL 4534036, at *11 (E.D.N.Y. Sep. 29, 2008) (“[U]nder the subcontract governing All American’s work at the U.S. Open, both RA and USTA have rights to oversee various aspects of the work performed by All American and its employees, including approving pricing and menus, and objecting to the continued employment of any All American employee—requiring that employee’s termination and removal from the premises.”).

259. *See, e.g.*, *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1361 (11th Cir. 1994) (“[A]ctual control is a factor to be considered when deciding the ‘joint employer’ issue, but the authority or power to control is also highly relevant.”); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (“The power to control a worker clearly is a crucial factor in determining whether an employment relationship exists.”).

workforce. The foreclosure means that franchisors, which are often a necessary party for workers to meaningfully exercise their labor and employment law rights, and which are also often the best-positioned party to deter legal violations, are not held responsible. Existing scholarly proposals to expand the joint employer doctrine in response are correct in their criticism of the current foreclosure approach. That said, doctrinal expansion is not necessary to find that franchisors are joint employers, at least in some instances. In this Section, we will discuss how to operationalize our approach in combatting efforts to narrow the scope of joint employment. We implore courts and administrative agencies to meaningfully assess the obvious and less obvious control that is embedded in the power relations between franchisors and franchisees.

Court and agency adoption of a power as control approach would promote the fundamental collective bargaining and wage compensation goals²⁶⁰ of labor and employment laws because it would hold franchisors responsible under these laws. It would offset the injustices that can result from employers' vast bargaining power over individual employees in low-wage workforces. Adoption of a power as control approach would also advance a purpose underlying all labor and employment laws: deterring employers from violating employees' workplace protections. Contrary to the Trump-era NLRB General Counsel's position that investigating the joint employer status of McDonald's was "not needed to remedy any allegedly meritorious violation,"²⁶¹ the foreclosure of joint employer liability works against deterrence goals because it removes any incentive for franchisors to identify, prevent, or correct labor and employment law violations. The Ninth Circuit's dismissal of the joint employer wage claim against McDonald's in *Salazar* represents an extreme form of this worst-of-all-worlds scenario: franchisors that instruct franchisees to comply with practices and policies that violate labor and employment law but face no potential liability for those violations.²⁶²

The current state of affairs may actually encourage franchisors to engage in forms of indirect control that can harm workers. The uncertainty of the joint

260. Narrowing the joint employer test beyond even what the common law would permit is contrary to the legislative mandate in wage and hour law to broadly construe the employment relationship using the "suffer or permit" standard. 29 U.S.C. § 203(g). The Supreme Court has reasoned that the "striking breadth" of this definition covers "some parties who might not qualify as [employees] under a strict application of traditional agency law principles." *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992); *see also* *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) ("[C]ourts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act.") (internal quotation omitted); *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1207 (7th Cir. 1986) (same). In proposing to rescind its current, narrow interpretation of the joint employer standard, the DOL correctly acknowledges that the current rule does not reflect the statute's broad definition of the employment relationship. *See* 86 Fed. Reg. 14038 (March 12, 2021).

261. Kullgren, *supra* note 96.

262. *See generally* *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019) (holding McDonald's was not liable as a joint employer even when it required its franchisee to use a payroll system that caused franchisee to violate California law).

employer doctrine encourages risk-averse companies to operate well within the compliance space to avoid even unlikely determinations of liability. This uncertainty deters franchisors from exerting indirect control that may encourage violations in franchise stores. As Susan Morse explained, when the law sets a safe harbor that removes that uncertainty, it encourages regulated entities to shift their behavior “from the compliance space within the safe harbor[]” to the line drawn by the safe harbor.²⁶³ As McDonald’s has done, franchisors may seek to reconfigure their own operations to reduce the possibility of labor and employment law liability. Our proposed approach seeks to close this loophole and create incentives to comply with baseline labor and employment standards by holding franchisors jointly accountable along with their franchisees.

A. End the Judicial Foreclosure of Joint Employer Liability in Franchising Cases

Judicial application of our franchisor power as employment control framework would profoundly change the outcomes of joint employer cases involving franchising, most of which courts currently dismiss right out of the gate.²⁶⁴ Courts need not change the joint employer test itself or adopt a different test in order to address the shortcomings of the dominant approach. Taking power, and therefore indirect control, more seriously simply requires a recalibration of evidence of indirect forms of control. As the Third Circuit has explained, the existence of a franchise relationship “does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such a relationship.”²⁶⁵ Discerning the existence of an employment relationship “depends in each case upon the nature and extent of such control as defined in the franchise agreement or by the actual practice of the parties.”²⁶⁶

Contrary to the dominant trend, some lower courts have assessed franchisors in ways that are consistent with our power as control approach. These courts, when denying motions to dismiss joint employer claims, have provided guidance to future courts about how to assess evidence of indirect control. For example, *Ocampo v. 455 Hospitality LLC* heavily weighed the franchisor’s indirect control in denying a motion to dismiss a FLSA wage claim against a franchisor.²⁶⁷ The court found that the plaintiff plausibly alleged that the franchisor (1) mandated franchise hotel employee trainings; (2) imposed recordkeeping, business software, and operational controls on the franchisee; (3) reserved the right to inspect the hotel, including routinely making announced and unscheduled audits and inspections; (4) reserved the right to make changes to hotel operations and to terminate franchises that did not comply with standards;

263. Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1397 (2016).

264. *See supra* Part I.A.

265. *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 786 (3d Cir. 1978).

266. *Id.*

267. *See Ocampo v. 455 Hosp. LLC*, No. 14-CV-9614, 2016 WL 4926204, at *8 (S.D.N.Y. Sept. 15, 2016).

and (5) was aware of wage and hour law violations and failed to stop them.²⁶⁸ These allegations were sufficient to state a claim that the franchisor was a joint employer.²⁶⁹ *Parrott v. Marriott International* also looked at forms of indirect control collectively and similarly denied a motion to dismiss a joint employer FLSA claim against a hotel franchisor.²⁷⁰ The court found relevant that the franchisor had the power to terminate the contract and had policies and meetings to recommend how the franchisee could reduce labor costs.²⁷¹

A few courts have properly considered indirect and reserved forms of control in the Title VII context as well, using a similar test used by courts considering claims of joint employment under the NLRA and FLSA. In *Elsayed v. Family Fare LLC*, the court considered “determining what was sold, the price of the sale, and how to advertise,” as well as mandated hours and uniforms, as relevant forms of indirect control.²⁷² It found that the franchisor’s refusals to permit the franchisee to sell particular items and provide customers with complimentary items were examples of “close supervision” that supported a joint employer determination.²⁷³ The court also considered the franchisor’s communications about enforcement and monitoring, including assertions to the franchisee that it was the “boss” who could “fire” the franchisee, as sufficient to allege a joint employer relationship, despite the lack of other indicia of direct control.²⁷⁴ The court in *Harris v. Midas* similarly considered indirect control when it denied a motion to dismiss a Title VII claim against a franchisor.²⁷⁵ The court found that the franchisor’s reserved power to inspect books and records, issue workplace policies, and require training in those policies, including sexual harassment policies that the franchisee alleged were violated, showed sufficient control over workplace rules, supervision, and employee records.²⁷⁶

As the trial court in *Elsayed* recognized, these cases diverge from the “line of cases that emphasizes that franchisors can exercise substantial control over franchisees without becoming employers of the franchisee’s employees.”²⁷⁷ They stand in contrast to the dominant trend to foreclose joint employer claims in franchising and illustrate how courts that foreclosed joint employer claims should have handled those cases. As the Ninth Circuit instructed in *Global Horizons*, considering direct control to the exclusion of other factors stands

268. *Id.* at *6.

269. *Id.* at *7.

270. No. 17-10359, 2017 WL 3891805, at *4 (E.D. Mich. Sept. 6, 2017).

271. *Id.* at *2.

272. No. 18-cv-1045, 2020 WL 780701, at *5 (M.D.N.C. Feb. 18, 2020).

273. *Id.*

274. *Id.*

275. No. 17-95, 2017 WL 5177668, at *1–2 (W.D. Pa. Nov. 8, 2017).

276. *Id.* The court adopted a Third Circuit version of the *Bonnette* factors: “(1) the alleged employer’s authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) the alleged employer’s day-to-day supervision of employees, including employee discipline; and (3) the alleged employer’s control of employee records, including payroll, insurance, taxes and the like.” *Id.* at *1.

277. *Elsayed*, 2020 WL 780701, at *4.

contrary to the common law agency test, which considers the total indicia of control.²⁷⁸ Instead of requiring evidence of control over the instrumentality, courts should consider whether a franchisor's overall influence and power to co-determine the work is sufficient to state a plausible joint employer relationship and to avoid summary judgment.²⁷⁹

This more comprehensive approach to assessing franchisors' indirect control could end the virtual foreclosure of joint employer liability in franchising. Required training, payroll systems, employment policies, hiring policies for managers, and recommended measures to control labor costs can be strong indirect evidence of a joint employer relationship. It becomes even stronger when courts also factor in franchisors' intensive monitoring, inspections, and recommendations tied to franchise retention and renewal. These findings invite further research into whether and under which circumstances courts should presume a joint employment relationship based on the types of indirect control identified in Part II.²⁸⁰ At a minimum, the types of indirect control discussed here can be sufficient for a reasonable fact finder to infer that the franchisor is a joint employer. When franchisors exert significant control indirectly, such as through the franchise agreement, extensive recommendations and monitoring, and enforcement measures, courts should find these allegations sufficient to defeat a motion to dismiss.²⁸¹ If such allegations are supported

278. U.S. Equal Emp. Opportunity Comm'n v. Glob. Horizons, Inc., 915 F.3d 631, 638 (9th Cir. 2019) (“[T]here is ‘no shorthand formula’ for determining whether an employment relationship exists, so ‘all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” (quoting *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 324 (1992))).

279. See, e.g., *Ramirez-Castellanos v. Nugget Mkt., Inc.*, No. 17-cv-01025, 2020 WL 2770060, at *5 (E.D. Cal. May 28, 2020) (adopting the *Global Horizons* agency test, finding that evidence of supervision and power to terminate work is sufficient to avoid summary judgment).

280. In 2018 the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018), adopted a broader, simpler “ABC” test (named for its three elements), which presumes employment status for California wage and hour claims. *Id.* at 36–40. California codified *Dynamex* in A.B. 5, but Proposition 22, a voter referendum, exempted some platform network companies from its reach in 2020. See Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html> [<https://perma.cc/BVZ6-W3KB>]. The ABC test presumes employment status in a number of states. See Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 B.U. L. REV. 651, 682 (2020). The test, however, primarily addresses employer classification of employees as independent contractors, and courts have not resolved whether the ABC test also applies to joint employers. Compare *Henderson v. Equilon Enters., LLC*, (Cal. Ct. App. 2019), 253 Cal. Rptr. 3d 738, 752–54 (Cal. Ct. App. 2019), *appeal denied* (Feb. 11, 2020) (holding that the ABC test does not apply to joint employment because “*Dynamex* was concerned with the problem of businesses misclassifying workers as independent contractors so that the business may obtain economic advantages that result from the avoidance of legal and economic obligations imposed on an employer by the wage order and other state and federal requirements”), with *Moreno v. JCT Logistics, Inc.*, No. EDCV 17-2489, 2019 WL 3858999, at *7 (C.D. Cal. May 29, 2019) (applying *Dynamex* to both putative direct and joint employers). Elmore is currently investigating the application of indirect control to the ABC test.

281. See, e.g., *Lora v. Ledo Pizza Sys., Inc.*, No. DKC 16-4002, 2017 WL 3189406, at *6 (D. Md. July 27, 2017) (denying franchisor's motion to dismiss plaintiff's FLSA claim because plaintiff's allegations that franchisor “had at least some power to control and supervise workers and to hire, fire, or modify conditions of employment” at the franchise store were sufficient to allege joint employer status).

through credible evidence, courts should consider them sufficient to deny motions for summary judgment and to dismiss the complaint.²⁸² Likewise, courts should consider them sufficient to present a jury question notwithstanding conflicting evidence by the franchisor.²⁸³

B. Direct Agencies to Investigate Joint Employer Liability in Franchising Cases

Considerations of power and the ability of franchisors to control franchise stores indirectly have meaningful implications for public agency enforcement. If agencies embrace the power as control approach, they could shift their strategic priorities to investigate joint employer liability in their franchising cases. Most of the literature about enforcement of employment laws emphasizes private enforcement through the judiciary because of the limitations of public enforcement and the need to fill public enforcement gaps.²⁸⁴

But executive branch agencies, both in federal and state government, also have a key role to play in labor and employment enforcement. As Michael Waterstone argued, public enforcers are not constrained by the need to finance litigation or by various doctrinal limitations that often hamper class claims.²⁸⁵ This is why the Trump-era NLRB's General Counsel was wrong in refusing to investigate allegations of joint employment when the direct employer (the franchisee) acknowledged itself as the employer. It is no coincidence that both the McDonald's and Domino's cases began as public agency investigations. The evidence of their exercised power came from testimony by franchisor representatives and franchisees, evidence that is not easily available prior to litigation or a formal agency investigation.

The power dynamics between franchisors and franchisees, and the controls they foster, are not easily recognizable to the naked eye of the would-be-plaintiff employees who experience a labor or employment law violation in the course of their work. Frontline employees are unlikely to have access to the complexities

282. See, e.g., *Elsayed v. Fam. Fare LLC*, 18-cv-1045, 2020 WL 780701, at *2, *5–6 (M.D.N.C. Feb. 18, 2020) (converting franchisor's motion to dismiss to motion for summary judgment based on franchisor affidavits contradicting plaintiff's evidence supporting joint employment determination, and finding genuine issue of material facts sufficient to deny motion).

283. See, e.g., *Sarikaputar v. Veratip Corp.*, No. 17-CV-814, 2020 WL 4572677, at *3 (S.D.N.Y. Aug. 7, 2020) (finding that factual disputes about defendant's alleged employer status were material to the case and had to be decided at trial); *Ramirez-Castellanos*, 2020 WL 2770060, at *5 (holding that, because the defendant implicitly admitted there were genuine issues of material fact, a jury would decide the disputed issue of whether defendant jointly employed the plaintiffs).

284. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) ("Private lawsuits can potentially help to fill the enforcement gap left by the undercommitment of public resources; indeed, they can sometimes supply a big gun where public enforcement has none to wield."); Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357, 362 (2020) (noting that public agencies provide "a small fraction of total enforcement" of employment law enforcement).

285. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 461–65 (2007) (discussing the disability rights context).

of this one-sided business relationship and how it might lead to a change in their work hours or the speed at which they complete a task. These information asymmetries create significant uncertainty about the success of any joint employer claim. Given this uncertainty, it is unlikely that the documentation in the McDonald's and Domino's cases would have ever been unearthed in a legal analysis that required direct control and thus essentially presumed no joint employer relationship at the outset.

Agency adoption of our power as control approach is even more crucial in the wake of *Epic Systems Corp. v. Lewis*,²⁸⁶ which has limited workers' access to justice. *Epic* requires that courts now enforce employer mandatory arbitration agreements with class-action waivers under the Federal Arbitration Act.²⁸⁷ After *Epic*, claims by low-wage workers in franchise stores are likely only available for systemic violations that can be arbitrated en masse or that become subjects of public pressure and legal mobilization, such as the Fight for Fifteen movement.²⁸⁸

In contrast, public agencies can investigate and litigate these claims generally without being subject to mandatory arbitration agreements. Most individual wage and hour law claims are low value.²⁸⁹ Therefore, it is unlikely that the potential recovery from an individual claim would justify the time and expense of seeking to prove a joint employer relationship.²⁹⁰ But in areas of labor and employment law like joint employer claims in franchised sectors, which is widely considered underenforced,²⁹¹ redundant enforcement by private litigators and public agencies can be productive.²⁹² Public agency enforcement can both provide access to justice for individuals who cannot engage in private litigation and develop individual complaints into systemic litigation unlikely to occur through private enforcement alone. Without the aggregation of private claims that could justify the discovery necessary to establish a joint employer relationship, it will continue to be crucial for public agencies to pursue joint employer theories when investigating complaints in franchise stores.

286. 138 S. Ct. 1612 (2018).

287. *Id.* at 1632.

288. See Elmore, *supra* note 284, at 379–86; Griffith & Gates, *supra* note 4, at 249.

289. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1184 (2012).

290. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1117–18 (2014) (arguing in favor of public enforcement where private enforcement leaves gaps, including “cases in which workers would be particularly unlikely to complain on their own, where workers have low levels of substantive and procedural legal knowledge, and where workers are highly susceptible to retaliation”).

291. WEIL, *supra* note 18, at 131–132 (finding that “[t]he probability of noncompliance [with wage and hour law] is about 24% higher among franchisee-owned outlets than among otherwise similar company-owned outlets”).

292. As Zachary Clopton argued, public and private enforcement offer independent potential benefits, and redundant enforcement is particularly beneficial if the enforcers are sufficiently differentiated to address the resource constraints, information deficits, and other causes of underenforcement. Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 308–13 (2016).

Like the NLRB's McDonald's investigation and the NYAG's Domino's investigation, agencies should approach complaints of labor and employment law violations by considering whether there is a plausible joint employer. At the outset, agencies may assess whether the terms in the franchise agreement show the types of reserved control that suggest a plausible joint employer relationship. If so, agencies should require franchisees to disclose the on-the-ground practices of the franchisor, including manuals, IT systems, trainings, inspections, and ongoing monitoring related to franchise retention and renewal. If these control measures suggest substantial indirect control, agencies should seek a determination of joint employer status.

Further, to spur private litigation that will benefit from public investigations, public agencies should make investigation findings and underlying investigative material public after the investigation's completion whenever possible. Besides being necessary to assess the indirect control of a franchisor, consideration of a franchisor's power over its franchisees will also inform the agency's evaluation of whether investigating the franchisor will advance the deterrence, remedial, and collective bargaining goals of workplace laws.

CONCLUSION

This Article argues that holding franchisors responsible for labor and employment law obligations will require deeper interrogation of how franchisor power transmutes into franchisor influence over workers' wages and working conditions. This approach will require taking a fuller account of various types of unexercised and exercised control, which appear in the franchise agreement and in franchisors' on-the-ground practices. To advance this argument, we rely on insights from original empirical analyses of (1) forty-four contracts between leading fast-food franchisors and their franchisees in 2016 and (2) extensive documentation provided in joint employer legal proceedings against two major fast-food franchisors in the United States—McDonald's and Domino's.

Our proposed power as control construct, which would fit into existing doctrine, considers the cumulative effect of franchisors' reserved and exercised influence over the working conditions in their franchisees. Taking franchisors' power more seriously in legal analyses of control would help courts, administrative agencies, and policy-makers advance the goals of labor and employment law within the confines of existing doctrines, thereby reducing unnecessary harm to some of the lowest-paid workers in the U.S. economy.