Farm Labor Contractors and Agricultural Producers as Joint Employers under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis

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Since 1963, farm labor contractors who employ migrant farm workers have been regulated by federal law. The Migrant and Seasonal Worker Protection Act of 1983 (MSPA) stiffened enforcement of the law by broadening the definition of joint employer to include, in many instances, the agricultural producer or packer who engages a migrant worker contractor. Nevertheless, Congress clearly rejected a per se rule that would treat producers as joint employers because, in some employment settings, producers exercise too little control over the pay or conditions of employment for migrant workers. On March 12, 1997, the U.S. Department of Labor issued a Final Rule that effectively treats all producers as joint employers with farm labor contractors. Professor LeRoy challenges the Rule by presenting evidence that federal courts have decided joint employment issues in accordance with congressional intent under the MSPA. Professor LeRoy also presents evidence of declining employment opportunities for migrant farm workers, ranging from increased enforcement of immigration laws, imports of hand-harvested fruits and vegetables that are undercutting prices for do-

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mestic producers, and environmental regulations that are taking land out of production. Professor LeRoy concludes that the DOL, by introducing its new Rule in the midst of such serious pressures on both producers and migrant farm workers, has actually endangered migrant farm workers' jobs. Professor LeRoy calls for abandonment of the Rule.

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People say, "You're getting that cheap labor." We pay anywhere between $350 and $500 per week. It ain't cheap labor. It ain't about cheap labor. It's about getting the product out of the field.\(^1\)

The determination of economic dependence is based upon the "economic reality" of all the circumstances and not upon isolated factors or contractual labels.\(^2\)

An "economic reality" test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality.\(^3\)

I. INTRODUCTION

Migrant farm workers\(^4\) toil under difficult conditions for relatively little pay and benefits.\(^5\) Nevertheless, they freely participate in labor markets\(^6\)

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4. The U.S. Dep't. of Agriculture defines a migrant farm worker as "a farm worker whose employment required travel that prevented the farm worker from returning to his/her permanent place of residence the same day." See NATIONAL AGRICULTURAL STATISTICS SERVICE, FARM LABOR, August 14, 1997 report, at 12 [hereinafter, FARM LABOR], table titled "Migrant Workers: Percent of All Hired Workers, United States, By Quarter, 1995-1997," n.1, reprinted in Internet format at <http://mann77.mannlib.cornell.edu/reports/nassr/other/pfl-bb/1997/farm_labor_08.15.97>. This article cites the July 1997 survey because that survey coincides with the height of the growing season for many fruit, vegetable, and horticultural crops. It therefore gives the best picture of farm labor markets when they are fully utilized. In contrast, the agency's February survey portrays more limited conditions, primarily in Florida, Texas, and California.

5. Field workers earned $6.45 per hour, according to an August 1997 survey by the National Agricultural Statistics Service. Id. at 1. For more detailed information see discussion infra in Part VI.

6. For current information about the size of this labor market, see generally FARM LABOR, supra, note 4 and see discussion infra Part VI(B)(1)). For a historical example of this labor market, see HEARINGS ON S. 1085 S. 1778, S. 2141, and S. 2498 (Bills Relating to Migratory Labor) Before the Subcomm. on Labor and Public Welfare, 86th Cong. 912 (1960) (testimony of William H. Braatz, Sanitation Director for Palm Beach County, Florida):

(On Belle Glade we have the day-haul pattern right on the loading zone, which is a square block in the middle of the city, and the migrants report before 7 o'clock. . . . All the growers' buses back up to the block and each field walker advertises what crop he has, what prices they
that offer so little because, with so few employable skills, they lack better alternatives.

In response to a 1952 policy that encouraged immigrants to work temporarily on farms, and developing evidence that migrant workers were being exploited, Congress held lengthy hearings to learn about this casual and transient labor market. These hearings singled out farm labor contractors (FLCs) as culprits. There was considerable justification in doing so. Many agricultural producers were unable to find local people to work in necessary but temporary jobs, such as crop harvesting and therefore often contracted with FLCs to supply these workers. FLCs often recruited ille-

are willing to pay to harvest that crop, what field conditions are, and so forth. At 7 o'clock the whistle blows and the migrant jumps on the bus he happens to choose.

7. See discussion of low education attainment for many migrant workers, infra notes 299-300 and accompanying text.

8. See generally Agricultural Guest Worker Programs: Joint Hearing Before the House Subcomm. on Risk Management and Specialty Crops of the Comm. on Agricultural and the House Subcomm. on Immigration and Claims of the Comm. on the Judiciary, 104th Cong. 103 (1995) [hereinafter Hearings before the U.S. House of Representatives Agriculture Committee] (statement of Keith Collins): “The H-2A program established a means in 1952 for agricultural employers who anticipate a shortage of domestic workers to apply for permission to bring into the United States nonimmigrant aliens to perform seasonal or temporary agricultural work.”


10. Congressional hearings produced volumes of testimony on this point. William L. Batt, Jr., Pennsylvania’s Secretary of Labor and Industry, related that “[d]uring recruitment and on the job . . . workers are often subject to crew leaders who deliberately misrepresent employment conditions, change wage rates without explanation, exploit children, illegally sell liquor, profit in foodstuffs, operate gambling games, and keep inadequate or no payroll records.” Migratory Labor: Hearings on S. 1129 Before the Senate Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare, 87th Cong. 468 (1961).

Even supporters of a bill to regulate FLCs recognized that some crew leaders performed a beneficial and necessary labor market function. Rev. Gailen R. Weaver testified:

We do not condemn all crew leaders or the crew leader system. There are sufficient instances of record where crew leaders have been a positive force in the situation of regularizing employment, representing the interests of the worker, and serving in other beneficial ways to convince us that the crew leader can be a very important agent for improvement of the conditions described in our statement.

Id. at 136 (1961).

11. Growers in the 1960s were very concerned about any federal regulation that would restrict hiring of migrant workers. Charles M. Creuziger, a Wisconsin vegetable grower, observed: “The loss of crew leaders and, therefore, their crews, would be a serious blow to many segments of our industry who are dependent upon this type of mobile work force to husband their crops and would add to the already critical shortage of reliable, dependable farmworkers.” Id. at 82 (1961). This remains true today. See, e.g., Kate Watson-Smyth, Why Migrant Workers Are Happy with Meager Fruits of Their Labours, THE INDEPENDENT - LONDON, July 14, 1997, at 6, available in 1997 WL 12333670 (reporting that English farmers have difficulty recruiting natives to work 16-hour shifts in fields, but have little or no difficulty employing Eastern European immigrants in this manner).

12. On this point, Congress noted:

The relationship between migratory workers and their farm employers is often temporary and impersonal. The labor contractor organizes groups of workers in areas in which they live, establishes contact between them and the growers who are often located in labor shortage areas in other States, and helps to provide continuity of employment. He usually provides the
gal immigrants, and capitalized on the dependency created by their alien-age. FLCs would often string together a series of farm jobs over several states, making the workers dependent on FLCs for transportation to fields and temporary housing.

In an attempt to remedy these problems, Congress enacted the Farm Labor Contractor Registration Act (the FLCRA) in 1963. The law required FLCs to register with the U.S. Department of Labor (the DOL) and to comply with requirements such as disclosing housing and transportation information and making payroll information available to migrant workers. Congress considered this law a failure, however, and amended it in 1974.

Means of transportation for members of his crew, lends them money if necessary during the season, pays them their wages, handles all contacts with the grower, and generally supervises the workers on the job. He is, therefore, the individual who has the most continuing relationship with these migrant workers.


14. When Congress considered a bill in 1969 to strengthen protection for migrant workers, they heard testimony from Ernesto Galarza, who spent 40 years in farm labor camps:

\[\text{[I]f you take the Mexican farm labor group as an exponent of the total farm labor group, this sector is itself a mix of subgroups . . . . There are thousands of wetbacks. They have been and continue to be braceros, who are temporary contract workers, and there are so-called green-card commuters . . . . [T]he farm labor group in the Southwest is particularly composed of Mexicans, Filipinos, blacks, and of southern Appalachian whites . . . .}\\end{\array}

Migrant and Seasonal Farmworker Powerlessness: Hearings on the Migrant Subculture Before the Senate Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare, 91st Cong. 471 (1969). Galarza also explained that these workers had an unhealthy dependence on FLCs:

\[\text{[I]f you fall into disgrace with your patron, the labor contractor with whom you have been working for years perhaps, you are in real trouble because you are not only in disgrace with him, but you are in disgrace with those powers above him for whom he is the broker, and this is a major disaster in your life and the life of your family and one that you will try to avoid at all costs.}\\end{\array}

Id. at 474.


\[\text{Each cabin is furnished with a small wood-burning stove located next to the door, two desk-size tables and two or three shelves. There is a single electrical outlet hanging from the middle of the room. When a tenant moves into a cabin he is supplied with a number of wooden or metal chairs and metal bed frames with Army-type springs . . . . More than twenty-five years of exposure to elements and people have taken a toll on the cabins. It is not uncommon to see daylight through cracks and holes in the walls and floors. Cabin walls are often lined with newspaper and masking tape, poignant reminders of efforts by past tenants to minimize the effects of wind and cold.}\\end{\array}

Id. at 507.


17. See infra notes 36-49 and accompanying text.

It did so again in 1983, when it replaced the FLCRA with the Migrant and Seasonal Agricultural Worker Act (the MSPA).\textsuperscript{19}

This article examines the most recent development in this area of regulation: a U.S. Department of Labor Final Rule (the Rule) that essentially treats producers as the joint employers of FLCs whom they engage.\textsuperscript{20} Efforts to enforce the FLCRA and MSPA through private lawsuits have often turned on whether the FLC and the agricultural producer are joint employers. In enacting the MSPA, Congress essentially codified the broad joint employment analysis used in several key decisions.\textsuperscript{21} Congress also instructed federal courts to examine other factors, related to the “economic realities” of a given employment setting, that would warrant a finding of a joint-employment relationship.\textsuperscript{22}

This article presents empirical research showing that, despite DOL assertions to the contrary, federal courts have faithfully administered the MSPA in accordance with legislative intent. Congress significantly broadened producer liability for the misconduct of FLCs in part because it was concerned that enforcement of the law would be undermined by sham contracts that shifted all liability to FLCs.\textsuperscript{23} But Congress also believed that in some situations, holding a producer jointly liable would be unfair.\textsuperscript{24} Despite this history, the DOL felt it was necessary to create a broader standard to encourage enforcement of the MSPA. As a result, the Rule effectively treats a producer as an FLC’s joint employer in all cases.\textsuperscript{25} The Rule also applies to a wide range of industries (farms, nurseries, and commercial timber operations that depend heavily on human labor to plant, cultivate, and harvest vegetable crops, fruit, cotton, timber, and the like)\textsuperscript{26} without considering the unique circumstances of each. Moreover, the Rule appears to be motivated in part by politics\textsuperscript{27} and in part by concern that pay for migrant

\textsuperscript{19} Pub. L. 97-470, 96 Stat. 2600 (1983) [hereinafter the MSPA]. See also infra notes 61-84 and accompanying text.

\textsuperscript{20} See 29 C.F.R. § 500(h) (1997) [hereinafter the Rule] and the discussion infra Part III(B).

\textsuperscript{21} See infra notes 71-74, 77-78 and accompanying text.

\textsuperscript{22} See infra notes 75-80 and accompanying text.

\textsuperscript{23} See id.

\textsuperscript{24} See, e.g., infra notes 65-66.

\textsuperscript{25} See 29 C.F.R. § 500.20(h)(5) (1997) (“If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.”) (emphasis added). See also 29 C.F.R. §§ 500.20(h)(4), 500.20(h)(5)(i), (iii) (1997).

\textsuperscript{26} The primary though not exclusive focus of this Article is work performed by migrants on “FVH” farms (i.e., those that produce fruits, vegetables, or horticultural goods). The MSPA also applies, however, in other settings where migrant workers are employed, for example, packing houses. See 29 U.S.C. § 1802(2). FVH producers are especially affected by the Rule because the seasonality of such crops requires large numbers of workers for short periods of time.

\textsuperscript{27} See infra notes 328-331 and accompanying text.
workers is less than pay for more permanent employees who perform the same work directly for producers.\(^28\)

This article adds to a literature of classic\(^29\) and more recent\(^30\) research concerning the regulation of farm worker employment. It presents empirical analyses of federal court decisions in which the joint employment issue was litigated under the MSPA. The results show that prior to the Rule’s creation, courts acted in accordance with congressional intent by applying a wide range of factors, as well as the amorphous “economic reality” test.\(^31\)

In most cases, the courts ruled that a producer is a joint employer with an FLC, a result that Congress did not require but probably intended.\(^32\) The cases, considered as a whole, show that Congress used sound judgment in rejecting a strict liability standard.

This article also shows that FLCs perform a necessary market function by recruiting suitable and willing laborers. Evidence is presented to demonstrate that although migrant farm workers earn low wages, they typically earn more than the federal minimum wage.\(^33\) The point of this infor-

\(^{28.}\) See 62 Fed. Reg. 11,734, 11,745 (1997). It is likely that the Rule’s creation was also motivated by a concern that wages for migrant workers are falling. The evidence on this point is mixed. Some surveys conducted by agricultural economists suggest that farm workers’ wages have fallen 20 percent or more over the past two decades, in part, because “there is a substantial surplus of workers, almost of all of them immigrants . . . .” Farm Workers’ Incomes Improve, But Still Lag, THE OMAHA WORLD-HERALD, May 18, 1997, at 7M, available in 1997 WL 6304058 (quoting Don Villarejo, Executive Director of the California Institute for Rural Studies). Compare Stephen Greenhouse, New Rules to Protect Laborers on Farms, SAN DIEGO UNION-TRIBUNE, Mar. 12, 1997, at C1, available in 1997 WL 31221626 (quoting administrator of the DOL’s wage and hour division as saying that migrant farm workers are among the “worst-paid workers” in the country).


\(^{31.}\) See infra Part III(B), and Tables 1.C and 2.

\(^{32.}\) See infra Part III(B), and Table 1.A.

\(^{33.}\) See infra notes 263-269 and accompanying text.
mation is to question the Rule's assumption that migrant farm workers are treated unfairly. In short, many of these workers, although poor, are not subject to the abuses that prompted Congress to regulate this area and they appear to have more in common with other working poor people than the DOL apparently assumes.

This article also considers a variety of contextual factors that are connected to the Rule—specifically agricultural trade policies, stiffened immigration laws, increased farm mechanization, tougher environmental policies, and welfare reform—that appear likely to dampen job prospects for migrant farm workers. Unfortunately, the DOL did not consider carefully these broader but potentially relevant factors when it formulated the Rule.

To be clear, this article does not conclude that current protections afforded by the MSPA to migrant farm workers should be weakened. However, it challenges the Rule because it adds to a growing list of reasons for producers to curtail labor-intensive operations. This article also raises the concern that the MSPA, like previous regulation that intended to improve housing for farm workers, may have a paradoxical and harmful effect, concluding with a suggestion of a better way to improve enforcement of the MSPA. The law should not have been changed. Instead, the federal government should devote more resources to investigate abuses and improve compliance with existing regulation.

II.


A. Origins of the Migrant and Seasonal Worker Protection Act of 1983

1. The Farm Labor Contractor Registration Act of 1963

Congress enacted the FLCRA to redress exploitation of migrant agricultural workers by FLCs. The law indicated which persons or entities

34. See discussion infra Part VII.

35. See Farm Workers' Incomes Improve, But Still Lag, THE OMAHA WORLD-HERALD, May 18, 1997, at 7M, available in 1997 WL 6304058, reporting the unintended ill-effects of Congress' attempt to legislate housing improvements for migrant workers: "In the 1960s, farmers usually provided free, though sometimes substandard, housing to their workers. But federal laws that were enacted a decade ago to set standards for those farmers who provide housing have instead caused many growers to stop providing lodging, concluding it is too difficult and costly to meet the regulations. As a result, farm workers must pay for their own shelter, a cost that often claims at least one-third of their paychecks." Id.


37. Congress estimated that 5,000 to 8,000 FLCs ("crew leaders") would be subject to this law. See S. Rep. No. 88-202 (1964), reprinted in 1964 U.S.C.C.A.N. 3690, 369.
were FLCs and required them to register with the DOL for the purpose of obtaining a certificate to operate.\textsuperscript{38} No certificate was to be issued unless an applicant presented satisfactory information concerning her conduct and method of operation as an FLC, and proof of public liability insurance on vehicles used in her business as an FLC.\textsuperscript{39}

The law’s main thrust was to require honest dealing between FLCs and migrant workers. The law required FLCs to (1) disclose to all migrant workers the terms and conditions of their employment when they were recruited,\textsuperscript{40} and post these terms and those related to housing at both the work site and labor camp;\textsuperscript{41} (2) abstain from certain specified conduct;\textsuperscript{42} (3) use safe, insured vehicles to transport the workers;\textsuperscript{43} and (4) keep accurate records of the hours or piece-rates for each employed worker.\textsuperscript{44}

However, the FLCRA had significant limitations. Although it provided for non-issuance or revocation of a DOL certificate,\textsuperscript{45} the law’s enforcement scheme was weakened by classifying violations as only misdemeanors with fines capped at $500.\textsuperscript{46}

The law was also weak because it exempted a significant class of agricultural producers who recruited farm laborers only for their own operations.\textsuperscript{47} Furthermore, it exempted FLCs who recruited migrant workers

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\textsuperscript{38} The law defined a “farm labor contractor” as “any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports . . . migrant workers (excluding members of his immediate family) . . . for interstate agricultural employment.” 7 U.S.C. § 2042(b) (1964), repealed by 29 U.S.C. § 1802(7) (1983).

\textsuperscript{39} See FLCRA § 5(a), 78 Stat. 920, 921-22 (repealed 1983).

\textsuperscript{40} See FLCRA § 6(b)(1)-(4), 78 Stat. at 923, requiring FLCs to disclose the area of employment, crops and operations where employment would occur, the type of transportation, housing, and insurance to be provided, and wage rates.

\textsuperscript{41} See FLCRA § 6(c), 78 Stat. at 923, requiring FLCs, upon arriving at work sites, to post in a conspicuous place a written statement of the terms and conditions of employment. FLCRA § 6(d) required FLCs who controlled housing facilities to post in a conspicuous place the terms and conditions of occupancy. See 78 Stat. at 923.

\textsuperscript{42} FLCRA §§ 5(b)(1)-(7) enumerated conditions that would bar issuance of a certificate: falsifying applications; giving workers misleading information about employment; failing, without justification, to perform agreements with farm operators; failing, without justification, to comply with the terms of any working arrangements made with migrant workers; failing to show financial responsibility or keep an insurance policy; recruiting, employing, or utilizing illegal aliens; being convicted for gambling, prostitution, or unlawfully distributing alcohol or narcotics in connection with or incident to her activities as an FLC. See 78 Stat. at 923.

\textsuperscript{43} FLCRA § 5(a)(2) required FLCs to demonstrate proof of liability insurance or other evidence of financial responsibility for damages arising out of transportation of migrant workers. See 78 Stat. at 921-22.

\textsuperscript{44} FLCRA § 6(e) required that “in the event [an FLC] pays migrant workers engaged in interstate agricultural employment, either on his own behalf or on behalf of another person,” she must “keep payroll records which shall show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings.” 78 Stat. at 923.

\textsuperscript{45} See FLCRA § 5(b), 78 Stat. at 921-22. FLCRA § 11 also provided for federal court jurisdiction in disputes arising under FLCRA. See 78 Stat. at 924.

\textsuperscript{46} See FLCRA § 9, 78 Stat. at 924.

\textsuperscript{47} See FLCRA § 3(b)(2), the most significant exemption, excluding “any farmer, processor, canner, ginner, packing shed operator, nurseryman, freezer, or cold storage operator who engages in any
from any foreign nation that had an agreement with the U.S. to provide temporary workers. It also, by covering only FLCs who hired 10 or more migrant workers, the law did not apply to small operations.

2. **The Farm Labor Contractor Registration Act Amendments of 1974**

A decade later, Congress found that the FLCRA failed to change FLCs' exploitative practices. It concluded that "It is quite evident that the Act in its present form provides no real deterrent to violations. Since the Act's inception, only four persons have been referred to the Department of Justice for criminal prosecution; and only one person has ever been convicted and sentenced." Congress concluded that the law was far too lax, not because its substantive provisions were faulty, but because its enforcement scheme was weak. Lawmakers particularly blamed "the difficulty of proving that the contractor is engaged in recruitment across state lines; the absence of any requirement that those who benefit from the work of migrant laborers assume responsibility for engaging only registered FLCs; the relatively mild penalties provided by the Act; and the lack of a private remedy for aggrieved workers." The increasing tide of illegal immigrants drawn to farm work was viewed as an aggravating factor.

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48. FLCRA § 3(b)(4) excluded as FLCs persons who obtained "migrant workers of any foreign nation for employment in the United States, if the employment of such workers is subject to (A) an agreement between the United States and such foreign nation, or (B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for in the United States by an instrumentality of such foreign nation." 78 Stat. at 920. Thus, the FLCRA did not cover farm workers admitted under temporary work permits from Mexico and other nations.

49. FLCRA § 3(b), 78 Stat. at 920.


It is unfortunately an all too common experience for workers to be abused by farm labor contractors. Testimony revealed that in many cases the contractor: exaggerates conditions of employment when he recruits workers in their home base, or that he fails to inform them of their working conditions at all; transports them in unsafe vehicles; fails to furnish promised housing, or else furnishes substandard and unsanitary housing; operates a company store while making unitized deductions from workers' "paychecks" for purchases, and pays the workers in cash without records of units worked or taxes withheld.

51. Id. at 3.

52. Id.

53. See id. concluding that:

illegal aliens have become an increasingly large source of farm labor in this country, and that the services of an FLC are often utilized to procure this clandestine workforce. Although the existing Act generally prohibits such activities by making it grounds for revoking or suspending the contractor's registration, such sanction in itself is ineffective since the majority of contractors have in the past ignored the Act's registration requirement.
Congress therefore amended the FLCRA. Penalties were stiffened for contractors who employed illegal aliens. Moreover, Congress stepped up enforcement by creating a cause of action for migrant workers who were deprived of their statutory rights. Coverage of the law was extended to persons who directly benefitted from migrant workers, in particular agricultural producers and packing sheds.

The law's substantive provisions were also strengthened. Payroll record-keeping duties were expanded to persons for whom contractors furnished migrant workers. Contractors were required to post accurate employment and housing information in a language understood by migrant workers. "Company stores" run by FLCs, scams that robbed workers of their wages, were also made illegal.

B. The Migrant and Seasonal Worker Protection Act of 1983

Congress repealed the FLCRA in December 1982 and replaced it with the MSPA. As it did when it amended the FLCRA in 1974, Congress believed that "many of the abuses which were the subject of the 1963 legislation continued unabated." In elaborating this view, Congress noted:

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55. See Amendments of 1974 § 13, amending FLCRA § 9, providing that any FLC who had not registered under the FLCRA was subject to a criminal penalty of up to a $10,000 fine or a prison sentence of up to 3 years, or both. 88 Stat. 1652, 1656.
56. See Amendments of 1974 § 14(a), creating a new FLCRA § 12 that provided any aggrieved person the right to file suit in an appropriate district court of the United States without regard to the amount in controversy, or to the citizenship of the parties. Federal courts were authorized to appoint an attorney for such person and award damages equal to the amount of actual damages, $500 for each violation, or other equitable relief. 88 Stat. 1652, 1657.
57. See Amendments of 1974 §2, still exempting "[a]ny farmer, processor, canner, ginner, packing shed operator, or nurseryman" provided that "he personally engages in any such activity for the purpose of supplying migrant worker's solely for his own operation." 88 Stat. at 1652-53. The law also clarified that "foremen and similar bona fide employees will not have to register as Farm Labor Contractors if it can be shown, for example, that they are full-time and permanent employees of an employer who utilizes a limited portion of their time for activities as defined in section 3(b) of the Act." Sen. REP. No. 93-1295, at 6 (1974) reprinted in 1974 U.S.C.C.A.N. 6441, 6447. However, in a critical provision that signaled Congress' intent to expand coverage of the FLCRA, the law stated enforcement should take into account "a full consideration of the economic realities of agricultural production and processing." Id.
58. See Amendments of 1974 §11(c), requiring FLCs to provide migrant workers and the users of migrant labor with specified payroll information. 88 Stat. at 1656.
59. See Amendments of 1974 § 10, 88 Stat. at 1655, amending FLCRA § 6(b). Recruitment of migrants as strikebreakers was a dishonest practice of some FLCs. For a case enforcing of this provision, see Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983).
60. See Amendments of 1974 § 11(a), amending FLCRA § 6 to require each FLC to pay promptly all money or things of value entrusted to him by a farm operator, and prohibiting the contractor from requiring workers to purchase goods exclusively from himself or another party. 88 Stat. 1652, 1655.
62. H.R. Rep. No. 97-885, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4548 [hereinafter, the House Report]. In reaching this conclusion, the House Committee on Education and Labor stated that it had "serious doubt on the ability of the [DOL] to adequately enforce the provisions of the FL-
It was hoped that through this extension of coverage the employment conditions of migrant and seasonal workers would be improved and abuses substantially reduced. Experience under the [Amendments of 1974], however, has been mixed. While agricultural workers have benefitted from its broader coverage provisions, the Act has created uncertainty about the status of fixed situs employers which has led to the mandatory registration of many farmers as farm labor contractors.63

The new law reflected two competing concerns: the FLCRA was so deficient in addressing problems in the contractor-migrant worker relationship that the law needed to be overhauled;64 but the Amendments of 1974 had created unintended difficulties for agricultural producers and employers.65 In enacting the MSPA, Congress explicitly recognized the compromising nature of its new law.66

Notwithstanding this balancing of interests, the amended law expanded the legal duties running from agricultural producers to migrant workers.

CRA.” Id. at 4. The Committee noted that the DOL had 58 investigators for FLCRA enforcement in 1979, but only 40 in 1981, resulting in decline in investigations, from 5708 to 3600. See id.

63. Id. at 2.

64. The House Report cited specific examples of abuses that continued under the FLCRA: Evidence received by the Committee confirms that many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States. The Committee has learned:
of the Haitian migrant who after a full day’s work was told that instead of being paid that he owed the camp money for a week’s rent, and since he was unable to pay was left penniless at the Trailways Bus station;
of the forty-seven teenage farm workers who were seriously injured when the flat-bed grain truck in which they were being transported overturned;
of migrant workers who were forced into debt, beaten and held as virtual slaves;
of a large agricultural association that recruited Puerto Rican farm workers for 275 growers without informing them that they were recruited to act as strikebreakers;
how a full-time employee of a corporation, who had formerly operated as an independent crewleader, recruited young Puerto Ricans to harvest asparagus with promises of good wages, food and housing while the migrants found only cramped, dirty and unsanitary living quarters and below minimum wages;
how a vice president of a major canning company admitted that he had changed many of the workers’ daily pay records kept by the company timekeepers . . . to reduce workers’ hours so that the company would not have to pay the minimum wage;
of excessive and automatic pay deductions for food, housing and electricity, which was only turned on when the workers were in the field, as well as exorbitant transportation costs which often left workers owing the company or crewleader money. Id. at 2-3.

65. Examples of employer hardships under the FLCRA included a personnel director in a large food processing plant who was required to file fingerprints with the DOL because part of his salary went toward his occasional work in processing paperwork for in-plant, migrant workers; a small farmer who was found to have violated the registration requirements under the FLCRA, thereby subjecting him to its enhanced fines and criminal sanctions because he arranged through an FLC to employ a few migrant workers (he argued unsuccessfully that he was not an FLC because he did not directly recruit these workers); and another farmer who was found to have violated the FLCRA by transporting workers on his own without prior DOL authorization after an FLC’s bus broke down and stranded migrant workers. See id. at 4.

66. The House Report stated that “H.R. 7102 is a consensus bill—a result reached only after extensive negotiation between representatives of the agricultural community, organized labor, migrant groups, the United States Department of Labor and the committees of jurisdiction in both the U.S. House of Representatives and the U. S. Senate.” Id. at 1.
This was partly accomplished by broadening the definition of an agricultural employer. More significantly, however, Congress adopted a joint employment doctrine with the intent of greatly increasing a producer’s responsibility for the actions of contractors who were engaged to employ migrant workers. To underscore the importance of adopting this doctrine for the MSPA, the Report by the House Committee on Education and Labor stated that “it is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties.”

Congress foresaw two specific instances for applying the joint-employment rule. First, it noted that the joint-employment rule “will be particularly acute when a defendant-employer association asserts that the worker in question was not an employee but an independent contractor or in the alternative that such worker was solely an employee of an independent contractor/crew leader.” In these instances, according to the House Committee, courts were to adopt the broad approach taken in Rutherford Food Corp. v. McComb, Real v. Driscoll, Mednick v. Albert Enterprises, and Usery v. Pilgrim Equipment Co., Inc.

67. MSPA §§ 3(1), (2), 29 U.S.C. §§ 1802(1), (2) define “agricultural association” and “agricultural employer,” respectively, as “any nonprofit cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable state law” and “any person who owns or operates a farm, ranch, processing establishment, cannery, packing shed or nursery or produces or conditions seed.”

68. The House Committee on Education and Labor explained that its use of the term “employ” in MSPA § 3(5), 29 U.S.C. § 1802(5) was meant to correspond to the same definition in section 3(g) of the Fair Labor Standards Act, 29 U.S.C. § 203(g) (1983). See H.R. Rep. No. 97-885, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4552. The Committee noted that its “use of this term was deliberate and done with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute.”

69. Id.

70. Id.

71. 331 U.S. 722, 730 (1947), finding that:
   (1) The workers did a specialty job on a production line. (2) The contractual terms did not vary in any material way as one worker succeeded another. (3) The premises and equipment were those of the proprietor. (4) The workers had no ‘business organization’ that could offer their services to others. (5) The proprietor’s manager kept close watch over the workers’ activities. (6) The workers could profit from ‘efficiency,’ but it was the efficiency of the pieceworker, not that of an ‘enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.’

72. 603 F.2d 748, 754 (1979), noting the factors for determining the existence of a joint-employment relationship include:
   (1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer’s business.

73. 508 F.2d 297, 299 (5th Cir. 1975), stating: “[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service (citation omitted).”

74. 527 F.2d 1308, 1311 (5th Cir. 1976), cert. denied, 429 U.S. 826 (1976), stating that the relationship is determined by reference to “the degree of control, opportunities for profit or loss, investment
In the House Committee’s view, the MSPA might also apply to an "agricultural employer or association who asserts that the agricultural workers in question are the sole employees of an independent contractor/crewleader or where there exists other various working relationships, including the sharing of such workers between several agricultural employers or agricultural associations." In these cases, where an FLC is found to be an independent contractor, the House Committee believed that such a finding should "not as a matter of law negate the possibility that an agricultural employer or association . . . be a joint employer of the harvest workers and jointly responsible for the contractor’s employees." The House Committee stated that the analysis in Hodgson v. Griffin and Brand of McAllen should be controlling.

In a particularly emphatic admonition, the Committee stated its “intent . . . that any attempt to evade the responsibilities imposed by this act through spurious agreements . . . be rendered meaningless; [and] to make clear that it is the economic reality, not contractual labels nor isolated factors which is to determine employment relationships.”

The main change provided by the MSPA, therefore, was to expand and explicate the joint-employment standard. Outside of those changes, the law essentially restated the main substantive portions of the FLCRA, with minor modifications.

76. Id.
78. See H.R. REP. No. 97-885, at 7.
79. Id. citing Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979). The Real court reversed the dismissal of a lawsuit involving a large strawberry grower who used FLCs to engage field workers. Even though the FLCs employed the field workers, that fact did not negate the possibility that the grower was a joint employer:

Although DSA exercises little direct supervision over the appellants’ work, it apparently does determine the form of the working relationship between the appellants and Driscoll. In addition, as already noted, the Agreement reserves to DSA the power to reject Driscoll’s choices for “Sub-Licensee.” DSA possesses the power under the Agreement to determine the quantity and variety of the strawberry plants grown by the appellants . . . . Inferences drawn from the record suggest that DSA effectively, though indirectly, controls certain important decisions in growing the strawberries, including the spacing of the plants, when and how much fertilizer is to be applied, and the timing and type of spraying for insects . . . . Particularly significantly, it appears that DSA may ultimately determine the amount the appellants are paid for their labor. Real, 603 F.2d at 756.

80. For example, the MSPA requires FLCs to post accurate, job-related information in a language that workers understood, see 29 U.S.C. § 1821(b), (g) (1994), and requires that employers “pay the wages owed [a] worker when due.” 29 U.S.C. § 1822(a) (1994). MSPA § 203(b) did not add to housing requirements under FLCRA, but required that housing for migrant workers be certified as in compliance with federal, state and local laws before occupancy occurs. See 29 U.S.C. § 1823(b) (1994). MSPA § 401 strengthened the Secretary of Labor’s authority to promulgate rules requiring FLCs to carry insurance and provide safe transportation for migrant workers. See 29 U.S.C. § 1841 (1994).
It is also important to note that other federal and state laws supplement the MSPA. The Fair Labor Standards Act’s (the FLSA) broad definition of an employer is used in conjunction with defining an employer under the MSPA.81 Also, courts occasionally hold that an FLC and her migrant workers are a producer’s “employees” under the FLSA, and find that the producer failed to pay minimum wages.82

Some states also regulate the employment of migrant farm workers. Although this domain is not explored in this article, some representative illustrations are offered. Some states, for example, separately require FLCs to register and be certified.83 Other state regulations pertain to housing for migrant workers.84

III.
THE DEPARTMENT OF LABOR’S JOINT EMPLOYMENT RULE

A. The DOL’s Justifications for the Rule

The DOL offered four justifications for its broadening of the MSPA joint-employer standard. First, the agency believed that it needed “to clarify and provide more accurate and complete information to the regulated community,” thereby making the MSPA regulations more “user-friendly.”85 To that end, the agency pointed to refinements in the way the Rule uses payroll preparation as one way to determine the existence of a joint-employment relationship.86 More fundamentally, the DOL perceived a need to clarify when an agricultural operator or producer, through an FLC, controls a migrant worker’s employment. For example, it stated that “where the agricultural employer/association retains the right to direct details of the work, this fact is indicative of control and therefore relevant to the joint

83. See, e.g., Florida Farm Labor Registration Law, FLA. STAT. ANN. §§ 450.27-450.38 (West 1997). The law prohibits an FLC or “crew leader” from operating until a certificate of registration has been issued to him or her. See § 450.30(1). The law prohibits transfer or assignment of the certificate, requires annual renewal, and subjects FLCs to education programs and a written examination. See §§ 450.30(3)-(5). The Florida exam must be retaken if an FLC is penalized under the law. See § 450.30(6).
84. See, e.g., Illinois’s Migrant Labor Camp Law, 210 ILL. COMP. STAT. ANN. 110/1-17 (West 1993). The law requires a license to operate migrant worker housing for 10 or more migrant workers, or 4 or more migrant workers and their family members. Licenses must be renewed annually. See §§ 110/2-3. Violations of the law are a Class A misdemeanor. See 110/14.
86. See id. at 11,736, stating:
[The Department agrees that] some clarification in the regulatory language would be helpful in order to convey that the proper consideration is not who “retains” the payroll records but rather who “prepares or makes” the payroll records. The obligation to “make” payroll records is clearly an employer function under MSPA... and is appropriate to consider in the joint employer analysis. The Final Rule provides this clarification.
employment analysis." The DOL also provided highly specific guidance concerning what effect a producer's specification of field-work performance standards has on her joint-employer status.

Second, since the FLSA and the MSPA have such similar definitions of a joint employer, the DOL believed that this standard needed redefinition to provide more congruent treatment of these laws. The agency expressed concern that identification of factors to determine the existence of joint-employment relationship between FLCs and farm operators "appears to be subject to some misunderstanding in the regulated community and the courts . . . ." The Department noted that courts have expansively construed joint employment in response to Congress' desire that the FLSA serve a broad remedial purpose. The proper "test of an employment relationship," according to DOL, is "economic dependence," which requires an examination of the relationships among the employee(s) and the putative employer(s) to determine upon whom the employee is economically dependent." To accomplish this, a test must examine the "economic reality" of all the circumstances and not [just] isolated factors or contractual labels. The agency noted approvingly that "courts have consistently applied a multi-factor analysis as a means of gauging whether the worker is economically dependent on the putative employer . . . ." In a proper analysis, "no single factor is determinative." Third, the DOL believed that some courts had created confusion in applying the joint employment doctrine and that their misapplication of this principle required clarification. In particular, it believed that some courts were simply keeping a factor scorecard without looking at the economic interdependency of agricultural operators and migrant workers.

87. Id. at 11,739.
88. See id. at 11,740, stating:
[T]he greater a grower's involvement in the assurance and verification that the FLC is meeting or will meet the contract's ultimate performance requirements, the greater the likelihood that the grower would demonstrate sufficient indirect control to indicate an employment relationship with the FLC's crewmembers. Where the grower not only specifies in the contract the size or ripeness of the produce to be harvested, but also appears in the field to check on the details of the work and communicates to the FLC any deficiencies observed, the circumstances must be closely examined to determine if the grower is demonstrating sufficient indirect control of the workers to indicate there may be an employment relationship with them.
89. See id. at 11,745.
90. See id. at 11,743.
91. See id.
92. Id.
93. Id. at 11,746.
94. Id.
95. See id. at 11,742-43.
96. See, e.g., the statement that: [s]ome recent court decisions—such as Aimable—have applied the current regulation as a checklist, or as a rigid formula in which factors simply are entered in two columns with little analysis beyond a comparison of the totals at the bottom of the columns "for" and "against" joint employment. The most recent case to consider the joint employment in agriculture issue has instructed that this analytical method is not what was intended by the courts in the seminal
Finally, the DOL stated that its enforcement experience led it to believe that the MSPA is not serving the broad remedial purpose that Congress intended. The agency pointed to studies that show that the use of FLCs is increasing and that FLCs are undesirable employers. The broad objective underlying the Rule, therefore, is to make operators and producers responsible and accountable for the migrant workers who are employed in their enterprises.

B. The DOL's Joint Employment Rule

The Rule has two elements. The first involves the status of an FLC who is a producer's (or association's) employee. The Rule provides that "the agricultural workers in the [FLC's] crew who perform work for the agricultural employer/association are deemed to be employees of the agricultural employer/association and an inquiry into joint employment is not necessary or appropriate." The second element of the Rule pertains to a more common situation: an FLC who provides services to more than one agricultural producer. This revision provides new guidance to determine whether an FLC is an independent contractor or the producer's joint employer. The DOL, in addition to identifying earlier court decisions that properly analyzed this issue, added to this list of exemplars. The agency added these decisions or by Congress in its express adoption of the FLSA's broad concepts of "employ" and joint employment. The proposed rule is intended to assist in focusing on and applying the multifactor analysis which is required.

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97. See id.
98. See id. 11,743 n.38, citing Office of the Assistant Secretary for Policy, U.S. Farmworkers in the Post-IRCA Period: Based on Data from the National Agricultural Workers Survey, at 16 (March, 1993).
100. See 62 Fed. Reg. at 11,743. The DOL concludes that "it is the Department's belief that the proposed regulation will enable more agricultural employers/associations to understand and fulfill their obligations if, as the American Farm Bureau Federation's Grower Handbook says, they will 'accept that the way you want your operation to work does not allow you to avoid being a joint employer.'" 62 Fed. Reg. at 11,743.
102. See id.
sions because they examined the "economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or [FLC], as appropriate."\textsuperscript{105}

The Rule directs courts to make "[t]his determination . . . based upon an evaluation of all of the circumstances . . . "\textsuperscript{106} which include:

(i) The nature and degree of the putative employer’s control as to the manner in which the work is performed;
(ii) The putative employee’s opportunity for profit or loss depending upon his/her managerial skill;
(iii) The putative employee’s investment in equipment or materials required for the task, or the putative employee’s employment of other workers;
(iv) Whether the services rendered by the putative employee require special skill;
(v) The degree of permanency and duration of the working relationship;
(vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer’s business.\textsuperscript{107}

The analysis of the migrant worker’s employment status is not over at this point, because the Rule establishes an additional test to determine a migrant worker’s joint employment status vis-a-vis an FLC who employs her and an agricultural producer who engages the contractor. Even if the worker’s contractor is found to be an independent contractor, “it still must be determined whether or not the employees of the farm labor contractor are also jointly employed by the agricultural employer/association.”\textsuperscript{108}

The Rule states this general test for making a judgment in a dual-employer case: "If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist."\textsuperscript{109} However, "[w]hen the putative employers share responsibility for activities set out in the following factors or in other relevant facts, this is an indication that the putative employers are not completely disassociated with respect to the employment and that the agricultural worker may be economically dependent on both persons."\textsuperscript{110} The “ultimate question” that courts must decide hinges on “the economic reality—whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee.”\textsuperscript{111}

To guide courts in examining the economic realities of various employment relationships, the Rule sets forth additional guidelines that differ from the previous enumeration that pertain to whether an FLC is an in-

\textsuperscript{105} See 29 C.F.R. § 500.20(b)(4)(i) (1997), citing Lauritzen, 835 F.2d at 1538; Beliz, 765 F.2d at 1329; Castillo, 704 F.2d at 192; and Real, 603 F.2d at 756.
\textsuperscript{106} 29 C.F.R. § 500.20(h)(4).
\textsuperscript{107} Id.
\textsuperscript{108} 29 C.F.R. § 500.20(b)(5)(i) (1997).
\textsuperscript{109} 29 C.F.R. § 500.20(b)(5) (1997).
\textsuperscript{110} Id.
\textsuperscript{111} See 29 C.F.R. § 500.20(b)(5)(iii) (1997).
dependent contractor. This second set of guidelines applies where the FLC is an independent contractor, but nevertheless her migrant workers may be jointly employed by an agricultural producer. These additional elements pertain to (1) the producer’s supervision of a worker,112 (2) the producer’s ability to hire or fire this worker,113 (3) the degree of permanency between worker and producer,114 (4) the worker’s skill level,115 (5) the extent to which the worker’s activities are integrated into the producer’s business,116 (6) the producer’s control of the property where the worker’s activities occur,117 and (7) whether the producer engages in employment-related activities, such as providing workers tools, bathroom facilities, payroll statements, and so forth.118

C. Participation by Affected Groups in the DOL’s Rulemaking Process

The DOL published a Notice of Proposed Rulemaking in the Federal Register on March 29, 1996 and provided for a public comment period until June 12, 1996.119 Ninety-one persons or organizations responded to the Notice of Proposed Rulemaking.120 Supporters121 believed that the pro-

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112. See 29 C.F.R. § 500.20(h)(5)(iv)(A) (1997), stating that this factor involves “[w]hether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect), taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties.”

113. See 29 C.F.R. § 500.20(h)(5)(iv)(B) (1997), stating that this factor involves “[w]hether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s).”

114. See 29 C.F.R. § 500.20(h)(5)(iv)(C) (1997), stating that this factor involves “[t]he degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue.”

115. See 29 C.F.R. § 500.20(h)(5)(iv)(D) (1997), stating that this factor involves “[t]he extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training.”

116. See 29 C.F.R. § 500.20(h)(5)(iv)(E) (1997), stating that this factor involves “[w]hether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association.”

117. See 29 C.F.R. § 500.20(h)(5)(iv)(F) (1997), stating that this factor involves “[w]hether the work is performed on the agricultural employer/association’s premises, rather than on premises owned or controlled by another business entity.”

118. See 29 C.F.R. § 500.20(h)(5)(iv)(G) (1997), stating that this factor involves “[w]hether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers’ compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).”


120. See 62 Fed. Reg. 11,734, 11,734 (1997) (63 comments were supportive of the proposed rule and 28 were opposed).

121. The two most influential supporters, as reflected in the Notice of Final Rulemaking, were the Migrant Farm Justice Project [hereinafter MFJP] and the American Federation of Labor-Congress of Industrial Organizations [hereinafter AFL-CIO]. Other groups submitting favorable comments included
posed rule would remove confusion which has developed under the current regulation,\textsuperscript{122} account for more of the factors that comprise control over a laborer's work,\textsuperscript{123} implement congressional intent in enacting the MSPA,\textsuperscript{124} and reflect the economic reality that the end-user of farm labor usually sets the parameters of farm field work and therefore should be treated as a joint employer with an FLC.\textsuperscript{125}

A broad cross-section of agricultural growers and trade associations opposed the Rule.\textsuperscript{126} While support for the Rule appeared mild, opposition was strident. The strongest objection was that the Rule would hold producers strictly liable for the conduct of FLCs.\textsuperscript{127} The DOL responded to this concern by adding a provision stating that the Rule had "been changed . . . to clarify that this regulation is not intended to create a strict liability or per se standard of joint employment liability."\textsuperscript{128}

\textsuperscript{122} The MFJP asserted "the proposed rule is necessary to clarify the current regulation to more fully and completely conform to case law cited in the MSPA legislative history and the judicial rulings construing the Act." \textit{Id.} at 11,744.

\textsuperscript{123} The MFJP also contended that "the current regulation, particularly the listed factors, has excluded other relevant factors, thereby misleading Wage and Hour compliance investigators and the affected community about the obligations under the Act." \textit{Id.}

\textsuperscript{124} The AFL-CIO maintained that "the proposed rule reflects fairly the factors which Congress intended to aid in evaluating whether workers are individual contractors or employees." \textit{Id.} at 11,743. The MFJP cited the MSPA's legislative history, noting that "Congress found that the FLCRA had 'failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers' and that 'a completely new approach must be advanced.'" \textit{Id.}

\textsuperscript{125} The AFL-CIO asserted that "a labor intermediary may make all the implementing decisions within those broad parameters but the person establishing those parameters retains sufficient control to be deemed a joint employer." \textit{Id.} at 11,744. To illustrate, they noted that "the putative employer retains the right to dictate the 'place, pace and timing' of the harvest. A grower places his/her interests in the place, pace and timing of the harvest to maximize profit given market price.

\textsuperscript{126} These included the American Farm Bureau Federation, California Grape and Tree Fruit League, Florida Fruit and Vegetable Association, Midwest Food Producers Association, National Cotton Ginters' Association, New England Apple Council, and the United States Sugar Corporation. The National Council of Agricultural Employers [hereinafter NCAE] provided a coordinated response for agricultural employers. \textit{Id.} at 11,734.

\textsuperscript{127} The most cogent argument was put forth by the NCAE. Its view, summarized in the preamble to the Rule, was that

\textbf{\textit{[t]he proposed regulation effectively establishes a strict liability test for joint employment. The motive ascribed to the Department is that the Department is seeking to discourage agricultural employers/associations from using FLCs, thereby driving FLCs from the labor market, disrupting the agricultural labor supply, and empowering unions to substitute for FLCs in providing labor to employers. Further, the NCAE asserts that the alleged strict liability standard would allow the Department and farmworker legal services lawyers to reach into the deep pockets of agricultural employers/associations when violations occur, without the need to produce adequate evidence bearing on the joint employment determination. Finally, NCAE asserts that creation of the alleged strict liability through a regulatory change would be an illegitimate attempt to establish a legal standard which Congress and the courts have been unwilling to adopt.}}\textit{Id.} at 11,737.

\textsuperscript{128} 29 C.F.R. § 500.20(h)(5)(iv) (1997).
Some opponents also believed that the Rule was a subterfuge to facilitate union organizing of farm workers by outlawing the use of FLCs. The paper and pulp industries argued, for example, that the Rule's very broad joint employment provisions would disrupt the "the typical (contracting) arrangement in the reforestation industry..." The Rule itself was "illegitimate" because it will "establish a legal standard which Congress and the courts have been unwilling to adopt." By characterizing the Rule as an "unlawful strict liability joint employment standard for agricultural employers or associations who use the services of farm labor contractors," the employers' umbrella organization (the National Council of Agricultural Employers) suggested that it would sue to block its enforcement. The Rule was also derided because it would, according to the opposition, unjustly enrich plaintiff lawyers who represent migrant workers.

Although the number of public comments is relatively small, and the Rule involves a technical issue, Internet communication about the Rule reveals the importance of this matter. The Chief Economist for the U.S. Department of Agriculture has created a specific webpage where the Rule is reproduced in its entirety. The California Farm Bureau Federation website informs members and the public that "[a]gricultural employers are following closely a recent ruling regarding joint liability for employee actions. For years, labor unions and public interest groups have been pushing to make farmers jointly liable with the farm labor contractor for work rule violations..." Despite such vocal opposition and such valid concerns, the DOL did not craft the Rule to accommodate the perceived problems. It retained a strict liability standard while maintaining that it was no doing so, apparently because it believed the federal courts would not enforce the MSPA properly without it. However, as the next Part of this article shows, that is simply not so.

129. The NCAE argued that the DOL's motive in creating the Rule was "to discourage agricultural employers/associations from using FLCs, thereby driving FLCs from the labor market, disrupting the agricultural labor supply, and empowering unions to substitute for FLCs in providing labor to employers." 62 Fed. Reg. 11,734, 11,737 (1997).
130. Id.
131. Id.
132. Id.
133. The NCAE asserted that the "strict liability standard would allow the Department and farmworker legal services lawyers to reach into the deep pockets of agricultural employers/associations when violations occur, without the need to produce adequate evidence bearing on the joint employment determination." Id.

This contention is not supported, however, by cases reviewed for this article where plaintiff-farm workers prevailed. No cases, for example, awarded punitive damages to plaintiffs. Moreover, the NCAE did not elaborate on its suggestion that these cases unfairly burdened producers with litigation costs.

An empirical analysis of joint-employment adjudication under the MSPA suggests that the Rule was unnecessary. Prior to the DOL’s release of the Rule, the federal courts had applied the MSPA joint-employer standard in accordance with congressional intent and found producers to be joint employers in the vast majority of cases. If a court found that a producer was not a joint employer, it did so only after an exhaustive analysis of the particular factual situation.

A. Case Selection Methodology

In order to be included in the empirical study, a case had to involve issues that the Rule was designed to address. Primarily, they had to involve litigation under the MSPA, rather than the FLCRA.136 This constraint was necessary because a key justification for the Rule was that courts had misinterpreted congressional intent under the MSPA.137

Secondly, a case had to involve the kind of recruiting relationship between migrant worker, FLC and agricultural producer that Congress believed was especially ripe for abuse.138 To illustrate this distinction, some cases involved a family farm where one family member recruited migrant workers particularly and exclusively for her farm.139 Under the MSPA, this person is an FLC and must register with the DOL unless she qualifies for a small business exemption.140 Although this FLC is capable, in theory, of exploiting workers, the fact that she is not in the business of recruiting,

136. The MSPA was adopted in January, 1983 and became effective April 14 of that year. The MSPA repealed and replaced FLCRA. See supra Part II.B. Since the MSPA was intended to create a break with the FLCRA’s ineffective enforcement regime, see supra notes 62-65 and accompanying text, FLCRA cases involving a joint-employment relationship are excluded from the scope of this article’s research. See, e.g., Donovan v. Sabine Irrigation Co., Inc., 695 F.2d 190 (5th Cir. 1983).


139. See, e.g., Witvoet v. Calderon, 999 F.2d 1101, 1102-06 (7th Cir. 1993) (finding that the district court erred in holding that family farmers were not entitled to family farm exemption under the MSPA); and Martinez v. Shinn, No. C-89-813-JBH, 1991 WL 84473, at *16 (E.D.Wash. May 20,1991) (finding that a family member is an FLC and that he and his family farm are joint employers).

140. See, e.g., IUAIW v. Ruiz, No. B-83-270, 1991 WL 315133 (S.D. Tex., Jan. 22, 1991). The case did not involve litigation of a joint employment issue. Instead, Robert Ruiz maintained that he qualified as an exempt employer under the MSPA because his employment of migrant workers did not exceed 500 man-days. Id. at *1. The court rejected this argument. Id. at *5. Besides lacking a joint employment issue, the facts arose before MSPA was enacted. Thus, this case failed to meet two criteria for inclusion in this database.
transporting and supplying migrant workers for other employers lessens the potential for such exploitation.\textsuperscript{141}

The third constraint required litigation of the joint employer relationship between an agricultural producer or operator and an FLC.\textsuperscript{142} This was necessary because the Rule pertains specifically to court adjudication of this issue.\textsuperscript{143} Thus, MSPA cases which did not involve litigation of this issue are not included in the sample.\textsuperscript{144}

\section*{B. Empirical Results}

Table 1.A. below lists all the cases that met the criteria. All of the cases were federal court decisions that adjudicated the joint employer relationship between producers and FLCs. All of the cases also involved MSPA claims, and some involved ancillary claims.

In defining the joint-employer standard, Congress implicitly wanted this doctrine to be applied to most of these relationships.\textsuperscript{145} Research in Table 1.A. shows that the courts have carried out congressional intent by finding a joint employer relationship in eleven of the sixteen cases in the sample. Congress believed that some situations would arise in which a finding of joint employers would not be warranted.\textsuperscript{146} The fact that courts ruled that a producer was not a joint employer with an FLC in five out of sixteen cases is consistent with this aspect of congressional intent.

When it strengthened the joint-employer standard in 1983, Congress wanted to enhance legal protection for migrant farm workers.\textsuperscript{147} In empirical terms, Congress probably believed that producers should be held liable with FLCs in a substantial percentage of MSPA cases.\textsuperscript{148}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{141} The justification for this research decision is underscored by the legislative history of the MSPA and its forerunner. Proponents for the FLCRA correctly noted that abuse of migrants is especially ripe when those workers are cut off from their communities and native culture and are transported from one location to the next, without any meaningful way to communicate nor any choice as to where they will temporarily reside. \textit{See supra} notes 14 and 15.
\item \textsuperscript{142} This requirement reflects the DOL’s rationale for the Rule:
Since the current regulation was promulgated in 1983, it has become clear to the Department that the regulation does not offer complete guidance on joint employment and may lead to misunderstanding and confusion. The regulation has been misconstrued in as much as the five factors delineated in \([29 \text{C.F.R.}]\ 500.20(h)(4)(ii)(A)-(E)\) have sometimes been viewed as an exhaustive list of factors that the Department believes are probative of joint employment.
\item \textsuperscript{143} 62 Fed. Reg. 11,734, 11,742-43 (1997). Thus, this criterion was tests the DOL’s contention that courts have misconstrued MSPA regulations in joint-employment cases.
\item \textsuperscript{144} See, e.g., \textit{Salinas v. Rodriguez}, 963 F.2d 791 (5th Cir. 1992).
\item \textsuperscript{145} \textit{See supra} notes 67-79 and accompanying text.
\item \textsuperscript{146} \textit{See, e.g., supra} note 65 and accompanying text.
\item \textsuperscript{147} \textit{See H. REP. NO.} 97-885, at 4 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 4547, 4550, concluding that “the record before the committee casts serious doubt on the ability of the Department of Labor to adequately enforce the provisions of FLCRA.”
\item \textsuperscript{148} The Committee’s new enforcement goal on behalf of migrant farm workers implied:
\end{itemize}
\end{footnotesize}
Table 1.B. shows liability outcomes that reflect whether courts are ruling in a way that is consistent with this general intent. Ten decisions found a producer actually or potentially liable for MSPA violations. Six decisions ruled that producers were not liable, or ruled on the joint employment issue in such a way as to moot the liability issue.

Table 2 shows that a vast majority of the courts (fourteen out of sixteen) also included the "economic reality" test as a part of their analysis. Even then, one of the two courts that did not apply the "economic reality" test nonetheless found the producer was a joint employer with an FLC.

Table 3.A. summarizes the ten cases that appear to be litigation victories for migrant farm workers. In all cases, producers were held to be joint employers. In five cases, Antenor v. D&S Farms, Antuez v. G & C Farms, Barrientos v. Taylor, Haywood v. Barnes, and Torres-Lopez v. May, courts ruled on the joint employment issue and remanded for or proceeded to a trial on the merits. In the remaining cases, Aviles v. Kunkel, Leach v. Johnson, Maldonado v. Lucca, Monville v. Williams, and Saintida v. Tyre, producers were found to be liable for MSPA and ancillary FLSA or state law claims.

Table 3.B. summarizes six cases that are best characterized as litigation victories for agricultural producers. In one case, Alviso-Medrano v. Harloff, the court ruled that a farm was a joint employer with an FLC, but also ruled that neither was liable under the transportation section of MSPA because migrant workers had formed their own carpool. In the remaining five cases (Aimable v. Long & Scott Farms, Charles v. Burton, Gonzalez v. Puente, Ricketts v. Vann, and Howard v. The number of investigators has fallen from 58 in 1979 to 40 in 1982 and the number of investigations has fallen from 5,708 in 1979 to a projected 3,600 in 1982. Nothing that the committee has learned indicates that violations of the act or the exploitation of workers has fallen to the same extent. The Department of Labor indicated in its testimony that it will be able to more efficiently enforce the provisions of this act because the duties and responsibilities are clear. The Department testified that this act will allow it to concentrate its enforcement personnel on true abuses... The Committee encourages the Department to take the opportunity provided by this new act and redouble its efforts in enforcing the protection that agricultural workers so desperately need.

Id.

149. 88 F.3d 925, 936-38 (11th Cir. 1996).
153. 111 F.3d 633, 639-44 (9th Cir. 1997).
159. 868 F. Supp. 1367, 1374-75 (M.D. Fla. 1994).
producers won because in each case the court ruled that the producer was not a joint employer with the FLC.

Table 1.A. provides data that test the DOL’s assertion that courts have failed to examine more than the five joint employment factors that were expressly indicated in the MSPA. In only three cases, Gonzalez v. Puente, Monville v. Williams, and Saintida v. Tyre, did the courts apply the minimum number of factors or fewer. And in two of those cases, Monville and Saintida, the courts nevertheless found a joint-employment relationship. All of the other courts used more than the statutory minimum.

163. 32 F.3d 71, 76-77 (4th Cir. 1994).
164. 852 F.2d 101, 104-05 (4th Cir. 1988).
Table 1
JOINT EMPLOYER CASES DECIDED UNDER MSPA

A. COURT RULING ON JOINT EMPLOYER CASES

<table>
<thead>
<tr>
<th>Agricultural Producer Treated As Joint Employer</th>
<th>Agricultural Producer Not Treated As Joint Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Torres-Lopez v. May, 111 F.3d 633, 639-44 (9th Cir. 1997)</td>
<td></td>
</tr>
</tbody>
</table>

B. COURT RULING ON JOINT EMPLOYER CASES

<table>
<thead>
<tr>
<th>Actual or Potential MSPA Liability</th>
<th>No Employer Liability Under MSPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>FLC</td>
<td>Agricultural Producer</td>
</tr>
<tr>
<td>Antenor</td>
<td>Antenor</td>
</tr>
<tr>
<td>Antuez</td>
<td>Antuez</td>
</tr>
<tr>
<td>Aviles</td>
<td>Aviles</td>
</tr>
<tr>
<td>Leach</td>
<td>Barrrientos</td>
</tr>
<tr>
<td>Maldonado</td>
<td>Haywood</td>
</tr>
<tr>
<td>Monville</td>
<td>Leach</td>
</tr>
<tr>
<td></td>
<td>Maldonado</td>
</tr>
<tr>
<td></td>
<td>Monville</td>
</tr>
</tbody>
</table>

C. SHORT OR LONG FACTOR TEST APPLIED BY COURT

<table>
<thead>
<tr>
<th>Liability Under MSPA</th>
<th>No Liability Under MSPA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SHORT TEST</strong></td>
<td><strong>LONG TEST</strong></td>
</tr>
<tr>
<td>Monville (5 Factors)</td>
<td>Antenor (8 Factors)</td>
</tr>
<tr>
<td>Sainitida (No Factors)</td>
<td>Antuez (9 Factors)</td>
</tr>
<tr>
<td></td>
<td>Aviles (7 Factors)</td>
</tr>
<tr>
<td></td>
<td>Barrrientos (9 Factors)</td>
</tr>
<tr>
<td></td>
<td>Haywood (9 Factors)</td>
</tr>
<tr>
<td></td>
<td>Leach (8 Factors)</td>
</tr>
<tr>
<td></td>
<td>Maldonado (7 Factors)</td>
</tr>
<tr>
<td>Gonzalez (5 Factors)</td>
<td>Aimable (6 Factors)</td>
</tr>
<tr>
<td></td>
<td>Alviso (7 Factors)</td>
</tr>
<tr>
<td></td>
<td>Charles (7 Factors)</td>
</tr>
<tr>
<td></td>
<td>Howard (9 Factors)</td>
</tr>
<tr>
<td></td>
<td>Ricketts (9 Factors)</td>
</tr>
</tbody>
</table>
### Table 2

**USE OF THE “ECONOMIC REALITIES” TEST**

<table>
<thead>
<tr>
<th>Decisions Using the “Economic Realities” Test</th>
<th>Decisions Not Using the “Economic Realities” Test</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ricketts v. Vann</strong>, 32 F.3d 71, 74 (4th Cir. 1994)</td>
<td></td>
</tr>
<tr>
<td><strong>Torres-Lopez v. May</strong>, 111 F.3d 633, 639 (9th Cir. 1997)</td>
<td></td>
</tr>
</tbody>
</table>
### Table 3

**Summary of Migrant Worker Claims and Court Outcomes Under the MSPA**

<table>
<thead>
<tr>
<th>Case</th>
<th>MSPA Claim</th>
<th>Ancillary Claim</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antez v. G&amp;C Farms</td>
<td>Workers allege failure to keep payroll records.</td>
<td>Workers allege failure to pay Social Security and New Mexico payroll taxes.</td>
<td>Farm is held as joint employer with FLC. Trial set to determine liability.</td>
</tr>
<tr>
<td>Aviles v. Kunkel</td>
<td>Workers allege failure to provide recruiting and housing disclosures.</td>
<td>Workers allege failure to pay FLSA minimum wages.</td>
<td>Farmers are held jointly liable for MSPA and FLSA violations.</td>
</tr>
<tr>
<td>Barrientos v. Taylor</td>
<td>Workers allege farm’s failure to check FLC’s certification and failure to post occupancy certificate.</td>
<td>Workers allege common law negligence arising out of tobacco wagon accident</td>
<td>Farm is held as joint employer with FLC. Trial set to determine liability.</td>
</tr>
<tr>
<td>Haywood v. Barnes</td>
<td>Workers allege failure to provide payroll records and housing disclosures.</td>
<td>None.</td>
<td>Farmers are held as joint employers with FLC. Trial set to determine liability.</td>
</tr>
<tr>
<td>Leach v. Johnson</td>
<td>Workers allege registration and record-keeping violations.</td>
<td>Workers allege failure to pay FLSA minimum wages.</td>
<td>Farm owner is held jointly liable with FLC for MSPA and FLSA violations.</td>
</tr>
<tr>
<td>Maldonado v. Lucca</td>
<td>Workers allege failure to register as FLC and failure to provide payroll.</td>
<td>Workers allege failure to pay FLSA and New Jersey minimum wages.</td>
<td>Farm is held as joint employer with FLC. Both are liable under MSPA, FLSA, and state law.</td>
</tr>
<tr>
<td>Monville v. Williams</td>
<td>Workers allege recordkeeping violations.</td>
<td>Workers allege failure to pay FLSA minimum wages.</td>
<td>Farm owner is held jointly liable with FLC for MSPA and FLSA violations.</td>
</tr>
<tr>
<td>Saintida v. Tyre</td>
<td>Workers allege registration, insurance, and payroll record violations.</td>
<td>Workers claim workers’ compensation arising out of car accident as they were transported to work.</td>
<td>Producer is jointly liable for MSPA, workers’ compensation, and FICA claims.</td>
</tr>
<tr>
<td>Torres-Lopez v. May</td>
<td>Workers allege failure to register as FLC, certify insurance, and other recordkeeping violations.</td>
<td>Workers allege failure to pay FLSA and Oregon minimum wages.</td>
<td>Farm is held as joint employer with FLC. Case remanded for further proceedings.</td>
</tr>
</tbody>
</table>
### B. Cases Won by Agricultural Producers and Operators

<table>
<thead>
<tr>
<th>Case</th>
<th>MSPA Claim</th>
<th>Ancillary Claim</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alviso-Medrano v. Harloff</td>
<td>Workers seek damages for van accident on way to work.</td>
<td>Workers seek damages for unpaid wages under FLSA.</td>
<td>Farm is joint employer with FLC, but is not liable under the MSPA since workers had carpooled on their own.</td>
</tr>
<tr>
<td>Antenor v. D&amp;S Farms</td>
<td>Workers allege failure to provide wage and hour payroll information.</td>
<td>Workers allege failure to pay Florida unemployment and federal Social Security payments.</td>
<td>Farm is held as joint employer with FLC. Case remanded for further proceedings.</td>
</tr>
<tr>
<td>Aimable v. Long &amp; Scott Farms</td>
<td>Workers allege unspecified MSPA violations.</td>
<td>Workers allege unspecified FLSA and payroll tax violations.</td>
<td>Farm is not a joint employer with FLC.</td>
</tr>
<tr>
<td>Charles v. Burton</td>
<td>Workers allege insurance, payroll, and transportation violations arising out of pickup truck accident that killed two migrant workers.</td>
<td>Workers allege unspecified FLSA violations.</td>
<td>Farm is not a joint employer with FLC.</td>
</tr>
<tr>
<td>Gonzalez v. Puente</td>
<td>Workers allege unspecified violations arising out of one day of picking cucumbers.</td>
<td>Workers allege unspecified FLSA damages.</td>
<td>Farm is not a joint employer with FLC.</td>
</tr>
<tr>
<td>Howard v. Malcolm</td>
<td>Workers allege recordkeeping and housing certification violations.</td>
<td>Workers allege failure to pay FUTA and FICA taxes.</td>
<td>Farm is not a joint employer with FLC.</td>
</tr>
<tr>
<td>Ricketts v. Vann</td>
<td>Worker injured from falling out of contractor's pickup truck alleges record-keeping and insurance requirements.</td>
<td>Worker alleges imputed negligence to farm owners.</td>
<td>Farm is not a joint employer with FLC.</td>
</tr>
</tbody>
</table>
V.

The Rule Is Based On Questionable Arguments and Erroneous Assumptions

The DOL did not undertake a systematic analysis of joint employment cases adjudicated by federal courts. Had it done so, it would have had more difficulty justifying the Rule. The case analysis presented above reveals several flaws in the Rule and the reasoning behind it.

A. The Rule Creates A Strict Liability Standard And Contradicts Congressional Intent

The Rule’s excessive reliance on the “economic reality” test for determining a joint-employment relationship is no test at all, but rather is a mechanistic approach for making agricultural employers strictly liable for the conduct of FLCs. This focus is unwarranted because (1) the MSPA and the FLCRA already directed courts to apply this analysis, (2) most courts have applied seven factors or more, and in doing so, have taken “economic realities” into account, (3) Congress did not intend that the “economic reality” test would displace consideration of factors that indicate a producer was not a joint employer of an FLC, and (4) agricultural employment relationships are highly varied, depending on the size of the operation, amount of work, the proximity of an owner to a production process, and the

168. Of particular interest is this passage in the Rule’s preamble: “some of the regulated community and some courts have taken the position that these are ‘the five regulatory factors,’ treating them as an exclusive or exhaustive list.” 62 Fed. Reg. 11,734, 11,743 (1997), citing Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir.), cert. denied, 513 U.S. 943 (1994). This assertion is plainly contradicted by the MSPA cases that are reported in Table 1.C., supra.

The DOL also misrepresented the Aimable court’s analysis. The Eleventh Circuit noted in that case: “To begin our analysis, we look first to the regulations adopted by the Secretary of Labor. In the definition of joint employment, § 500.20(b)(4)(ii) specifically states that the factors ‘to be used as guidance by the Secretary[] include, but are not limited to,’ the five regulatory factors.” 20 F.3d at 439. The court added: “Further, the fact that the regulation makes reference to cases that considered factors in addition to the five regulatory factors reinforces our view that additional factors may be considered.” Id.

The court proceeded to analyze the five expressly stated MSPA factors, and six additional factors ((1) investment in equipment and facilities, (2) opportunity for profit and loss, (3) permanency and exclusivity of employment, (4) degree of skill required to perform the job, (5) ownership of facilities where work occurred, and (6) performance of a specialty job integral to the business)). See id. at 443-44.

The DOL further misrepresented the analysis in Aimable by claiming the Eleventh Circuit had applied only the five regulatory factors. In fact, it was the district court that had used only these factors, and the Eleventh Circuit admonished it for doing so. In the end, the Eleventh Circuit rejected the farmworkers’ argument for applying 11 factors as overbroad, and rejected the producer’s argument for applying only the five regulatory factors. The court concluded that “neither position is accurate.” Id. at 439.

169. See supra notes 71-79 and accompanying text (discussing the analysis under the MSPA) and see Hodgson v. Griffin and Brand of McAllen, 471 F.2d 235, 237-38 (5th Cir. 1973) (applying the economic reality test under the FLCRA).

170. See supra Tables 1.C. and 2.

171. See supra notes 64-66 and accompanying text.
type of crop involved. Congress considered this heterogeneity important when it said:

[T]he agricultural economy contains many and varied employment relationships involving a mixture of employers, contractors and employees . . . [and] a single employee may have the necessary employment relationship with not only one employer but simultaneously . . . with an employer and an [FLC] or with several employers with or without . . . an [FLC]. The focus of each inquiry, therefore, must be on each employment relationship as it exists between the worker and the party asserted to be a joint employer. In the tests and criteria as set forth in this section it is expected that the special aspects of agricultural employment be kept in mind.172

The Rule ignores this admonition when it outlines the “economic reality” test: “If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.”173 It is well-nigh impossible to imagine an exchange between a producer and an FLC that would not benefit the producer and thus “associate” the producer and the FLC. The Rule is a mere contrivance for holding producers strictly liable for the misconduct of FLCs.

Aimable v. Long & Scott Farms174 illustrates how the new Rule will likely deflect courts from considering congressional intent. In that case, migrant workers sued for damages under MSPA and put forward the same legal arguments now embodied in the Rule. In considering whether or not to apply the “economic reality” test, the court of appeals found this approach “[f]acially . . . attractive” because existing DOL regulation “specifically states that our deliberations ‘are not limited to’ the five regulatory factors.”175 The court rejected that theory, however, stating: “It is telling that no other court has adopted each of appellants’ proposed factors in one case. The reason: not all factors are relevant in every case.”176

Another court came to the same conclusion:

Under that formulation of the test, an employment relationship would be defined on the basis of whether the plaintiff was ‘ultimately economically dependent upon’ the defendant . . . . If ‘ultimate economic dependence’ was the determinative circumstance, the test, and the factors outlined above, would have little meaning in that every employee of a farm labor contractor could be found ultimately dependent for their livelihood on the individual who has hired the contractor.177

173. 29 C.F.R. § 500.20(b)(4).
176. 20 F.3d at 444. The court also seemed concerned about proliferating the analytical factors to be considered in MSPA cases when it stated wryly: “If we were to agree with appellants, this case would displace Haywood (which had nine factors) as the case with the greatest number of factors.” Id. at n.13, citing Haywood v. Barnes, 109 F.R.D. 568 (E.D.N.C. 1996).
The facts of *Aimable* show why courts must be given some latitude in deciding how many—and which—MSPA factors apply to a joint-employment case. Two hundred-six migrant workers who harvested vegetable crops between 1985 and 1989 sued their FLC and the farm where they worked, claiming violations under the FLSA and the MSPA. John Miller, an FLC who had been engaged by the farm for twenty-five years to recruit and direct migrant laborers, hired these workers. Notwithstanding his long relationship with this producer, Miller had similar contracts with other farms; thus, Long & Scott accounted for less than half of his revenue. The farm and the FLC negotiated a flat rate for harvesting a quantity of crops, and Miller, in turn, paid workers on a piece-rate basis. The district court ruled that Long & Scott was not a joint employer under the FLSA or the MSPA, and therefore granted the farm’s motion to be dismissed from the suit.

The court of appeals noted that DOL regulations are meant to be used for analytical guidance, but that courts may consider additional factors to determine whether a joint-employment relationship exists. Although the court applied all the prescribed factors in this case, it rejected the producer’s argument that the court’s analysis should be limited to those factors.

The workers, on the other hand, argued for the court to apply factors that were not relevant. They noted that Long & Scott exercised ultimate control over their work (the first regulatory factor) because they determined which fields to plant and harvest and decided how many times to harvest a field. According to the workers, these decisions determined how much field work was to be performed. The court rejected this view, however, because the workers’ analysis did not consider “specific indicia of control (for example, direct employment decisions such as whom and how many employees to hire, whom to assign to specific tasks, and how to design the employees’ management structure).” Applying this more specific analy-

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178. *See Aimable*, 20 F.3d at 437.
179. *See id.*
180. *See id.*
181. *See id.*
183. *See Aimable v. Long & Scott Farms*, 20 F.3d 434, 440 (11th Cir.), *cert. denied*, 513 U.S. 943 (1994), citing 29 C.F.R. § 500.20(h)(4)(ii) (1992) (noting that “the definition of joint employment . . . specifically states that the factors ‘to be used as guidance by the Secretary . . . include, but are not limited to’ the five regulatory factors.”)
184. *See Aimable*, 20 F.3d at 440.
185. *See id.*, stating that “not all of appellants’ eleven factors should be given equal weight and, indeed, several of them are of no value insofar as they apply to factual circumstances not here present.” The court concluded, for example, that permanency and exclusivity of the employment relationship was not a factor (“this factor is irrelevant . . . [because] it . . . fails to demonstrate that Long & Scott was appellants’ joint employer”). *Id.* at 443.
186. *See id.* at 440.
187. *See id.*
188. *Id.*
sis, the court concluded that "Long & Scott did not directly control the number of workers hired to do the work; it did not demand that Miller hire (or fire) specific individuals; and, it did not select specific workers to do specific jobs."\textsuperscript{189}

In examining the degree to which Long & Scott supervised the work, the court determined that the farm's control of the work was "de minimis."\textsuperscript{190} While finding that Long & Scott employees regularly came out to the fields, the court noted that these employees only rarely provided any direction to workers.\textsuperscript{191} In finding that "infrequent assertions of minimal oversight by Long & Scott do not rise to the level of supervision necessary to satisfy this factor," the court compared this extent of control to cases in which farms were more directly in control of contractors and the supervision of field work.\textsuperscript{192}

The workers strongly emphasized the presence of a third factor, the producer's putative control over pay.\textsuperscript{193} The court was unpersuaded by this theory, finding this "leap of logic . . . unfounded."\textsuperscript{194} As with its analysis of the control factor, the court looked at more specific transactions that occurred between Miller and the workers in ruling that this factor did not indicate that the contractor and farm were joint employers.\textsuperscript{195}

Congress intended the courts would perform a detailed analysis, but the Rule's "economic reality" actively discourages the sort of attention to the facts that the Eleventh Circuit applied in \textit{Aimable}.

\textbf{B. The DOL Incorrectly Presumed That Federal Courts Have Ignored The "Economic Reality" Test}

Apart from its mechanistic adaptation of the "economic reality" test, the DOL made the following faulty assumption:

[T]he MSPA "joint employment" regulation will be strengthened by focusing more closely on the ultimate test for employment and joint employment

\textsuperscript{189} \textit{Id.} The court elaborated that "Long & Scott hired Miller to pick and pack a specified quantity of vegetables. It was Miller's responsibility to determine the necessary number of workers, to recruit those workers, and to compensate them for their labor." \textit{Id.} Thus, the court concluded that "Miller (independent of Long & Scott) exercised absolute, unfettered, and sole control over appellants and their employment." \textit{Id.} at 440-441.

\textsuperscript{190} \textit{Id.} at 441.

\textsuperscript{191} \textit{See id.}

\textsuperscript{192} \textit{See id.} citing Hodgson v. Griffin and Brand of McAllen, 471 F.2d 235 (5th Cir. 1973) and Haywood v. Barnes, 109 F.R.D. 568 (E.D.N.C. 1986).

\textsuperscript{193} \textit{See Aimable v. Long & Scott Farms, 20 F.3d 434, 442 (11th Cir.), cert. denied, 513 U.S. 943 (1994).} The workers contended that since Long & Scott determined the amount that Miller was paid, it effectively determined their pay.

\textsuperscript{194} \textit{See id.} at 442.

\textsuperscript{195} The court found that Miller had negotiated at arm's length with Long & Scott and tried to increase the amount of his contract; that he determined how much he would pay field workers based on revenue from Long & Scott and his other contracts; and that he acted independently in deciding what portions of his revenue to spend on pay for workers, housing, and equipment. \textit{See id.} at 442-43.
as established by the federal courts, i.e., "economic dependence," and by further clarifying the multi-factor analysis to be used to determine the existence of "economic dependence" in the agricultural context. Such a clarified regulation will ensure more consistent application of the FLSA principles of employment and "joint employment" under MSPA, and will also ensure the full implementation of the Congressional intent in adopting those principles in MSPA.196

The DOL proceed to criticize the federal courts:

To the extent that courts and the regulated community may have strayed from the "economic reality"/"economic dependence" analysis—by applying the regulation as a rigid checklist, or treating the regulation as an exclusive list which precludes consideration of additional factors (e.g., whether workers' activities are an integral part of a putative employer's operation), or distorting or placing undue emphasis on particular factors (e.g., "control" misconstrued as being direct supervision of workers' activities)—the regulation is not only being misinterpreted but is also being applied so as to frustrate the express intention of Congress in enacting MSPA.197

This criticism is unsupported. As Table 2, supra, shows, fourteen of the sixteen cases that met the research criteria for this article expressly adopted the "economic reality" test. The Rule not only fails to account for the very high percentage of decisions that apply this factor; it also ignores the courts that properly applied this test.

Monville v. Williams198 is a good example of the kind of federal court analysis that the DOL ignored. The case involved a pickle producer who engaged an FLC to bring twenty migrant workers from Florida to Maryland to harvest his crop. Early in its analysis, the court demonstrated a proper awareness of Congress' intent regarding the joint-employment relationship when it stated: "Under the FLSA and the [MSPA], 'employees are those who as a matter of economic reality are dependent upon the business to which they render services.'"199 It then grounded this test in the specific employment relationships disclosed by the facts and found that a joint-employment relationship existed.200

In particular, the court examined whether the FLC applied some specialized skill, or whether he was merely an extension of the producer's management of the harvesting process. The court found that Bradford, the producer, "did go into the field and inspect the contents of plaintiffs' buckets. Williams' lack of specialized skill is suggestive of that he was an employee of Bradford's rather than an independent contractor."201

197. Id. at 11,746.
199. Id. at *6, quoting Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 (5th Cir. 1985).
201. Id. at *7.
level, the court examined payroll record-keeping and noted that the "records as to plaintiffs' work on Bradford's farm during the 1983 pickle cucumber harvest are deficient in several respects. Some of the plaintiffs are not listed on the payroll records for some pay periods. None of plaintiffs' permanent addresses are included. For some pay periods the complete name of the worker and/or the social security numbers are not recorded." The court concluded that "Bradford chose to delegate the recordkeeping responsibilities to Williams and did no more than make a cursory examination of the payroll records as Williams had prepared them. Delegation of these responsibilities will not shield an agricultural employee from liability."

Not all factors, however, indicated that the FLC was the producer's joint employee. The court observed that "[o]ne factor suggestive that Williams was more than a mere employee of Bradford's is that Williams took his crew to other farms at times when all the ripened pickles on Bradford's farm had already been picked." Ultimately, however, more factors weighed in favor of finding that a joint-employment relationship existed, according to the court: "Under the circumstances in this case Williams was not 'in business for himself.' Rather, Williams acted as Bradford's foreman for the harvesting phase of Bradford's pickle cucumber operation."

Clearly, Congress sought to prevent producers from shielding themselves from MSPA liability by hiding behind a contract with an FLC. But Congress also intended that courts would make fact-specific inquiries.

Reading the Rule without the research findings disclosed in this Article, one would assume that courts had overlooked the "economic reality" test; but as Table 2, supra, shows, only two courts actually did so, and in one case the court nevertheless ruled that a joint-employment relationship existed. Even without carefully examining all the factors that Congress intended or applying the "economic reality" test, the court in Saintida v. Tyre concluded that a packing house was a joint employer with its FLC, and held all the defendants liable for MSPA violations and state

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202. Id. at * 9.
203. Id.
204. Id. at * 8.
205. Id. at * 9.
206. See supra notes 70-78, 172 and accompanying text.
208. See id. The defendants claimed that the MSPA applied "only to those who 'employ' agricultural workers," but the court found that "the Defendants' assertion that they did not employ the Plaintiffs is erroneous. Under the [MSPA], the term 'employ' is given the meaning provided under the [FLSA]..." Under this definition, an employer 'cannot shield himself from liability by placing a recruiter-contractor between himself and the laborers, by giving the recruiter contractor responsibility for direct oversight of the laborers (citation omitted)." Id. Although the court did not apply the MSPA factors, its reasoning was consistent with courts that did so:

The joint employment doctrine is a 'central foundation' of the [MSPA] and the 'indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties (citation omitted).' First, that such determination should be considered in light of the protective purposes of this Act is consistent
claims arising out of car accidents while workers were transported to work.  

In sum, the empirical research presented here shows that the DOL invented a problem and presumed, without careful legal analysis, that there had been inadequate judicial enforcement of the MSPA.

C. The Rule's Inflexible Standard Holds Producers Liable Regardless of the Amount of Control They Exercise Over FLCs

As a result of its excessively liberal and inflexible joint-employment standard, the Rule imposes liability on a producer for FLC behavior that was completely beyond the producer’s control. Producers who exercised no control over an FLC’s actions will be held to the same standard as those who used an FLC but retained ultimate control over the FLC and the workers. This is a patently unfair result and the Rule should be abandoned for that reason alone.

The Rule’s “economic reality” test is based on the premise that producers are economically superior to migrant farm workers, unfairly exploit this advantage, and therefore, must be held to account for the actions of FLCs who act as intermediaries. There are instances, however, where producers are small, undercapitalized, and unprofitable and where, in the course of benefitting from the work of migrant field hands, cannot fairly be held responsible for the actions of FLCs.

with the approach taken in United States v. Rosenwasser, 323 U.S. 360 (1945), in which the Court stated in defining 'employ' under the FSLA: ‘a broader or more comprehensive coverage within the stated concept would be difficult to frame.’ Inherent in this expansive interpretation is the intent of the Committee that the terms 'employee,' 'employer' and 'independent contractor' not be construed in their limiting common law sense.

Id. at n.2.

209. The court awarded $100 in damages to each plaintiff for MSPA registration verification violations; $300 for recordkeeping violations; $300.00 for improper wage statements; and $500 for improper vehicle registration. See id. at 1375-76.

210. Since none of the employers maintained workers' compensation for any of the plaintiffs, the court ruled that Florida's workers' compensation system did not provide the plaintiffs with an exclusive remedy. See id. at 1376-77. The court then awarded medical expenses and lost wages resulting from the accident as actual damages under MSPA. See id. 1376-77. Thus, the court awarded Saintida Jean $45,882.06 ($22,500.00 in lost wages and $23,382.06 in medical bills); Ghislaine Desir $10,525.25 ($10,000.00 in lost wages and $525.25 in medical bills); Wendy Lambert $4,570.00 ($4,000.00 in lost wages and $570.00 in medical bills); Cantave Laurent $7,040.00 (all lost wages); Lucie Lemorin $8,000.00 (all lost wages); and Renose Pierre-Louis $5,605.50 ($5,287.50 in lost wages and $318.00 in medical bills). See id. at 1377.

211. The Rule is also open to a possible challenge under Section 706(A)(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2) (1997), which states, “[t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .” See also American Trucking Assns. v. United States, 344 U.S. 298, 314-15 (1953) (a rule may be overturned if the agency “had no reasonable ground for the exercise of judgment’’); Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

Charles v. Burton is such a case. John and Felix Burton expanded their farming operation in 1990 to include beans and cucumbers but in order to do so. The Burtons turned to the Georgia Department of Labor for help in finding an FLC, and eventually engaged Wilner Luxama to bring about thirty workers from Florida. During the harvest, Luxama transported his crew from their temporary housing in Ashburn to the Burtons' farm in Barney, Georgia, a distance of about fifty miles. The Burtons told Luxama which fields were ready to harvest, and thereafter, Luxama directed and supervised the actual harvest, including assignment of duties.

During the harvest, workers put beans in the boxes supplied and received tickets to certify the amount they had picked. The Burtons paid Luxama a set fee for each box of beans harvested, and Luxama paid the workers a set price for each ticket.

On the morning of June 3, 1992, the pickup truck in which Luxama's workers were being transported overturned, killing the driver and two workers, and seriously injuring the other workers. The workers then sued the Burtons under the MSPA for violating the "registration, vehicle safety, [and] vehicle insurance" provisions.

After noting that as many as sixteen factors had been applied by previous courts in testing for joint employment under the MSPA, the court believed that seven factors fit the facts of the case. Considering the nature and degree of control that the Burtons exercised over Luxama's workers, the court reasoned that "control arises ... when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work." It concluded that in this case "there is absolutely no indication in the record that defendants ... retained the 'right to dictate the manner in which the details of the harvesting function [were] executed.'"

Considering a related factor, degree of field supervision, the court concluded that "although the record reveals that the Burtons maintained a de-

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214. See id. at 1576.
215. See id.
216. See id. at n.2.
217. See id. at 1576.
218. See id.
219. See id.
220. See id. at 1577.
221. See id.
222. See id. at 1578-79.
gree of supervision over the work, that supervision was extremely limited."

The workers also maintained that the Burtons and Luxama were joint employers because they ultimately controlled harvesting piece-rates. Characterizing the workers' argument, the court noted their logic "'follows the transitive property of geometry: first, [the Burtons] controlled the amount [Luxama] received; second, [Luxama] controlled the amount [the workers] received; therefore, [the Burtons] controlled the amount [the workers] received. This relationship is validated, [the workers] assert, by [Luxama's] refusal to pay [the workers] more money.'" The court dismissed this argument by noting that "the laws that bind the Euclidian world do not apply with equal force in federal employment law; the (workers') leap of logic is unfounded."

The court next considered whether the Burtons had authority to modify employment conditions, looking to factors such as who set the hours each employee would work, who determined which tasks each employee would perform, and who was responsible for the workers' housing. On each field-work element, the court found that Luxama directly controlled how much work would be performed and by whom; and as to the workers' housing, the court concluded that the Burtons exercised no control because "the workers were responsible for finding their own housing." The fact that the workers lived in temporary housing fifty miles from the Burtons' farm and also worked at other farms must have entered into this legal conclusion.

The court, without explanation, summarily concluded that Luxama alone was responsible for preparing the workers' payroll and paying their wages. However, it also found that the work was performed on the Burtons' farm and that the workers performed a 'speciality job' integral to the Burtons' business, factors that favored finding a joint-employment relationship.

At this juncture, the court considered the workers' argument that the economic realities of the relationship between them and the Burtons should be dispositive, regardless of how the discrete factors were scored by the court. In rejecting this argument, the court reasoned that this logic would mean that "every farmer who hired a farm labor contractor would become for purposes of the [MSPA] . . . a joint employer of the contractor's employees. An 'economic reality' test that sweeps as broad as plaintiffs sug-

226. Id. at 1580-81, quoting Aimable, 20 F.3d at 442 (alteration in original).
228. See id. at 1581.
229. Id.
230. See id.
231. See id.
232. See id. at 1581-82.
gest is no test at all; it is a mere formality. Thus, the court ultimately concluded that the Burtons were not the workers’ joint employers.

The same case would have had an opposite result if it had been tried under the Rule. The broad “economic reality” test advanced by the migrant workers in *Burton* is identical to the Rule’s test. On *Burton*’s facts, however, it would be manifestly unjust to hold the farmers liable for a car accident they could not have prevented.

Furthermore, the flexibility that courts have brought to cases under the MSPA is lost under the Rule. This wisdom in this flexibility—which Congress intended when it enacted the MSPA—is demonstrated by comparing *Burton* to another case involving workers who were injured while they were transported, *Barrientos v. Taylor*. Jose Barrientos, a migrant farm worker, was injured while riding in a tobacco wagon on the Taylor family farm in North Carolina. The Taylors had engaged an FLC to provide workers for the sweet potato and tobacco harvest. Barrientos sued for damages under the MSPA.

The court examined nine factors that were pertinent to the Taylors’ relationship with the plaintiff and found that a majority of the factors showed that the Taylors were joint employers with the FLC. Applying an “economic reality” test, the court found that Barrientos was “dependent” on the Taylors. They exercised control over Barrientos’ work; directed and supervised the harvest crew; determined the workers’ pay; and the court also found that Hernandez’ work required little or no initiative. The Taylors inspected the harvested sweet potatoes and remediated problems that arose during this activity. The court credited Barrientos’ testimony that “he received instructions, albeit indirectly, from Jake Taylor, Jr., and he recalled Linda Taylor directing him where to park the truck which he has driving to unload sweet potatoes.” The court therefore concluded that a joint-employment relationship existed for this purpose.

On the point, the court concluded that “[t]he Taylors and Taylor Farms dictated what plaintiffs would receive.” In 1992, “Taylor Farms paid Hernandez $5.25 per hour for each hour that Hernandez’s crew worked on the tobacco harvest. . . . Hernandez, in turn, paid the workers $4.25 per hour.” The workers were paid piece rate for the sweet potato harvest. Taylor Farms paid Hernandez $.85 per bushel and an additional ten cents per
controlled working conditions; invested far more in equipment, land, housing, and storage used by the workers than the FLC; owned the facilities where the workers lived and worked. In addition, the court found that Taylors and migrant workers had more of a permanent than temporary employment relationship. Although the Taylors argued that harvesting required special skill (which would have worked against a finding of joint employment), the court found to the contrary. The court ruled in favor of the Taylors on only factor: preparation of payroll and payment of wages.

Burton and Barrientos are facially similar cases. Both involved transportation of migrant workers to, or at, work, a classic situation that concerned Congress. But they were different in key respects: field-hands who worked for numerous farms versus those who had a more steady relationship with one farm; those who drove themselves on a regular highway in a car to work in the same way that many other workers do versus those who rode on an inherently dangerous farm vehicle; and those whose work benefitted poor farmers who relied on a seed company to finance their operations versus a better-capitalized operation. Because the MSPA's enforcement scheme prior to the Rule accounted for these important differences, it was fair. However, by treating these very different cases alike the Rule excessively broad and unfair in application.

bushel to cover the contractor's expenses. Hernandez then converted the pay system for workers from hourly wages to piece rates. See id.

244. The Taylors never hired or fired any particular worker but they exercised control of the farm workers' employment conditions and owned the labor camp where the workers lived. See id. at 383. The Taylors also determined where, when, and how long the field hands worked. See id. at 383.

245. Hernandez's contribution in these areas was "negligible." Id. at 383.

246. See id. at 383.

247. Id. at 384. On this critical issue, the court observed that even though the field hands worked for the Taylors only during the harvesting season, that fact "[d]id not vitiate the essential permanency of the relationship with the defendants." Id., quoting Haywood v. Barnes, 109 F.R.D. 568, 589 (E.D.N.C. 1986). The Barrientos court noted "[h]arvesting of crops is a seasonal industry, without much permanence beyond the harvesting season. However temporary the relationship may be it is nevertheless true that the relationship is permanent to the extent that the migrants worked only for defendants during the season." Barrientos v. Taylor, 917 F. Supp. 375, 389 (E.D.N.C. 1996), quoting Haywood, 109 F.R.D. at 389. Applying this reasoning, the court found that everyone in the contractor's crew worked exclusively for the Taylors during the 1992 season. Barrientos, 917 F. Supp. at 389.

248. The court concluded that the "plaintiffs clearly performed unskilled labor." Barrientos, 917 F. Supp. at 383. They "cut flowers and leaves from tobacco plants, unloaded tobacco from wagons and placed it on racks, removed tobacco from barns, cut sweet potato plants and placed them in boxes, picked sweet potatoes, filled buckets with sweet potatoes, and loaded sweet potatoes on trucks." Id.

249. The contractor was in sole and exclusive control of this process, submitting payroll data to a payroll service and paying FICA/FUTA taxes with consulting the Taylors. See id.
VI.
The Current State of Migrant Farm Workers: Will the Rule Help Them?

FLCs continue to recruit, hire, and manage migrant farm workers; and, as in the past, these workers perform a variety of essential tasks for agricultural producers.\(^{250}\) Abuses have led some to characterize "the migrant agricultural labor system (as a form of) imposed peonage . . ."\(^{251}\) But there is serious reason to question whether the Rule will actually improve their situation. A careful consideration of the nature of the workforce and the other pressures on migrant farm workers and the agricultural industry in general leads to the conclusion that the Rule actually endangers the jobs of those it aims to protect.

A. Who Are Migrant Farm Workers?

Ethnographers have identified three distinct migratory streams of farm workers.\(^{252}\) Family income for these workers remains very low.\(^{253}\) Migrant farm work is usually seasonal and inconsistent.\(^{254}\) Migrants are often needed because local people are unwilling to turn out for this work.\(^{255}\)

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250. Steven Greenhouse, New Rules to Protect Laborers on Farms, THE SAN DIEGO UNION-TRIBUNE, March 12, 1997, at C1, available in 1997 WL 3121626, relates that "[f]ederal officials estimate that 700,000 to 1 million of the nation's 2.5 million farm laborers, many migrant or seasonal employees, work for contractors. Contractors often recruit workers, hire and fire them, check work permits and drive workers to the fields."


252. See NANCY FEY CHAVKIN, U.S. DEPT. OF EDUCATION, FAMILY LIVES AND PARENTAL INVOLVEMENT IN MIGRANT STUDENTS' EDUCATION (May 1991), available at <http://www.ed.gov/databases/ERIC_Digests/ed335174.html>. Chavkin reports that current migrant farmworker population is difficult to estimate. As of 1989, the estimated range was 317,000 to 1.5 million. See id. at 1, citing J. SHOTLAND, FULL FIELDS, EMPTY CUPBOARD: THE NUTRITIONAL STATUS OF MIGRANT FARMWORKERS IN AMERICA (1989). The three basic migratory streams are the East Coast Stream (consisting of American Blacks, Mexican Americans and Mexican nationals, Anglos, Jamaican and Haitian Blacks, and Puerto Ricans); the Mid-continent Stream (consisting of Mexican Americans and Mexican nationals, with small numbers of American Indians); and the West Coast Stream (Mexican Americans and Mexican nationals, it has, in recent years, also included Southeast Asians). See id.


254. The NAWS STUDY estimated that 76% of farm workers perform harvest or pre-harvest jobs (involving primarily field crops, vegetables, fruits and nuts, and horticulture). See id. at 40-41. Four out of five farm workers were out of the workforce at some point during the year, and even during the peak harvest time in September, one-third were unemployed. See id. at 31.

255. According to the NAWS STUDY, 62% of harvest jobs are performed by migrant workers, see id. at 20, and 83% of all agricultural workers are immigrants. See id. at 3. It is important to note that the U.S. is far from unique in pursuing foreigners to do the arduous and unpleasant work of a field-hand. See, e.g., Kate Watson-Smyth, Why Migrant Workers Are Happy with Meager Fruits of Their Labours, THE INDEPENDENT - LONDON, July 14, 1997, at 6, available in 1997 WL 12333670, finding that English
These workers are mostly comprised of Mexican immigrants, many of whom work illegally in this country. Most of them are men with family dependents.

Several conditions create a market for migrant workers. Supply is often determined by the fact that too few people who live near farms are willing to do field work. Demand for migrant labor is created when producers grow labor-intensive crops.

Geography plays a key role in determining labor markets for migrant workers. Fruit, vegetable, and horticultural farms are concentrated in states with long growing seasons. These areas, therefore, offer the most employment opportunities for migrants. Since the better growing regions adjoin Mexico, many migrant workers are either immigrants or aliens from Mexico or Central America.

B. What Are Labor Market Conditions for Migrant Farm Workers?

The common belief that migrant farm workers are paid below or at minimum wage levels is contradicted by recent national surveys. Because of natural fluctuation in weather and growing conditions for crops, farm employment is highly variable. As one might expect, employment levels fall during winter and peak in late summer.

256. As of 1993, 80% of these workers were born in Mexico, 94% are Hispanic, and 22% were estimated to be either undocumented. See NAWS Study, supra note 253, at 13.

257. See id. at 57, reporting that 79% of harvest workers are men and 61% have families.

258. See, e.g., Note, Migrant Farm Labor in Upstate New York, 4 Colum. J. L. & Soc. Probs. 1, 4-5 (1968), disclosing that in New York, harvest and pre-harvest activities create temporary jobs for 31,000 agricultural workers, with 17,000 of these workers being recruited from out of state.

259. The USDA estimates that 89 percent of fruit production, 37 percent of vegetable production, and a "quite high" percentage of horticultural goods are harvested by hand. Hearings before the U.S. House of Representatives Agriculture Committee, supra note 8.

260. "[M]any workers who harvest winter fruits and vegetables in California, Arizona, Texas and Florida do not seek jobs in northern states. In addition, many legal and illegal agricultural workers do not remain in the United States year round and slightly less than one-half of FVH workers spend part of the year abroad; 50 percent of that number remains abroad for 4 months or more." Hearings Before the U.S. House of Representatives Agriculture Committee, supra note 8 at 251 (testimony of Keith Collins).

261. The USDA recently created a profile of farm workers who performed seasonal agricultural services during 1990 based on the DOL's National Agricultural Worker Survey. It found:

Workers were young, with two-thirds less than 35 years old, and they were 71 percent male. About two-thirds were married. Seventy-one percent were of Hispanic origin, with 62 percent foreign born, and 92 percent of those were from Mexico. Most lived in the U.S. less than 10 years. Spanish was the primary language for two-thirds, and over half had 8 or fewer years of formal education. Half the workers earned less than $7,500 per year and half of the workers' families has incomes below the poverty level.

Hearings before the U.S. House of Representatives Agriculture Committee, supra note 8 at 101 (testimony of Keith Collins).

262. See Farm Labor, supra note 4. The survey reflects this when it combines reporting of labor market data with detailed information about crop development across the country. The report accounted for grain, field corn, tobacco, vegetable and sugar beet harvesting, as well as hay baling. See id.
1. Pay

The most recent national survey portrays an improving labor market for farm workers. There were 1.41 million farm workers hired during the week of July 6-12, 1997.

Migrant workers comprised 10.8 percent of the hired agricultural workforce, compared to 13.1 percent in 1996. They were paid an average of $6.45 per hour, up 29 cents from 1996. This 4.7% gain exceeded the increase in the nation’s producer’s price of finished goods for the preceding year and outpaced wage-gains for hourly workers in that period. This hourly earnings figure is well above the national minimum wage, which rose to $5.15 in 1996.

From 1995 to the present, the percentage of migrants, as a proportion of all hired farm workers, has ranged seasonally from 5.7% to 13.1%. The number of workers employed by crew leaders has also risen sharply.

Migrant worker pay is similar to pay for service- and Hispanic-workers in other occupations. Nevertheless, migrant workers are terribly abused on occasions. In at least one case, FLCs enslaved their workers.

263. See id. at 1 (reporting that farm wages and employment each increased by 5 percent between July, 1996 and July 1997).
264. See id. The survey defines a migrant worker as “a farm worker whose employment required travel that prevented the farm worker from returning to his/her permanent place of residence the same day.” Id. at 12, table titled “Migrant Workers: Percent of All Hired Workers, United States, By Quarter, 1995-1997,” n.1.
265. See id.
266. See id.
268. Total civilian compensation rose 2.9 percent in 1996. The wage component of this figure rose 3.3 percent, but was offset by 0.2 increase in benefits. See Daniel J. LeRoy, Compensation: Private Employer Costs Rose 3.1 Percent in 1996, DAILY LAB. REPORT (Jan. 29, 1997), No. 19, at D-1.
270. Migrant workers comprised 12.4% of the hired labor force in July 1995; 11.6% in October 1995; 5.7% in January 1996; 7.5% in April 1996; 13.1% in July 1996; 11.1% in October 1996; 9.5% in January 1997; 6.3% in April 1997; and 10.8% in July 1997. See FARM LABOR, supra note 4, at 12.
271. The report states that “[c]rew leaders and custom crews provided 340,000 workers for the Nation’s farms and ranches during the week of July 6-12, 1997, up 9,000 from a year ago.” Id.
272. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, Table No. 668. Workers Paid Hourly rates, by Selected Characteristics: 1995, STATISTICAL ABSTRACT OF THE UNITED STATES 429 (Oct. 1996). In the service-producing, private sector, the median hourly earnings of workers paid at an hourly rate was $7.23, or, about $1 an hour more than average earnings for migrant farm workers in 1996. Workers of Hispanic origins earned an average hourly wage of $7.00—less than $7.66 earned by Black workers, and $8.32 earned by white workers. See id. These data show migrant farm workers are paid in the general range of other service-sector workers. It is entirely possible that their relative low earnings reflect the influences of ethnicity and national origin on pay, apart from the matter of performing field work. The existing pay rates for migrant workers are not necessarily justified by these data, but they suggest that the rates are consistent with broader earnings patterns.
273. See Martha T. Moore and Martin Kasindorf, Enslavement in America, USA TODAY July 28, 1997, at 1A, available in 1997 WL 7009016, reporting that in May 1997, three FLCs pled guilty to
A more common problem, according to a staff attorney for the Migrant Farm Worker Justice Project in Belle Glade, Florida, is “people not getting paid properly and being paid very little because of . . . smuggling debts and other exploitation.” Occasionally, children of migrant families are unpaid for their field work.

Piece-rate compensation is still common. This method favors employers by insulating them from raising wages to meet rising demand for commodities. For example, while demand for chili pepper has risen, piece-rate pay for chili pepper pickers remains very poor.

This example does not mean, however, that all or most migrant workers are poorly paid. On the other end of the spectrum are workers who rebuff union organizing drives, apparently because they are not dissatisfied with their hourly wages. In exceptional cases, farm workers earn high wages and participate in stock bonus plans.

smuggling Mexicans and Guatemalans into the country and then forcing them to pay their $700 smuggling fee by working as field hands. The migrants were housed in isolated camps in South Carolina and Florida, and were charged for housing and other necessities at rates designed to keep them in debt—and servitude—indefinitely. For an official account, see U.S. DEPT. OF JUSTICE, Three Men Plead Guilty to Enslaving Migrant Workers (1997), available in 1997 WL 230121.


275. See, e.g., Hernandez v. Ruiz, No. B-83-270, 1992 WL 510258, at *2 (S.D. Tex. May 4, 1992), reporting that “four children of Pedro and Amalia Sanchez picked cucumbers but their tokens were combined with those of their parents, and the parents were paid for the work. No wage records appear for Janie, Elisa, Alfredo or Gustavo Sanchez.”

276. See, e.g., Bueno v. Mattner, d/b/a Mattner Farms, 829 F.2d 1380, 1382 (6th Cir. 1987) (family farm paid about 100 migrant workers piece-rate to pick strawberries).

277. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, IMPLEMENTATION OF THE HELSINKI ACCORDS: MIGRANT FARMWORKERS IN THE UNITED STATES 19 (May 1993), quoting Carlos Marentes: “In the chili fields of New Mexico, as in many places, they pay by piece rate for what each worker produces, and this type of pay has not changed for the past ten years. Because of this, the annual salary of agricultural workers in our region was $5,300 in 1991.”

278. See Joseph Frazier, Unions Fail to Attract Field Workers, PORTLAND OREGONIAN, Aug. 25, 1997, at B2, available in 1997 WL 13114185. The article states:

Rose Baz’s message floats from her bullhorn across the laser-straight cucumber rows to about 50 migrants, working eyes-down in a sun-soaked field. “Do you make at least $5.50 an hour?” she shouts in Spanish from the side of the road. “Si, si,” mumble a few, bent over their work. “We’re here to see that they don’t lower the price,” she says. “The union wants to represent you. We are with you. How much do they pay you a bucket?” Most workers ignore the question but not labor contractor Julio Porras, who arrives in a pickup.

“You are stopping people from working. Why?” he says to Baz and another volunteer, Kevin Golding. “I am a Mexican, you are Anglos, you don’t understand our situation.” Unionization, he says, will lead farmers not to plant strawberries or other labor-intensive crops and to pick other crops by machine. He accuses the organizers of telling the workers the owner of this particular field was going to lower the picking price.

Frazier reports that field workers took no action to form or join a union.

279. See In re Bud Antle, Inc., N.L.R.B. Gen. Counsel Memo to Director of N.L.R.B. Region 32 (Jan. 13, 1997), available in 1997 WL 85126. A group of processors and forklift drivers in refrigerated warehouses were represented by a union certified by the California Agricultural Labor Relations Board. See id. at *1. When their last labor agreement expired, wages for the forklift drivers averaged $27.29 per hour. See id. at *2. After seeking but not receiving wage concessions, the employer locked out the union workers and replaced them. See id.
2. Working Conditions

Migrant workers, as in the past, often require transportation to their work. However, the FLC's traditional role in providing this service has been displaced, to some extent, by a taxi-like service that has grown around this casual labor market. Nonetheless, transportation to the fields continues to be hazardous. The main problem appears to be that workers are crowded onto the bed of pickup trucks, where they are especially exposed to injury or death traffic accidents.

Exposure to harmful pesticides also poses health problems for migrant farm workers, although accidents on farm equipment and field sanit-

280. See Barnaby Feder, Migrant Workers Get Share of Farm, The Des Moines Register, July 6, 1997, at 1, available in 1997 WL 6957181, discussing an unusual nursery that allows employees to participate in an stock-bonus payment plan. The owner, Griff Mason, said that the nursery turned to the stock bonus plan when it failed to attract local people to work there, and hired migrant workers from Mexico. Mason projects that the stock distributions and related bonuses will grow to at least $100,000 in 30 years for even the most lowly paid. One worker, Guillermo Castillo, said: "I don't feel like an owner . . . but I do feel like a partner."

281. A recent DOL rule proposal pertaining to FLC insurance requirements describes this system:

The Report of the Commission on Agricultural Workers stated that two-thirds of those working in California citrus and tomatoes paid "raiteros" an average of $3.00 per day for transportation. It is unknown to what extent these transportation providers have registered as FLCs but it is apparent from the farm labor contractor registration data maintained by the Department of Labor that many have not. Department of Labor Region 9, which includes the major labor-intensive agricultural state of California where the "raitero" practice is common, reports that only 79 of the 4298 registered FLCs are authorized to provide transportation.


282. See id., stating:


283. See Luis Perez, Judge Won't Dismiss Fines, THE POST-STANDARD, September 9, 1997, at B1, available in 1997 WL 5763306. This article reported that three migrant workers were killed and 14 injured when their van crashed into a tree in July 1995. Workers were being driven back to a migrant camp after spending the day working on Zappala Farms. Fifteen workers were seated on overturned buckets or the floor when the crash occurred. The farm and the FLCs who arranged transportation for the workers were fined $62,000 under the MSPA.

284. See National Farm Workers Ass'n v. Marshall, 628 F.2d 604, 610 n.16 (D.C. Cir. 1980), citing CLEMENT ASSOCIATES, INC., SAFETY FACTORS FOR CHILDREN EMPLOYED AS HARVESTERS OF STRAWBERRIES IN WASHINGTON AND OREGON (May 18, 1979), a private study commissioned by the DOL to analyze chemicals applied to farm fields and their possible effects on human beings. These included Benomyl (found to damage testicular tissue in rats), Captan (carcinogenic in mice), Endosulfan or Thiodan (low doses inhibit growth and cause mortality in young mice), and Carbaryl (dose-dependent neurological and behavioral effects in humans).

285. See Cathleen Ferraro, Sounding Alarm for Kid Safety on Farms, SACRAMENTO BEE, Oct. 16, 1997, at C1, available in 1997 WL 3311354, reporting research that shows that at least 53 children have died in equipment accidents on California farms since the late 1970s. Researcher James J. Beaumont stated: "There are more migrant laborers and seasonal workers, so a lot more children are being exposed to the possibility of these fatal events."
 tion problems present more immediate dangers.

Given the itinerant nature of farm labor, housing for migrant workers is properly considered a condition of employment. The current state of migrant housing, according to one federal official, "run[s] the gamut from very nice, where anybody would feel at home, to places nobody on the face of the Earth would want to live in." This official also observed that the "registered camps are in substantial compliance. The problems are in the camps that are hidden away. There are quite a number of these, but nobody will tell us where they are, so our hands are tied."

Although this assessment suggests that housing conditions have improved since the MSPA's forerunner, the FLCRA, was enacted, farm workers can still be found living in squalor. In some cases, for example, children of migrant workers are not provided beds in their temporary housing. In other instances, migrant workers are simply homeless.

Ironically, regulations to raise the standards of migrant housing have led to hardships for some workers. One organization that promotes the interests of migrant farmworkers recently observed:

Agricultural employers recognize that the lack of housing is a serious problem, but they face several disincentives to providing housing for migrant farmworkers. The need of the farmworker population to find temporary housing has traditionally been met by growers through the establishment of labor camps. But construction and maintenance of housing is expensive, especially if the housing will only be occupied during a short harvest season. Some employer-provided housing does exist, but ironically, attempts to enforce housing standards have created a trend toward agricultural employers' discontinuing the provision of housing. As a result, workers may share a small, grower-provided room with several other people. In the ab-


288. Id.

289. See Their Homes Are Not Castles, Seattle Post-Intelligencer, Nov. 23, 1997, at E1, available in 1997 WL 15957813, describing recent photographs of farmworker dwellings:

The little girl [pictured] ... stands in front of a makeshift plastic tent she shares with her family, some of whom sleep in the car—their sole means of migration from farm job to farm job. The fellow [pictured] sits on a log in front of the cobbled-together cardboard walls of his outdoor hovel that typify the housing stitched together by migrant workers. The boy [pictured] ... stands next to a washroom facility in Skagit County. There is a clothes washer and dryer in the building. Photographer Corwin said both were out of order when he took the photo in September [1997].


291. See Eduardo Montes, Life on the Streets: Farm Workers Lack a Place to Sleep Even Though Shelter Has Room to Spare, The Fort Worth Star-Telegram, July 23, 1997 at 1, available in 1997 WL 11894862, describing migrant workers who "lie in rows on the busy sidewalk, using the concrete as their pillow, cardboard boxes as their beds" as they await to be picked up at 2 a.m. by contractors.
sence of housing, farmworkers may be forced to sleep in tents, cars, ditches, or open fields.\(^{292}\)

3. \textit{Worker Adaptations to Migrancy}

Migrant workers often experience residency problems,\(^{293}\) language barriers,\(^{294}\) and lack of contact with community services.\(^{295}\) Starting in 1970, however, federal funding for programs to benefit migrant workers and their families multiplied. A recent study determined that twelve major migrant and seasonal programs for farmworkers spend over $600 million annually.\(^{296}\) With Republicans in control of Congress, however, support for this spending is declining.\(^{297}\)

Migrant workers and their families continue to face real hardships. Their children—even as young as six years-old—work in fields to supplement family income.\(^{298}\) They also encounter hardships in receiving formal education. Their mobility creates high dropout rates, classroom failures, little involvement in extracurricular activities, and negative attitudes about education.\(^{299}\) Nevertheless, some improvements are occurring. Some migrant children now receive long-distance instruction from their resident schools while they and their parents migrate to various states.\(^{300}\)

\(^{292}\) America's Farm Worker, Who Are America's Farmworkers?, at the America's Farm Worker homepage at <http://www.ncfh.org/aboutfws/aboutfws.htm#housing> (visited May 1, 1998).

\(^{293}\) The NAWS STUDY, supra note 253, found numerous indications of the rootless nature of migrant farm work. Interviews and job histories of these workers resulted in estimates that 62% of far workers migrate and a significant portion of those follow crops from farm to farm and often from state to state. Eighty-three percent of all agricultural workers are immigrants, and 55% are Mexican-born. See id. at 2-3.

\(^{294}\) See Community Service (May 21, 1996), available in 1996 WL 10164447, Federal Document Clearing House (testimony of Lynn Thornton, Executive Director, Georgia Commission for National and Community Service), describing the need for providing translation services to migrant farm workers in local hospitals, courts, and schools.

\(^{295}\) Id. To combat this problem, the AmeriCorps program in Georgia has attempted to link migrant farm workers to emergency health care providers.

\(^{296}\) See Philip L. Martin, The Endless Quest: Helping America's Farmworkers (1994). This amount is estimated to be about 10 percent of what the 1 million migrant and seasonal farmworkers earn in wages.


C. Other Pressures on Migrant Workers

Aside from these education, economical, and employment difficulties, migrant farm workers, and the producers who provide them work, are under increasing pressure from outside phenomena. Employment of migrant farm workers is threatened on many fronts and these pressures are intensifying. These include the following:

- Reduction in agricultural trade barriers is subjecting growers to new and unfair competition.\(^{301}\) For example, the U.S. Department of Agriculture only recently lifted an 83-year ban on the importation of Mexican avocados. Mexican avocados currently "sell in Canada at a fraction of the price U.S. buyers pay. Avocados in Canada retail for the equivalent of about 70 U.S. cents each, compared with around $1.50 in the U.S."\(^{302}\) U.S. avocado growers will likely face much stiffer price competition from producers who have a better climate and less regulated labor market for growing and harvesting this fruit. It is therefore probable that fewer domestic growers will continue in this business, and as a consequence, fewer jobs will be available for migrant workers. The tomato industry has been similarly affected by liberalized trade with Mexico.\(^{303}\) To compound matters for domestic growers, Mexico has imposed a punitive tariff on some U.S.-grown fruit, thereby limiting a good export market.\(^{304}\) There is already evidence that current trade policies have eroded employment opportunities for migrant farm workers.\(^{305}\) In addi-

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Some Florida farmers and agricultural suppliers, for instance, are upset at having to compete against Mexican growers, who don't face tough or strictly enforced regulations on labor and the environment. The Fort Lauderdale-based Florida Farmers and Suppliers Coalition has sent most members of Congress a videotape comparing U.S. and Mexican farm practices. The group contends that Mexican use of contaminated water, pesticides banned in the United States, and children as laborers threatens consumers' health and U.S. jobs. "We are going to be doing what we can to make [Mexican child labor] part of the debate," promises Steve Trossman of the International Brotherhood of Teamsters, whose truckers and food packers fear job losses from Mexican competition.


303. See, e.g., David Beard, *Flooding the Border*, Sun-Sentinel, Ft. Lauderdale, April 13, 1997 at 1F, available in 1997 WL 3097294, reporting the assessment of J. Luis Rodriguez, a former USDA Official, that "the rise in Mexican tomato imports since NAFTA threatens the jobs of thousands of Florida winter vegetable farmers."

304. See, e.g., Lynda V. Mapes, *The Polish Is Off the Apple*, The Seattle Times, Nov. 11, 1997, at J1, available in 1997 WL 3261642, reporting that on September 1, Mexico shut down Washington State's largest fruit export market by slapping a 101% tax on American apples. The article concluded: "Farmers always have dealt with uncertainties imposed by the weather. But an increasingly global and unstable market and labor troubles at home have added challenges to a risky business."

305. See Karen Jolly Davis, *Vegetable Growers See Tougher Times*, Virginian-Pilot & Ledger Star, Oct. 29, 1997, at D1, available in 1997 WL 12460002, reporting: "Two years of bad weather and stiff "some say unfair"—competition from Mexican growers have just about brought local vegetable farmers to their knees." As a result, more than 1900 of eastern Virginia's 5000 farmworker jobs have been lost.
tion, efforts to further liberalize trade may worsen these effects for producers and workers. The continuing effort to extend the President's authority to negotiate trade agreements is causing concern among "fruit and vegetable farmers who share a growing season with Mexico and South America" because these growers would be subject to intensified competition.

- Increased enforcement of immigration laws is harming migrant farm workers and producers. For example, New York is currently experiencing an acute shortage of migrant farm workers, resulting from the Immigration and Naturalization Service's massive enforcement action in 1997. As a result, large amounts of perishables were left unharvested. Rep. Robert Smith (R-Ore.) described the severity of this general situation when he said: "Enormous increases in resources to the INS . . . are creating chaos in rural America." New York producers are not alone in facing a growing shortage of farm workers; they are

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306. See Finlay Lewis, President Still Hopeful Despite Trade Setback, San Diego Union & Trib., Nov. 11, 1997, at A1, available in 1997 WL 14533961, reporting that President Clinton's effort to pass a bill that would authorize him to negotiate new trade agreements broke down when he fell about a dozen votes short in the House of Representatives. Nevertheless, Clinton expressed his determination to try again: "What we need to do is to sort of unpack the politics and the emotion and the substance and try to go back and put this together in a way that allows us to have a big bipartisan majority in the House."


308. For a detailed overview, see the congressional testimony of Bob L. Vice, president of the California Farm Bureau Association, before the House Committee on the Judiciary, Subcommittee on Immigration and Claims, reported in Temporary Agricultural Workers Visa Program, available in 1997 WL 14151120, *10-*11. Vice stated:

What is the effect of INS enforcement activity in agriculture? Let me give you a few examples. In my state of California, the largest user of hired agricultural workers in the U.S., we had a recent incident that illustrates the effect that an INS audit or raid can have on an agricultural employer. A vegetable farmer in Orange County had a majority of his workers apprehended after an INS check of his workers employment eligibility status. The workers were apprehended, creating a major labor shortage during peak harvest time. The grower went to the state Employment Development Department (the state job service charged with referring unemployed workers) and placed an order for 150 workers to do field work and replace those who were apprehended by INS. Over the next 10 days, the job service referred only three persons to work for the farmer. Only one showed for work and that person only worked for three days. As a result, the farmer lost 60 acres of beans and 20 acres of cabbage. These immediate losses are bad enough; however, the lack of an adequate workforce prevented him from planting his next crop and, as a result, he will have no crop to harvest in December. He is facing economic hardship. Variations of this example, with only the crop and state changing, have been reported to us by AFBF and NCAE members throughout the year in a previously unheard of quantity.


310. See id. The article reported: "Last month, agents arrested two dozen workers on the Torrey Farms in Elba, 30 miles east of Buffalo. As of Thursday, Torrey Farms still had 3,000 tons of cabbage encrusted in ice on the ground . . . ."

311. See id.
joined by apple growers in Washington,\textsuperscript{312} and fruit and vegetable growers in Florida.\textsuperscript{313} In addition to adversely affecting labor markets for migrant workers, the INS appears to be harassing these workers. "They're harassed at the laundromat, the grocery store, walking down the street, going to the post office," according to Maureen Torrey, whose family farm employs migrant farm workers.\textsuperscript{314} There are also unconfirmed reports that INS officers fired shots at migrant workers who were fleeing a farm in Byron, New York.\textsuperscript{315} INS enforcement activities were implicitly endorsed by a 1997 U.S.-Mexican study of illegal migration that concluded: "It is to the clear benefit of both countries to work toward eliminating unauthorized migration, which creates costs for both countries and makes migrants vulnerable to exploitation."\textsuperscript{316} In particular, the Binational Study on Migration expressed concern that tougher U.S. border controls have increasingly driven illegal migrants to use professional smuggling rings, which often abuse their charges and have raised the level of violence along the border.\textsuperscript{317}

- Environmental policies are squeezing out producers, and in the process, are likely reducing migrant worker jobs. To illustrate, in October 1997, federal and state officials began to offer Maryland farmers more than $250 million to leave 100,000 acres fallow to buffer the Chesapeake Bay and its tributaries against runoff pollution.\textsuperscript{318} Minnesota and Illinois have similar but even more ambitious projects awaiting federal approval.\textsuperscript{319}

- Mechanization is taking away work traditionally performed by migrant workers.\textsuperscript{320} This process is captured in some MSPA litigation. The


\textsuperscript{315} As a result, Rep. Bill Paxon (R.- N.Y.) wrote to Attorney General Janet Reno: "I am deeply concerned with the increased tension this incident has created as well as the troubling information I continue to hear coming from community leaders and farmers."


\textsuperscript{317} See id.


\textsuperscript{319} See id.

\textsuperscript{320} See John Sevighy, Migrants Hindered by Weather, Austin American-Statesmen, June 6, 1997, at B2, available in 1997 WL 2826395, noting: "A number of factors, including agricultural mechanization, are making it harder for migrants to find work each year. 'One machine and two guys can pick as many cherries as an entire crew can pick in a week,' according to a long-time migrant worker. In a more general vein, the USDA's chief economist suggests that 'a reduction in the supply of labor for..."
court in Antenor v. D & S Farms explained, for example: “Snap beans were traditionally hand-picked to minimize bruises and other cosmetic blemishes. However, by the late 1980’s, technological advances eliminated the need for much of the hand-harvest labor. Through the use of a process known as hydrocooling, the blemishes caused by rough mechanical harvesting of beans could be largely eliminated, thereby removing the premium for hand-picking of the beans.”

- A new type of farmer is emerging and she is less inclined to hire seasonal workers. Insightful testimony before Congress from John B. Campbell described this new producer as someone who views technology and change as essential to her survival. His observations that the new producer is more concerned than her predecessor about managing business risks and doing business in new ways imply that she is less likely to undertake the growing risks of producing crops that require employment of migrant farm workers.

- Employment regulation is already unfairly burdensome for producers who grow labor-intensive crops. A North Carolina Christmas tree grower recently testified that he has little choice but to hire migrant workers but finds such hiring extremely difficult because he must document their legal status under the Department of Labor’s H-2B program without also engaging in “documenting abuses” that lead to a charge of unlawful employment discrimination.

FVH producers would increase the price of labor and commodity production costs. The higher wages would be expected to encourage more efficient use of labor and substitution of capital for labor.’ He also observes that ‘the production of FVH crops remains very dependent upon hand labor because labor-saving technology and mechanization have not been developed.’ Cf., Philip L. Martin, The Outlook for Agricultural Labor in the 1990s, 23 U.C. DAVIS L. REV. 499 (1990), contending that labor-intensive crop production in the U.S. increased at a faster pace than job displacement caused by mechanization.


322. See Agriculture Economic Outlook, Cong. Testimony (Oct. 9, 1997) (testimony of John B. Campbell), available in 1997 WL 14152102, before the U.S. House of Representatives Committee on Agriculture. Subcommittee on General Farm Commodities:

I have heard farmers with low technical skills comment that farming isn’t much fun anymore. According to them it used to be that you could do about the same thing every year and come out okay—Now there seems to be no such thing as a normal year. Farmers who have high technical skills are having the time of their life. They see the new technology as an opportunity to make higher yields at less cost and thereby improve their profits. One producer recently told me he hates to tell his neighbors what he is doing because what works one year many not work the next.

323. Id.


We turned to the H-2B program in 1995 after an audit in 1994 by DOL sent many of our workers scurrying “to the hills,” apparently believing that DOL was the Immigration and Naturalization Service (INS) and would deport them. This lead (sic) us to believe that many of the workers who had provided us with work authorization documents that appeared legitimate,
The Rule comes at an inopportune time for people who have only marginal job skills and experience, because massive reform of the American welfare system is likely to increase competition in their relevant labor markets. For many years, farm work was "beneath" many Americans, but that may changing. When a large farming operation recently closed in Florida, questions arose about the ability of employment agencies to train and place migrant workers experienced unusual difficulties. There is already evidence that displaced migrant workers fail to transition into non-farm jobs.

Given the nature of migrant farm work—that it requires little skill or education, that it takes a physical toll, that it repels many people but is the basic means of subsistence for others, and that the industry is already under serious pressure—government regulation must walk a fine line between destroying what limited employment opportunities migrant workers have, while protecting them from abuses. The DOL did not do that when it created the Rule and as a result has endangered migrant farm workers.

VII.

Conclusions

The Rule appears to be motivated more by politics than by the courts' application of the MSPA or the economic realities of migrant farm workers. This is not to quarrel with the Clinton administration's sensitivities to

apparently were not work authorized. We also realized that a visit from the INS might result in the loss of our work force during harvest, and we would be out of business. This was our wake up call.
The problem was not simple. We knew that the law required us to hire anyone who was qualified and presented apparently appropriate work authorization documentation. If we did not hire workers because we suspected they had forged papers, then the Justice Department or Legal Services might sue us for discrimination. We faced a dilemma—having to choose between potential penalties and loss of our workforce for having workers with genuine appearing but nonetheless fraudulent documents, or discrimination suits for being too scrupulous in checking worker documents. Along with other growers, we began to look for a way to assure ourselves of a legal work force and stay in business.

325. An account by an experienced nursery operator indicates that farm labor is among the most undesirable jobs in the American economy: "'We haven't had a local market for entry-level farm labor since the 1960s,'" said McKay president Griff Mason, recalling how the company turned to migrant Mexican workers to sustain its nursery here in southeastern Wisconsin. "'People here just didn't see it as a place to start a career.'" Barnaby Feder, Migrant Workers Get Share of Farm, The Des Moines Register, July 6, 1997, at 1, available in 1997 WL 6957181.

326. See Craig Quintana, Workers May Pay Price of Lake Apopka Buyout, Orlando Sentinel, July 13, 1997, at A1, available in 1997 WL 2791425, reporting on the buyout and retirement of large farms in Florida for environmental reasons. An estimated 1522 seasonal jobs will be lost. The article suggests that "[e]ven with adequate funding, it may be difficult to quickly retrain career farm workers, who face hurdles such as age, education and language skills."

327. See Mark Arax, Welfare Chief Tilts at Windmills of Change Government, L.A. Times, July 15, 1997, at A3, reporting that in Fresno County, where many migrant workers are seasonally employed, "welfare isn't a stopgap but a way of life for nearly one out of every three residents. The five poorest cities in the state look out to the fields of America's wealthiest farmers. Every October, as the last Thompson grape is plucked from the vineyards, the unemployment rate in Fresno County jumps to 17%."
problems confronting migrant workers. Robert Reich, the former Secretary of Labor, attacked certain agricultural employers with appropriate indignation.\textsuperscript{328} When the Rule was under final review, the White House promoted Maria Escheveste—a daughter of migrant farm workers who toiled as a fieldworker as a child and eventually earned her law degree from Stanford—from an obscure post in the DOL's wage and hour division to the White House Office of Public Liaison.\textsuperscript{329} \textit{U.S. News & World Report}, in reporting that President Clinton strongly considered Escheveste to succeed Reich as Secretary of Labor, captured the political dimensions of an administration that weds symbols and policy:

> The heavy Hispanic turnout that helped propel President Clinton to victory in Florida, California and Arizona may well help boost Maria Echaveste—the daughter of immigrant Mexican farm workers—into the top job at the Labor Department. . . . Not only is the administration keen to repay the Hispanic community for its electoral support, it would like to keep at least one Hispanic in the cabinet . . . .\textsuperscript{330}

Acknowledging that politics are behind the Rule does not, however, mean that the DOL should not continue to enforce the MSPA. In fact, a more effective course would be to improve enforcement of the law as it stood prior to the Rule.

But hiring more DOL inspectors or attorneys does not make a news story. However, issuing a rule that presumes that FLCs are unscrupulous and producers are unjustly enriched through employment of migrant workers has a populist ring. News reports in vote-rich states such as California and Texas,\textsuperscript{331} in fact, played upon these populist themes the day the Rule was issued.

\textsuperscript{328} See DEPT. OF LABOR, Famed DeCoster Egg Case is Closed with Massive Settlement with OSHA, OCCUPATIONAL HEALTH & SAFETY LETTER (June 9, 1997), reporting the conclusion to OSHA and DOL enforcement actions taken against a large egg producer who apparently committed egregious safety and working-condition violations. The article reports, "last July, when proposing the penalties, former Labor Secretary Robert Reich said the conditions at the company’s migrant farm site, located in Turner, Maine, 'are as dangerous and oppressive as any sweatshop we have seen,' calling the working conditions 'atrocious' and the housing conditions 'deplorable.'"

Reich also was personally involved in DOL investigations of Case Farms, a North Carolina chicken-processor who mostly hired Guatemalan immigrants and dispatched 15-passenger vans across the border to recruit these employees. See Craig Whitlock, Immigrant Poultry Workers' Struggle for Respect Draws National Attention, NEWS & OBSERVER (Raleigh), Nov. 30, 1996, at A1.


\textsuperscript{331} See Steven Greenhouse, New Rules to Protect Laborers on Farms, SAN DIEGO UNION-TRIBUNE, Mar. 12, 1997, at C1, available in 1997 WL 3121626. The nationally syndicated news account quoted United Farm Worker spokesman Marc Grossman: "Contractors are directly responsible for many of the abuses the laborers endure . . . . Growers basically use labor contractors as a legal fiction to avoid their legal and moral responsibilities." John Fraser, acting administrator of the Labor Department's wage and hour division, was reported as saying: "Farm workers in this country are among the most
The political motivation behind the Rule is even more apparent upon close examination of the caselaw. The findings of this article show that the federal courts have implemented Congress' intent to examine the economic realities of employment for migrant farm workers. Based on the evidence presented here, a migrant farm worker who litigates an MSPA claim has a two-in-three chance of prevailing on her claim that a producer is a FLC's joint employer.

The Rule appears to penalize responsible producers who, in conjunction with reputable FLCs, take a progressive and humane approach to employing migrant farm workers. Occasionally, they perform the paperwork necessary to legalize the temporary importation of alien workers to perform agricultural labor.

This appears to have more potential to take away jobs than it does to make jobs safer or better. Its issuance comes at a particularly bad time for producers, who are experiencing increased pressure from foreign competition, immigration law, and environmental law. The Rule is oblivious to the broader—and real—context that determines a producer's decision to plant a labor-intensive crop. The DOL has apparently ignored the intense external pressures on agricultural producers and the inherent vulnerability of most migrant farm workers. Worse, the Rule is based on inside-the-Beltway hunches, with little effort to examine objectively how federal courts have applied the MSPA's joint employment doctrine. The Rule should be rescinded by administrative procedure, voided on legal grounds, or repealed by legislative enactment.

vulnerable, the most exploitable, the worst-paid workers." The same article appeared in Rules Beef up Protection for Farm Workers, Houston Chron., Mar. 12, 1997, at 12, available in 1997 WL 6544955.

332. For an example of a responsible recruitment methodology, see the example of the North Carolina Growers Association [hereinafter, NCGA], a cooperative group that seeks migrant farm workers in behalf of members, as reported in Migrant and Seasonal Agric. Workers Field Hearing, Congressional Testimony by Federal Document Clearing House Before the Workforce Protections Subcomm. of the House Educ. and the Workforce Comm., 105th Cong. (1997) (statement of C. Stan Eury, President, NCGA), available in 1997 WL 16138665, *13-*15:

NCGA staff and volunteer intermediaries placed posters advertising the jobs in places frequented by farmworkers. NCGA advertised in statewide newspapers and on local radio in North Carolina. In Florida, NCGA advertised in English and Spanish newspapers in Immokalee, Homestead and Belle Glade. NCGA also circulated the job order to the North Carolina JTPA grantee, North Carolina Farmworker Legal Services and Catholic Outreach Services and requested they share the information with other migrant organizations of which they were aware. . . . NCGA had disclosed a completed (one page) [MSPA form] WH 516 in Spanish and English, a copy of the interstate clearance order (12 pages typed single spaced) in English and Spanish describing the job in specific detail, a (6 page) workers hand book describing the job offer in simple terms in English and Spanish, a copy (1 page) of a SESA applicant holding checklist[;] additionally we conducted telephonic interviews with applicants describing the terms and conditions verbally and provided opportunity for questions and clarification.

333. See, e.g., Calderon v. Presidio Valley Farmers Ass'n., 863 F.2d 384, 392 n.7 (5th Cir. 1989) (farm association acting as FLC recruited hundreds of Mexicans to harvest crops in Texas, and in doing so, filed H-2 temporary visa permits in their behalf).